

**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.)

**DEFENDANT REED ELSEVIER INC.'S REPLY IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS SECOND AMENDED COMPLAINT**

Defendant LexisNexis,¹ a division of Reed Elsevier Inc., (“Lexis”) respectfully submits this Reply in Support of Defendant’s Motion to Dismiss Second Amended Complaint, and in opposition to Plaintiff Karen McPeters’ Response to Defendant Reed Elsevier’s Motion to Dismiss Second Amended Complaint (“Plaintiff’s Response”).²

¹ Improperly pled as Reed Elsevier, Inc., d/b/a LexisNexis by Plaintiff.

² Lexis filed its original Motion to Dismiss in this matter on June 7, 2010 (“Original Motion to Dismiss”). Lexis filed a supplemental Motion to Dismiss after this Court granted Plaintiff leave to file her Second Amended Complaint.

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I. Nature and Stage of the Proceeding; Issues to be Ruled Upon by the Court; Standard of Review

Lexis hereby incorporates by reference the Nature and Stage of Proceedings, Issues to be Ruled Upon by the Court, and Standard of Review sections from its Motion to Dismiss Plaintiff's Second Amended Complaint ("Motion to Dismiss"). In her Response, Plaintiff presents facts which she claims to be in dispute (Plaintiff's Response at 4); yet, Plaintiff points to no facts alleged by Lexis outside of the pleadings which would convert this motion to dismiss to a motion for summary judgment. Thus, Lexis' Motion to Dismiss should be decided under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Even if this motion to dismiss were converted to a motion for summary judgment, Lexis would still prevail as a matter of law because there are no genuine issues as to any material fact.

II. Plaintiff fails to sufficiently allege a RICO violation against Lexis.

Plaintiff's allegations are insufficient to meet the heightened pleading standards of a RICO claim as Plaintiff has failed to allege facts showing the existence of an association in fact enterprise that is separate and apart from the pattern of racketeering activity in which Defendants allegedly engaged as required under RICO. See Young v. Scruggs, 2010 U.S. Dist. LEXIS 60434, *19 (S.D. Miss. June 7, 2010). In other words, Plaintiff has failed to plead "specific facts which establish that the association exists for purposes other than to simply commit the predicate acts." Elliot v. Foufas, 867 F.2d 881 (5th Cir. 1989).

Plaintiff's Second Amended Complaint points to the electronic-filing process adopted by the Court as the basis for the association-in-fact enterprise. (Compl. ¶104-105). She points to the same electronic-filing process to establish the alleged pattern of racketeering (Compl. ¶ 106). Id. Instead of pointing to facts that articulate how Lexis, Montgomery County, Barbara Adamick, and Judge Edwards constitute an association in fact enterprise independent of the predicate acts, Plaintiff's Memorandum in Opposition merely references other legitimate business activities in which each entity or individual is engaged independently and not in association with each other to attempt to meet the

separate and apart requirement. Plaintiff does not understand the requirement. “A RICO association must also be an entity separate and apart from the pattern of activity in which it engages. When the relationship between members of an alleged enterprise does not exist for purposes other than simply to commit the predicate acts and reap the resultant rewards, this requirement is not met.” See Young v. Scruggs, 2010 U.S. Dist. LEXIS 60434, *19 (S.D. Miss. June 7, 2010) (citing Boyle, 129 S.Ct. at 2244) (Emphasis added); See also, County of El Paso v. Jones, 2009 U.S. Dist. LEXIS 113152, *61 (W.D. Tex. Dec. 4, 2009). Here, Plaintiff does not allege facts that would show that the relationship/association between the Defendants exists for any other purpose than to commit the alleged predicate acts (the operation of the electronic filing system). As a result, Plaintiff’s RICO claim should be dismissed.³

III. Plaintiff fails properly to allege violations of the Texas Theft Liability Act.

Plaintiff’s Response fails to acknowledge any of the arguments set forth in Lexis’ Motion to Dismiss regarding violations under the Texas Theft Liability Act. See Original Motion to Dismiss at 20, FN 17. Instead, Plaintiff alleges a new theory for an alleged violation pertaining to the duty to speak. Plaintiff’s Response at 14. Plaintiff has copied and pasted the legal rule for duty to speak, which sets forth four different circumstances under which a party is legally required to disclose certain facts. Plaintiff’s Response at 15. Conveniently, Plaintiff neglects to identify which circumstances are applicable to Lexis. As a result, Lexis is left to speculate which violation of the duty to speak Plaintiff

³ To the extent that Plaintiff may be arguing that the Boyle decision eliminates the separate and apart requirement, Plaintiff is mistaken. While Boyle indicates proof of enterprise and racketeering activity may coalesce, the Boyle court stated that proof of racketeering activity is not proof of an enterprise. See Boyle, 129 S.Ct. at 2245. Indeed since the Boyle decision, courts continue to require specifically pled facts showing that the association exists for purposes other than to simply commit the predicate acts. See Young v. Scruggs, 2010 U.S. Dist. LEXIS 60434, *19 (S.D. Miss. June 7, 2010) (citing Boyle v. United States, 129 S.Ct. 2237 (2009)).

is alleging. Presumably, Plaintiff relies on the rule that the duty to speak arises when 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.** *Id.* (Emphasis added). Plaintiff alleges Lexis concealed the 2003 Order and filing fee charges. Plaintiff's Response at 14-15. Plaintiff fails, however, to allege she relied on any fact concealed by Lexis, that Lexis knew of such reliance, or that Lexis knew Plaintiff was ignorant of the concealed fact and lacked equal opportunity to discover the truth. *See Id.* In fact, Plaintiff alleges she relied upon Adamick's representations that e-filing was mandated and that Adamick's representations (not any representations by Lexis) were the "factual and proximate cause" of Plaintiff's payment. Plaintiff's Response at 14. Plaintiff does not allege that Lexis knew she relied upon a concealed fact. The only action allegedly taken by Lexis in connection to this claim was the bill from Lexis to Plaintiff for E-filing charges. Plaintiff's Response at 14. This allegation does not reflect Lexis' knowledge of the 2003 Order, much less Lexis' knowledge of Plaintiff's reliance on the Order. Finally, there is no allegation Plaintiff lacked an equal opportunity to discover concealed facts, if there were any. Plaintiff claims the unlawfulness of the E-filing fees stems from the Texas Code portions setting filing fees, and that Plaintiff objected to the fees from the outset. Plaintiff's Response at 14. Plaintiff's objection to the E-filing charges suggests she suspected she was wrongfully charged. Plaintiff thus could have discovered any "unlawfulness" of the charges under the Texas Code provisions once her suspicions arose. Plaintiff is barred from alleging this violation, because she had equal discovery opportunities. Accordingly, Lexis did not owe a duty to speak to Plaintiff and did not violate such a duty.

IV. Plaintiff's alleged Open Courts violations are insufficient to state a claim for violations of a fundamental right, or violations of the Equal Protection Clause.

Plaintiff claims Lexis violated a fundamental right and thus, strict scrutiny applies to Plaintiff's equal protection claim. Plaintiff's Response at 16. While considerations of fundamental rights may overlap with considerations of equal protection rights, a violation of a fundamental right does not result in a violation of the Equal Protection Clause as Plaintiff suggests. *See Lawrence v. Texas*, 539 U.S.

558, 574-75 (2003). In addition to alleging a classification based on a fundamental right, Plaintiff must allege invidious discrimination to state a claim under the Equal Protection Clause. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666-67 (1966). In order to allege invidious discrimination, even when violation of a fundamental right is at stake, Plaintiff must analyze whether the comparison classes are in all relevant respects alike under the Equal Protection Clause. See Nordlinger v. Hahn, 505 U.S. 1, 10 (1992). Plaintiff is not entitled to skip this analysis simply because a fundamental right is at stake.

a. Plaintiff does not adequately plead violations of a fundamental right.

Plaintiff alleges her fundamental right of access to courts was violated unlawfully under the Equal Protection and Due Process clauses of the U.S. and Texas Constitutions. Plaintiff cites LeCroy v. Hanlon, 713 S.W.2d 335, 341 (Tex. 1986), for the proposition that Texas recognizes a fundamental right of access to the courts and certain filing fees constitute a violation of this right. Plaintiff's Response at 17-18. Upon closer inspection, however, LeCroy never states that strict scrutiny applies. LeCroy, 713 S.W.2d at 341. Instead, LeCroy states the right is "substantial" and invokes a balancing test for review, not strict scrutiny. Id.

Plaintiff does not apply the LeCroy balancing test to her allegations, and LeCroy is distinguishable. The LeCroy balancing test considers the reasonableness of the fee, which Plaintiff fails to address entirely. In LeCroy, the Legislature used filing-fee funds for the general welfare, which the court held was an unreasonable tax on litigants. Id. The court was careful to distinguish the use of fees for the general welfare (an unreasonable tax) from the use by the judiciary (a reasonable fee). Id. Here, the filing fees charged to Montgomery County litigants pay for services for the judiciary. The fact the service provider (Lexis) profits is inconsequential. The courts cannot possibly generate every necessary good and service in-house. Just as there is nothing unconstitutional about government agencies retaining private, for-profit companies for other necessary services, there is nothing unconstitutional or otherwise illegal about Lexis providing an efficient service to the Court that relates to the operation of the Court. Plaintiff's characterization of E-filing fees as a general

welfare tax is preposterous. Taken to its logical conclusion, Plaintiff's argument would render any filing fee illegal.

b. Plaintiff has not sufficiently alleged violations under the Equal Protection Clause.

There are three levels of scrutiny under the equal protection clause: rational basis, intermediate, and strict. Clark v. Jeter, 486 U.S. 456, 461 (1988). Thus, Plaintiff's inventive reference to "equal protection scrutiny," suggesting that there is one level of heightened scrutiny under the equal protection clause is incorrect. Plaintiff's Response at 21. Rational basis scrutiny applies when the class of individuals allegedly treated differently is not part of a suspect class, such as race or gender. See Clark, 486 U.S., at 461. Plaintiff fails to allege in her Second Amended Complaint how the E-filing practice will not survive rational basis scrutiny, and E-filing is not unconstitutional under rational basis scrutiny.⁴ Plaintiff has failed sufficiently to allege that Lexis has treated Plaintiff differently from other litigants who are in all relevant respects alike. See Nordlinger, 505 U.S. at 10; Morales v. Daley, 116 F. Supp. 2d 801, 813 (S.D. Tex. 2000). Plaintiff bears the burden of proving the litigants are alike in all relevant respects under rational basis scrutiny. See Newman Marchive P'ship v. Hightower, 349 F. App'x. 963, 966 (5th Cir. 2009). It is not sufficient to allege they are alike by virtue of their classification as litigants. See Nordlinger, 505 U.S., at 10. Moreover, many distinctions have been made between litigants with marital or parental status, and all other litigants, as Montgomery County has done with respect to E-filing. Lexis does not purport to know the actual reason for the distinctions (and Plaintiff cannot sufficiently allege Lexis agreed to the distinctions), but the distinctions are not uncommon. Courts distinguish between family law litigants from other litigants in many instances. See e.g., Troxel v. Granville, 530 U.S. 57, 62 (2009). Plaintiff has not acknowledged obvious historical distinctions between those classes not subject to E-filing and has not made any attempt to allege they are similarly situated in all relevant respects beyond stating they are

⁴ Plaintiff attempts to show the absurdity of rational basis scrutiny by way of an example involving public school students. Plaintiff's Response at 16. Even if rational basis scrutiny would render the state's policy constitutional, the example is irrelevant to this inquiry. Lexis does not deny that such a policy would be unjust; however, the standard for an equal protection violation is not injustice. Moreover, if in fact access to education were a fundamental right (which it is not), recourse would be available under substantive due process. In that case, strict scrutiny would likely apply.

all “litigants.” Thus, Plaintiff has not satisfied her burden of showing the class of litigants is in all relevant respects alike.

V. Plaintiff fails to state a claim of conspiracy under Section 1983.

In addition to her failure sufficiently to plead violations of a federal right, Plaintiff’s Section 1983 conspiracy claim fails sufficiently to plead an agreement to commit an illegal act. See Arsenaux v. Roberts, 726 F.2d 1022, 1024 (5th Cir. 1982). Plaintiff alleges one agreement between Lexis and Montgomery County – the 2007 agreement for providing E-filing services. Compl. at ¶ 260. Plaintiff alleges Lexis committed illegal acts resulting in deprivation of Plaintiff’s constitutional rights by setting and collecting E-filing fees. Plaintiff’s Response at 25. Plaintiff also references an agreement between Lexis and the other Defendants (or at least Montgomery County); however, Plaintiff never alleges an agreement between all Defendants to commit illegal acts. Compl. at ¶ 182-83. Plaintiff concedes in her Response that the 2007 Agreement did not allow Lexis to set, charge, collect and retain any fees, much less those in violation of the Texas Government Code. Plaintiff’s Response at 25. Because all of the alleged constitutional violations against Lexis hinge on the alleged illegal acts of charging, collecting and retaining E-filing fees, Plaintiff fails to allege any agreement to commit illegal acts or violate her constitutional rights. The only agreement Plaintiff alleges (the 2007 agreement) is completely disconnected from the alleged illegal acts. It is not sufficient to allege an agreement and illegal acts, without plausibly alleging a connection between the two at the time the agreement was made. See Arsenaux, 726 F.2d at 1024. Accordingly, Plaintiff fails sufficiently to plead a claim for which relief can be granted under Section 1983.

VI. Conclusion.

Plaintiff fails sufficiently to address Lexis’ arguments or add anything substantive with respect to the remaining issues of Immunity, the Voluntary Payment Doctrine, Separation of Powers, and Fraud. For each of Plaintiff’s claims, Lexis repeatedly has been left to decipher which factual allegations apply to which legal claims. For all of the foregoing reasons in this brief and the reasons set forth in its Motion to Dismiss, Lexis requests this Court grant its Motion to Dismiss for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2010, I electronically filed the foregoing **Defendant Reed Elsevier, Inc.'s Reply in Support of Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint** with the Clerk of Court using the CM/ECF system, which automatically sends an e-mail notification of such filing to the following attorneys of record:

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