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'S, MONTGOMERY COUNTY, TEXAS, MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND BRIEF IN SUPPORT

TO THIS HONORABLE DISTRICT COURT:

Defendants, MONTGOMERY COUNTY, TEXAS and BARBARA GLADDEN ADAMICK, file this Motion to Dismiss for Failure to State a Claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Rules

Federal Statutes

State Statutes

I. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

A. Nature and Stage of the Proceeding

1. Plaintiff is Karen McPeters. She has sued the Honorable Frederick E. Edwards, Judge of the 9th District Court of Montgomery County, Texas, Montgomery County, Texas, Barbara Gladden Adamick, the Montgomery County District Clerk, and ReedElsevier, Inc., d/b/a LexisNexis ("LexisNexis"). Judge Edwards is represented by separate counsel. As of the date of this filing, LexisNexis has not been served and summons has not been issued for it.

2. Plaintiff's claims arise from Judge Edwards' order that she use e-file exclusively to file documents in a case she brought that was assigned to the 9th District Court. LexisNexis is the sole source provider for e-filing services in Montgomery County. She complains the fees charged by LexisNexis to use the e-file service are, in fact, filing fees that are not statutorily authorized. *Plaintiff's Complaint,* ¶ 17, 18 and 38. Plaintiff concedes in her petition, however, that LexisNexis is "personally and independently responsible for the amount billed to litigants for fees and charges for use of e-filing services." *Plaintiff's Complaint,* ¶ 65. She further complains that Adamick refused to file documents tendered to her in person and through the mail, all in compliance with Judge Edwards' e-file order. Finally, McPeters asserts that Adamick voided the filing of a Rule 202 petition tendered to her through the mail, an assertion which is patently false.

3. All of the defendants are alleged to have violated: the RICO statute; Plaintiff's federal constitutional rights to equal protection, procedural due process and substantive due process; and her Texas Constitution rights to equal rights, open courts and due course of law. Additionally, Plaintiff alleges Defendant Adamick violated her statutory duties and she is entitled to damages

pursuant to Tex. Civ. Prac. & Rem. Code § 7.001. Finally, Plaintiff has requested class action status for the suit.

B. Issue to be Ruled upon by Court; Standard of Review

4. Defendants Montgomery County and Adamick seek dismissal of all claims brought against them pursuant to Fed. R. Civ. P. 12(b)(6). The issue is whether the Plaintiff has stated a claim upon which relief could be granted. A court should dismiss a plaintiff's claim for failure to state a claim upon which relief can be granted when the complaint demonstrates she cannot prove any set of facts which would entitle her to relief. *Rolf v. City of San Antonio*, 77 F.3d 823,827 (5th Cir. 1996). In considering a motion to dismiss, a district court should accept only well pleaded allegations as true, viewed in the light most favorable to the non-movant. *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1996). "A statement of facts that merely creates a suspicion that the pleader might have a right of action is insufficient." Id. "The court is not required to conjure up unpled allegations or construe elaborately arcane scripts to save the complaint." Id. Conclusory allegations or legal conclusions masquerading as factual allegations will not suffice to avoid a motion to dismiss. *Fernandez-Montes v. Allied Pilot's Association*, 987 F.2d 278, 284 (5th Cir. 1993).

C. Summary of the Argument

5. Plaintiff Karen McPeters has failed to state a claim upon which relief could be granted under RICO because she has failed to adequately allege an enterprise or racketeering activity. Further, Montgomery County cannot be held liable under RICO as civil RICO actions do not run against governmental entities.

6. McPeters has failed to state a claim upon which relief could be granted under 42 U.S.C. § 1983 against the County because Judge Edwards is not a county policymaker. As for her claims

for injunctive relief, Plaintiff's claims fail because of Section 1983's prohibition against injunctive relief against judicial officers. As Adamick was merely acting in compliance with Judge Edwards' e-file order, she is also entitled to the same prohibition. Finally, Adamick is entitled to absolute immunity from McPeters' Section 1983 claims.

7. Plaintiff has failed to state a claim on which relief could be granted with respect to her claims under the Texas Constitution's protections for equal rights, open courts and due course of law. There is no private cause of action for monetary damages under The Texas Constitution. Further, there is a rational basis for the e-filing order and system and Plaintiff's claim for due course of law must fail because her complaints do not implicate a constitutionally recognized property or liberty interest. Additionally, she has failed to state a claim for a violation of the Open Courts Clause as her complaint does not involve a statutory restriction on a common law cause of action.

8. As for Plaintiff's claim under Tex. Civ. Prac. & Rem. Code § 7.001, she has failed to identify which Texas Rule of Civil Procedure or section of the Texas Civil Practice & Remedies Code Adamick failed to comply with. Assuming she is complaining about Adamick's failure to comply with Tex. R. Civ. P. 21, she has no claim and she suffered no injury. Finally, McPeter's claim regarding the filing of the Rule 202 petition is false.

D. Factual Allegations

1. Montgomery County E-Filing

9. In 1997, the Texas Supreme Court approved Local Rules for Montgomery County concerning e-filing. Miscellaneous Order No. 97-9155.[1] *Defendants' Exhibit 1*. The order remains in place today.

10. In 2003, Defendant Judge Edwards signed an order regarding assignment of certain cases to e-filing ("e-file order"). This order is currently used to govern all cases assigned to e-filing in his court. *Plaintiff's Complaint, Exhibit A*.[2]

11. The e-file order states that, as of January 1, 2000, all civil cases filed in the 9th District Court will be electronically filed and governed by the Local Rules Regarding Electronic Filing. The Order specifically excepts certain types of cases from the e-file designation: actions brought by the State of Texas, Child Protective Services, adoption actions and new divorce and annulment cases filed after January 1, 2001, that are resolved within 90 days.

12. The order provides that pleadings or party-generated documents must be e-filed if the case is designated as e-file. However, it does provide that certain documents may be conventionally filed: if the party has leave of Court to conventionally file; the document is an

[1] Defendants ask that the Court take judicial notice of the records attached to the 12(b)(6) motion. A court may take judicial notice of "a document filed in another court ... to establish the fact of such litigation and related filings," but "cannot take notice of the factual findings of another court." *Taylor v. Charter Medical Corporation,* 162 F.3d 827, 829 (5th Cir.1998). The Defendants ask the Court to take judicial notice of Miscellaneous Order 97-9155, attached as Exhibit 1; the transfer order in *McPeters I*, attached as Exhibit 2; the e-file order in *McPeters I*, attached as Exhibit 3; and the court records in *McPeters II*, attached as Exhibit 4.

[2] When ruling on a motion to dismiss pursuant to Rule 12(c), the court may look to both the pleadings and "documents attached to the complaint because these documents thereby become part of the pleadings." *See Great Plains Trust Co. v. Morgan Stanley Dean Witter,* 313 F.3d 305, 313 (5th Cir.2002) (citations omitted).

Original Petition or Return of Service, or the document is an exhibit, appendix or "image" document exceeding 50 pages in length).[3]

13. Parties to e-file cases have two options to e-file: they can become a subscriber to the CourtLink (now LexisNexis) e-file system or they may bring their filings on a 3 ½" diskette to the public terminal located in the District Clerk's Office and upload the pleadings at no charge. The public terminal option is also described in the Local Rules.

14. The Order specifically notifies the parties to an e-file designated case that the District Clerk "shall not accept 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."

2. *McPeters I*

15. Plaintiff filed a civil lawsuit in Travis County, Texas, styled *Karen McPeters v. Montgomery County, Texas*. The case was transferred to Montgomery County and assigned to the 9th Judicial District Court, where Defendant Judge Edwards presides. *Defendants Exhibit 2.* Judge Edwards designated the *McPeters I* case as an e-file case. *Defendants' Exhibit 2*.

16. Plaintiff alleges she was not provided with a copy of the e-file order in *McPeters I*, nor did the clerk e-file it. *Plaintiff's Complaint*, ¶¶ *23, 25*. However, she did participate in e-filing in the case, as she admits in ¶¶ 30 and 33, in which she states she has been billed and required to

[3] For exhibits, appendices or images exceeding 50 pages, the Order provides that those documents may be conventionally filed with the District Clerk's Office, but the filing party must e-file a notice that there are conventional "paper" exhibits on file at the District Clerk's Office. *Plaintiff's Complaint, Exhibit A*.

pay fees and charges to LexisNexis. McPeters did not ask for leave of court in *McPeters I* to conventionally file documents in the case.

17. Plaintiff asserts that the District Clerk rejected two filings in *McPeters I* due to Judge Edwards' e-file order: her notice of appeal, which she attempted to file in person at the District Clerk's Office and a vacation letter which was mailed to the District Clerk. *Plaintiff's Complaint,* ¶¶ 69, 70 and 73. She instead filed them both through LexisNexis and suffered no legal prejudice. Plaintiff does not state whether or not she attempted to use the public access terminal at the District Clerk's Office.

3. *McPeters II*

18. On November 24, 2009, Plaintiff filed a "Petition to Investigate Potential Claims Pursuant to Tex. R. Civ. P. 202," *Karen McPeters v. Barbara Adamick*, Cause No. 09-11-11474-CV. *Plaintiff's Complaint, Exhibit B.* ("*McPeters II*.") The petition was mailed to the Montgomery County District Clerk by McPeters' counsel, Robert L. Mays, Jr., and was filed by the District Clerk on November 24, 2009, upon receipt. *Defendants' Exhibit 4.*

19. The petition was assigned to the 9th Judicial District Court and was designated as an e-file case. *Defendants' Exhibit 4.* Plaintiff alleges that while Defendant Adamick prepared and provided a copy of the e-file order to her, Adamick failed to e-file the order itself. *Plaintiff's Complaint*, ¶ *47.*

20. On January 6, 2010, Plaintiff received a copy of the Rule 202 petition with a blue "VOID" stamp over the file stamp. *Plaintiff's Complaint*, ¶¶ *50, 72*. However, the petition had been filed on November 24, 2009, when it was received by the District Clerk's Office. *Defendants' Exhibit 4.* While the Defendants are unable to identify the circumstances regarding the "VOID" stamp and the return of that document to Plaintiff's counsel, the certified record

from the court demonstrates that the Rule 202 petition was filed on November 24, 2009, when it was received in the mail from Plaintiff's counsel. *Defendants' Exhibit 4.* Thus, she did not suffer any injury in this "incident." The petition was eventually denied by Judge Bob Wortham, sitting as the 9th District presiding judge. *Defendants' Exhibit 4.*

21. Plaintiff's other specific complaint regarding *McPeters II* is that the District Clerk failed to file a vacation letter sent by counsel through the mail. She cannot show legal prejudice or injury due to this incident.

22. As in *McPeters I*, Plaintiff failed to request leave of court to conventionally file any documents. She also does not state whether she attempted to use the public access terminal at the District Clerk's Office.

E. Argument

1. RICO

23. Plaintiff's first federal cause of action is brought under 18 U.S.C. §§ 1961-1968, the Racketeer Influenced Corrupt Organizations Act ("RICO"). She alleges the Defendants have engaged in actions with a common purpose of "requiring Karen McPeters, and similarly situated litigants, to pay filing fees, service charges and taxes that are not authorized by statutes, and that exceed the amounts required by statutes." *Plaintiff's Complaint*, ¶ *61*. Civil enforcement actions brought under RICO are brought pursuant to 18 U.S.C. § 1964. [4]

[4] The Fifth Circuit has expressed doubt that injunctive relief is available to private plaintiffs in civil RICO actions. *Bolin v. Sears, Roebuck & Co*., 231 F.3d 970, 977, n.42 (5th Cir. 2000), citing *In re Fredeman Litigation*, 843 F.2d 821, 830 (5th Cir.1988). However, th Fifth Circuit has not decided whether equitable relief is available for private civil RICO plaintiffs under 18 U.S.C. § 1964(a)-(c). *Cunningham v. Offshore Specialty Fabrications, Inc*., 543 F.Supp.2d 614, 640 (E.D.Tex.,2008).

a. Montgomery County cannot be liable under RICO

24. With respect to Plaintiff's RICO claims as brought against Montgomery County, civil RICO actions under 18 U.S.C. § 1964 do not run against governmental entities. *See Lancaster Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397, 404-405 (9th Cir. 1991)(hospital asserting RICO claims against public hospital and hospital district could not impose liability on "body politic", i.e., taxpayers); *Genty v. Resolution Trust Corp*., 937 F.2d 899, 914 (3rd Cir. 1991)(holding municipalities not liable for civil RICO claims brought under § 1964(c) because treble damages are mandatory); *Dammon v. Folse*, 846 F.Supp. 36, 38-39 (E.D.La. 1994)(municpalities unable to form requisite criminal intent and taxpayers, who are supposed to be protected by RICO, should not be punished when RICO is violated by agents over whom they have little or no control). Thus, her RICO claim as brought against the County should be dismissed.

b. Elements of RICO Claim

25. In order to state a claim under 18 U.S.C. § 1962, a plaintiff must allege: 1) the conduct; 2) of an enterprise; 3) through a pattern; 4) of racketeering activity. *Elliot v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989)(citation omitted).

(1) Plaintiff fails to allege "Enterprise"

26. Plaintiff has failed to sufficiently allege the existence of an "enterprise." "An enterprise is a group of persons or entities associating together for the common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528 (1981). An enterprise could be a legal entity or "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). For an "association in fact" enterprise, the Plaintiff must demonstrate "an ongoing organization, formal or informal, and … evidence that

the various associates function as a continuing unit." *Atkinson v. Anardko Bank & Trust Co*., 808 F.2d 438, 439-40 (1987)(*quoting Turkette*, 452 U.S. at 583, 101 S.Ct. at 2528).

27. In Paragraph 61 of her Complaint, Plaintiff identifies the enterprise as the actions taken by the Defendants "with a common purpose" of requiring McPeters and other similarly situated litigants to pay filing fees, service charges, and taxes that are not authorized by statute and exceed the amounts required by statute.[5] She identifies the actions taken as the "Plan." *Plaintiff's Complaint, ¶ 61.* This is clearly insufficient to allege an enterprise. "The enterprise is not a pattern of racketeering activity, but must exist separate and apart from the pattern of racketeering activity in which it engages." *Whelan v. Winchester Production Company*, 319 F.2d 225, 229 (5th Cir. 2003)(citing *Atkinson*, 808 F.2d at 441). Plaintiff has failed to allege the existence of an enterprise "separate and apart" from the alleged racketeering activity.

(2) Plaintiff fails to allege Racketeering Activity

28. "Racketeering activity includes the commission of specified state-law crimes, conduct indictable under various provisions within Title 18 of the United States Code, including mail and wire fraud, and certain other offenses." *Pinnacle Consultants, Ltd. v. Leucadia Nat'l Corp*., 101 F.3d 900, 903-04 (2d Cir.1996). Section 1961(1) enumerates the various state and federal criminal offenses that qualify as predicate acts to a RICO claim. Only those crimes can serve as predicate offenses for the purpose of a RICO claim. 18 U.S.C. §§ 1961(1), 1962; *See Pan American Maritime, Inc. V. Esco Marine***,** 2005 WL 1155149, *4-5 (S.D.Tex. 2007)(citations omitted). Further, in order to establish a "pattern of racketeering activity, the Plaintiff must demonstrate that the racketeering predicates are related and amount to or pose a threat of

[5] Defendants note that, on the one hand, Plaintiff argues the fees are wholly unauthorized by law, but on the other hand, argues that the fees "exceed the amounts required by statute." If a fee is required by statute, then it is authorized by law. Plaintiff cannot have it both ways. Either the fee is unauthorized or is authorized and she is just being charged too much for the service underlying the fee.

continued criminal activity." ' See *In re Mastercard Int'l, Inc*., 313 F.3d 257, 261 (5th Cir.2002) (*quoting St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 441 (5th Cir.2000)) (other citations omitted).

29. In her complaint, Plaintiff alleges as predicate acts violations of 42 U.S.C. § 1983; 18 U.S.C. § 1341; 18 U.S.C. § 1343; 18 U.S.C. § 1951; and 18 U.S.C. § 1349. Section 1961(1) does not include violations of 42 U.S.C. § 1983 as a predicate offense.[6] Section 1349, which provides that "anyone that attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which is the object of the attempt or conspiracy" is also not included in the list as a separate predicate offense in Section 1961(1).

30. Sections 1341 and 1343 of Title 18, United States Code, involve mail and wire fraud and are listed in Section 1961(1) as predicate acts. Plaintiff asserts that LexisNexis delivered bills for e-filing activities through the U.S. mail and through the internet. *Plaintiff's Complaint*, ¶ *31, 33 and 80*. Defendant Adamick is not alleged to have sent her any bills. For RICO mail fraud, the Plaintiff must establish the following: 1) a scheme to defraud by means of false or fraudulent misrepresentation, 2) interstate or intrastate use of the mails to execute the scheme, 3) use of the mails by the defendant connected with the scheme, and 4) actual injury to the Plaintiff.[7] *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 428 (5th Cir.), *cert. denied*, 498 U.S. 895, 111 S.Ct.

[6] Further, Section 1983 is merely a civil statute and not a substantive one at that. "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' " *Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994), *quoting Baker v. McCollan,* 443 U.S. 137, 144, n. 3, 99 S.Ct. 2689, 2694, n. 3 (1979).

[7] *United States v. Bruno,* 809 F.2d 1097, 1104 (5th Cir.1987) ("Because the requisite elements of "scheme to defraud" under the wire fraud statute, 18 U.S.C. section 1343 and the mail fraud statute are identical, cases construing the mail fraud statute apply to the wire fraud statute as well.")"

244 (1990). When mail or wire fraud is alleged as a RICO predicate, the Fifth Circuit requires a showing of reliance. *In Re Mastercard Int'l Inc*., 313 F.3d at 263. RICO claims based on fraud must be pled with particularity. *Elliot*, 867 F.2d at 880.

31. Plaintiff has failed to allege the Defendants attempted to make a false or fraudulent misrepresentation. *In Re Mastercard International, Inc*., 313 F.3d at 263. She has failed to explain how the bills "advanced the alleged scheme of the defendants to defraud her." *Elliot*, 867 F.2d at 882. Nor does Plaintiff state how the communications violated federal law. *Id.*

32. Finally, Plaintiff cannot show reliance. The alleged fraudulent communications violate the mail fraud statute when they "serve[ ] to 'lull' the plaintiff into a false sense of security, postpone inquiries or complaints, or to lessen the suspect appearance of the fraudulent transaction." *Cadle Co. v. Shultz*, 779 F.Supp. 392, 400 (N.D. Tex. 1991). Plaintiff admits that LexisNexis was independently responsible for fees for using e-filing services. There was no sense of "false security."

33. As the last predicate act, Plaintiff alleges Defendants violated 18 U.S.C. 1951, the Hobbs Act. *Plaintiff's Complaint*, ¶ *81*. She alleges that Defendants "obstructed, delayed or affected commerce by requiring and obtaining payment from Karen McPeters in furtherance of their Plan under the color of official right." *Id.* The Hobbs Act prohibits the use of robbery, extortion, physical violence or threats of physical violence to obstruct interstate commerce. 18 U.S.C. § 1951)(a). Plaintiff's allegations do not include robbery, physical violence or threats of violence. "'Extortion' means obtaining property from another, with his consent, induced by actual or threatened force, violence, or fear." *Elliot*, 867 F.2d at 882. None of the alleged acts by Defendants fall into this category. Plaintiff was required to e-file, nothing more. No one threatened physical harm and certainly, if Plaintiff was in fear her cause would somehow be

dismissed because of her objection to e-filing (which she never took any action on with the 9th District Court), she had a remedy: she could appeal to the state appellate court.

34. In Paragraph 2 of her Complaint, Plaintiff alleges Defendants have received income from a "pattern of racketeering activity or through collection of an unlawful debt…." To the extent she is claiming that Defendants' actions constituted the "collection of an unlawful debt," Plaintiff has failed to state a claim. An "unlawful debt" is defined in 18 U.S.C. 1961(6) as one:

> (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and
> (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

35. Plaintiff has alleged no gambling activity by Defendants, so she must show that the "unlawful debt" was (1) incurred in connection with the business of lending money and (2) at a usurious rate which was at least twice the enforceable rate. 18 U.S.C. § 1961(6).

36. The Defendants are alleged to have charged Plaintiff "filing fees" that she did not want to pay because she thinks they are illegal. While that may, on the surface, sound like an "unlawful debt," it is not an "unlawful debt" under RICO. There is no allegation that the Defendants lent Plaintiff money or that the lending rate was usurious.

37. Plaintiff has failed to state a claim for RICO violations. Montgomery County cannot be held liable under RICO. Plaintiff has failed to adequately allege the existence of an "enterprise" and any sufficient predicate acts to support a RICO claim. She has failed to meet the heightened pleading requirements for RICO claims based on predicate acts of fraud. Plaintiff also cannot show Defendants' conduct constituted the collection of an "unlawful debt" under RICO. This claim should be dismissed.

2. Section 1983 Civil Rights Claims

38. In her second cause of action, Plaintiff has brought claims under 42 U.S.C. § 1983 for violations of her equal protection, substantive due process and procedural due process rights. *Plaintiff's Complaint* at ¶¶ 85-87. These claims stem from Judge Edwards' e-filing order and Defendant Adamick's actions in complying with that order. *Plaintiff's Complaint*, ¶¶ 87.

39. In order to state a claim under Section 1983, Plaintiffs must (1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law. *Leffall v. Dallas Independent School District*, 28 F.3d 521, 525 (5th Cir. 1994).

a. Adamick is Immune from both Monetary and Injunctive Relief

40. Court clerks "have absolute immunity from actions arising from acts they are specifically required to do under court order or at a judge's discretion." *Clay v. Allen*, 242 F.3d 679, 682 (5th Cir. 2001)(quoting *Tarter v. Hury*, 646 F.2d 1010, 1013 (5th Cir. 1981)). This is true even if the employee acts "in bad faith or with malice." See *Williams v. Wood*, 612 F.2d 982, 985 (5th Cir. 1980). Plaintiff's allegations against Adamick are all based on actions taken by Adamick while following Judge Edwards' e-file order.[8] Thus, Adamick is entitled to absolute immunity from Plaintiff's Section 1983 claim.

41. To the extent that Plaintiff requests injunctive relief against Adamick based on her Section 1983 claim, such relief is not available. Section 1983 provides in pertinent part:

> [I]n any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[8] Actually, the actions taken by Adamick (not accepting documents tendered to her in writing or through the mail) are in specific compliance with the e-file designation order.

42 U.S.C. § 1983 (emphasis added). Plaintiff does not allege that Judge Edwards' order, or Adamick's reliance on it, were in violation of a declaratory decree or that declaratory relief is otherwise unavailable. As Adamick was acting in compliance with Judge Edwards order – and he is entitled to immunity from a Section 1983 injunction – Adamick should likewise be immune from injunctive relief.

42. McPeters has sued Adamick in her official and individual capacity. A suit brought against a defendant in his official capacity is a suit against the county. *Bennett v. Pippin*, 74 F.3d 578, 584 (5th Cir.), *cert. denied*, 519 U.S. 817, 117 S.Ct. 68 (1996)("[a] suit against the Sheriff in his official capacity is a suit against the County"); *see Smith v. Davis*, 999 S.W.2d 409, 416 (Tex. App. – Dallas 1999) (citation omitted)("[i]n suing the employee in his official capacity, a plaintiff seeks, in effect, to impose liability on the governmental unit the employee represents rather than on the employee himself"). Thus, suing the County and Adamick in her official capacity is redundant.

b. Montgomery County – Judge Edwards is not a policymaker

43. In order to recover against Montgomery County for these claims, McPeters must identify the governmental policy or custom which resulted in the alleged deprivations of her constitutional rights, connect the policy or custom to the government itself, and show that the alleged policy or custom was the "cause in fact" or the "moving force" behind the violation of her constitutional rights. *Spiller v. City of Texas City Police Department*, 130 F.3d 162, 167 (5th Cir. 1997).

44. County liability can also be predicated on an official "custom" or "practice" which is most commonly defined as a "persistent, widespread practice of municipal officials or employees," which, although not authorized by officially adopted and promulgated policy, is so

common and well-settled as to constitute a custom which fairly represents municipal policy. *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984). "Actual or constructive knowledge of [a] custom must be attributable to the governing body of the municipality or to an official to whom that body has delegated policy-making authority." *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir.), *cert. denied*, 122 S.Ct. 53 (2001), citing *Webster*, 735 F.2d at 842.

45. Plaintiff cannot maintain a claim against the County because Judge Edwards is not a county policymaker. State district judges are agents of the State of Texas. *See Warnock v. Pecos County*, 88 F.3d 341, 343 (5th Cir. 1996)(holding Texas judges entitled to Eleventh Amendment immunity for claims made against them in their official capacity). Local judges acting in their judicial capacities do not act as local governmental policy-makers. *Krueger v. Reimer*, 66 F.3d 75, 77 (5th Cir. 1995)) (holding that neither a state district judge nor a County District Attorney acts as a local policy-maker when performing their respective official duties); *Johnson v. Moore,* 958 F.2d 92, 94 (5th Cir. 1992) (holding that a municipal judge's actions in repeatedly committing the plaintiff to jail without first appointing counsel for the plaintiff did not constitute actions establishing city policy); *Bigford v. Taylor*, 834 F.2d 1213, 1221-22 (5th Cir. 1988) (holding that a county magistrate's ruling in a case pending before him did not constitute setting county policy); *Carbalan v. Vaughn*, 760 F.2d 662, 665 (5th Cir.), *cert. denied*, 474 U.S. 1007, 106 S.Ct. 529, 88 L.Ed.2d 461 (1985) (holding that municipal judge did not act as a county policy-maker in refusing to accept a criminal defendant's offer of credit card charges in lieu of cash bail).

46. Montgomery County's only involvement in the case is based on the contract with LexisNexis. Plaintiff has not alleged – and cannot show – that the County took any actions in discriminating against certain litigants or that Adamick established Montgomery County policy

by following Judge Edwards' e-file order. It was Judge Edwards, not Montgomery County, who exempted certain litigants and types of cases from the e-filing requirements and ordered the Clerk to reject the pleadings.

3. Texas Constitution Violations

47. Plaintiff alleges Defendants' actions violated her rights under the Texas Constitution to equal rights, open courts and due course of law. Tex. Const. Art. I, §§ 3, 13, 19. *Plaintiff's Complaint* ¶¶ 91, 92 and 93. The Texas Supreme Court in *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 147 (Tex.1995), held that no private cause of action for money damages exists for alleged violations of Texas Constitutional rights. Thus, Plaintiff is barred from seeking money damages under the Texas Constitution.

a. Equal Rights – Rational Basis for E-filing System

48. Plaintiffs must establish two elements for an equal protection claim: 1) similarly situated individuals were treated differently, and 2) the disparate treatment she experienced was "deliberately based upon an unjustifiable standard, such as race, religion, or other arbitrary classification." *Allred's Produce v. United States Dept. of Agriculture*, 178 F.3d 743, 748 (5th Cir. 1999). Plaintiff asserts the disparate treatment she suffered was due to her status as a non-State of Texas, non-CPS, non-adoption case litigant. As this case does not involve a classification that does not target a suspect class or burden a fundamental right, the exception of certain class of cases from e-filing must be upheld unless it fails to bear a rational relationship to some legitimate end. *Romer v. Evans*, 517 U.S. 620, 631 (1996); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 115-116 (1996)(holding that rational basis is the correct equal protection scrutiny level for filing fees).

49. Plaintiff's equal protection claim fails because there is a rational basis for the Court's e-file order and system. For rational basis review, the reviewing court need only find that a legitimate goal "conceivably" or "reasonably" could have been the purpose and policy of the relevant decisionmaker. *Nordlinger v. Hahn*, 505 U.S. 1, 15, 112 S.Ct. 2326 (1992). The actual motivation behind the restriction is irrelevant. *Id.*

50. The e-filing system reduces paper filing, offers immediate access to the docket to both court personnel and litigants, and substantially reduces the service burden for parties. Parties are afforded more time to file pleadings, as the filing time is extended. As acknowledged by Plaintiff, other Texas courts use the Texas Online e-filing system and the same advantages are considered. Additionally, civil cases usually last longer than the types of cases excepted in the e-file order and generate more motions and paperwork. Child Protective Services cases are excepted because of privacy concerns. There is a rational basis for the e-file order and system and any classifications contained therein. This claim should be dismissed.

b. Open Courts – No claim under Open Courts

51. Plaintiff also seeks injunctive relief and while she does not specify which cause of action entitles her to relief, she is not entitled to any such relief under the Texas Open Courts provision of the Texas Constitution found in Article I, Section 13. The Texas Supreme Court has held that the Open Courts Clause only applies to statutory restrictions upon a legitimate common law cause of action. *Federal Sign v. Texas Southern Univ.*, 951 S.W.2d 401, 410 (Tex. 1997), superseded by statute on other grounds, citing *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 499 (Tex. 1995). Since Plaintiff's claim regarding the Texas Open Courts Clause does not challenge "a legislative act that infringes upon a common law cause of action, her 'open courts' challenge is inapplicable here." *Peeler*, 909 S.W.2d at 499. To the extent Plaintiff wishes to substitute the

Montgomery County Local Rules on e-filing and Judge Edwards 2003 e-file designation order for the "legislative act" contemplated in *Federal Sign*, she still has not alleged – and cannot show – that the Local Rules and the 2003 Order infringe upon a common law cause of action. She was not kept from asserting her legal claims.

c. Due Course of Law – No Claim

52. The Texas Due Course of Law Clause, Article I, Section 3, has been held to provide the same protections as the Due Process Clause of the United States Constitution. Thus, in assessing due process claims under the Texas Constitution, federal case law is considered. *University of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex.1995) (citing *Mellinger v. City of Houston,* 68 Tex. 37, 3 S.W. 249, 252-53 (1887)). Citizens are to be afforded procedural due process, meaning notice and opportunity to be heard, when constitutionally recognized property or liberty interests are infringed upon by the state. *Freeman v City of Dallas*, 186 F.3d 601, 606 (5th Cir. 1999), *citing Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 313-315, 70 S.Ct. 652 (1950); *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893 (1976). In this case, Plaintiff has not shown that she has been deprived of a constitutionally protected liberty or property interest because her case was designated as an e-file case. She has failed to specify what procedural due process she was not afforded. Further, Defendants point out that the e-file order specifically allows parties to ask for leave of court to conventionally file documents. Plaintiff has not alleged that she exhausted this remedy.

53. Due Process also encompasses "substantive" due process, whereby citizens are protected from state action that arbitrarily or caprciously deprives them of an interest in life, liberty or property. *Morton v. City of Beaumont*, 991 F.2d 227, 230 (5th Cir. 1993). However, the Supreme Court has held that "if a constitutional claim is covered by a specific constitutional

provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process. *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). As Plaintiff's claims are already covered under the Equal Protection Clause and the procedural due process component of due process, she has no separate substantive due process claims.

4. Statutory Duties – No Claim

54. In her fourth cause of action, Plaintiff complains that Defendant Adamick failed to perform her "statutory duties" and seeks the statutory penalties provided by Texas Civil Practice & Remedies Code § 7.001.

55. Section 7.001 is entitled "Liability for Refusal or Neglect in Performance of Official Duties," and provides as follows:

> (a) A clerk, sheriff, or other officer who neglects or refuses to perform a duty required under the Texas Rules of Civil Procedure or under a provision of this code derived from those rules is liable for actual damages only in a suit brought by a person injured by the officer's neglect or refusal.
>
> (b) The officer may be punished for contempt of court for neglect or refusal in the performance of those duties. The court shall set the fine at not less than $10 or more than $100, with costs. The officer must be given 10 days' notice of the motion.
>
> (c) This section does not create a cause of action for an action that can otherwise be brought under Chapter 34. A party may seek actual damages under this section or Chapter 34, or the party may seek contempt sanctions, but the party may not seek both damages and contempt.
>
> (d) An action or motion brought under this section must comply with and is subject to the provisions in Sections 34.068, 34.069, 34.070, and 34.074, except that a motion brought under Subsection (b) need not comply with Section 34.068(b).

Tex. Civ. Prac. & Rem. Code § 7.001 (Vernon Supp. 2009)

56. Plaintiff does not specifically identify which Rule of Civil Procedure and/or provision of the Texas Civil Practice and Remedies Code Adamick allegedly violated. In Paragraph 37 of the Original Complaint, she states that the District Clerk is "required by statute to accept and file documents tendered to her, Tex. Gov't Code § 51.303(a) and Texas Rules of Civil Procedure 21" (*Plaintiff's Complaint* § 37.)

57. A plain reading of Section 7.001 demonstrates that Plaintiff cannot recover based on Adamick's failure to comply with Tex. Gov't Code § 51.303(a) because Section 7.001 only applies to violations of the Texas Rules of Civil Procedure and the Texas Civil Practice and Remedies Code, not a violation of the Texas Government Code.

58. As for Texas Rule of Civil Procedure 21, Plaintiff has not shown an injury. Contrary to Plaintiffs' assertions, Adamick is only accused of one act of not filing the documents as tendered and returning them to the Plaintiff, the Rule 202 petition. *Plaintiff's Complaint* at ¶ 50. In fact, she is not even accused of not filing it, but merely returning a copy of it with "VOID" stamped over the file stamp. The records from that case make clear that Plaintiff has no claim of not having documents filed that were tendered to the Clerk. As for the remaining documents Adamick is alleged to not have filed, Plaintiff cannot show she was injured in pursuing her state court actions.

59. Plaintiff's reliance on Section 7.001 to state a cause of action is misplaced and this claim should be dismissed.

5. Class Action – No Certification Necessary

60. Plaintiff has included a request for the court to designate this case as a class action pursuant to Fed. R. Civ. P. 23. See Pl. Orig. Complt. at ¶ 95. As outlined above, the Plaintiff has failed to state a claim for which relief could be granted. Thus, she also fails to present a

basis for class certification and certainly could not serve as class representative. Defendants respectfully request the Court deny Plaintiff's request for class status.

6. Punitive Damages – No recovery from County

61. The County is immune from punitive and/or exemplary damages. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) ("a municipality is immune from punitive damages under 42 U.S.C. § 1983"); Texas Civil Practice and Remedies Code §101.024 (Vernon 2005)("This chapter does not authorize exemplary damages.")

II. REQUEST FOR REPLY OR MORE DEFINITE STATEMENT

62. A motion for more definite statement is proper when the plaintiff did not plead its cause of action by particularized pleading, as required by the Fifth Circuit for Section 1983 cases in which individual is alleged to have violated the plaintiff's civil rights. *Schultea v. Wood*, 47 F.3d 1427, 1432-1434 (5th Cir. 1995)(*en banc*). The heightened pleading standard demands that a plaintiff's pleadings raise a genuine issue as to the alleged illegality by the defendant, identify the defendant's alleged unlawful conduct, and must rest on more than conclusions alone. *See Schultea*, 47 F.3d at 1433; *Fee v. Herndon*, 900 F.2d 804, 807 (5th Cir.) *cert. denied*, 498 U.S. 908, 111 S.Ct. 279 (1990). To avoid dismissal, a plaintiff must plead all facts with particularity and demonstrate specifically how his federal rights have been violated by the defendant. *See Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). Accordingly, in order to avoid dismissal and in order to comply with the requirement of reply, plaintiffs must allege specific facts which show an objectively unreasonable violation of clearly established law. *See Siegert v. Gilley*, 500 U.S. 226, 231, 111 S.Ct. 1789, 1793 (1991); *Burns-Toole v. Byrne*, 11 F.3d 1270, 1274 (5th Cir.), *cert. denied*, 512 U.S. 1207, 114 S.Ct. 2680 (1994). Furthermore, governmental officials are entitled to a stay of discovery until after the Court determines, assuming the truth of

the factually specific allegations, that the official's conduct violated clearly established law. *See Crawford-El v. Britton*, 523 U.S. 574, 598, 118 S.Ct. 1584, 1597 (1998).

63. "Personal involvement is the touchstone of § 1983 jurisprudence." *Fickes v. Jefferson County*, 900 F.Supp. 84, 88 (E.D. Texas 1995). Plaintiff must plead all facts demonstrating Defendant Adamick's *personal involvement* in her alleged injury. She had not yet done so and to the extent that the Court does not deem Adamick is entitled to absolute immunity and only qualified immunity is at issue, Defendant Adamick requests a more definite statement from the Plaintiff to state, with particularity, detailed facts supporting the contention that Adamick is not entitled to qualified immunity. *See Elliott v. Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985). Mere conclusory allegations are not enough to overcome this burden. *See Schultea*, 47 F.3d at 1433.

64. The heightened pleading requirement also applies to RICO claims based on fraud, as Plaintiff apparently alleges. *See Elliot*, 867 F.2d at 880. To the extent that the Court does not dismiss the RICO claims at this stage of the proceedings, Defendants Montgomery County and Adamick request the Court order Plaintiff to satisfy the heightened pleading requirements for RICO claims based on fraud.

IV. CONCLUSION

65. Plaintiff 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 Plaintiffs' claims against the Count and Adamick.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants Montgomery County, Texas and Barbara Gladden Adamick, pray the claims made by Karen McPeters made against them be

dismissed, with prejudice, and for such other and further relief, both general and special, at law or in equity, to which they may be entitled, and for which they will ever pray.

Respectfully submitted,

DAVID K. WALKER
MONTGOMERY COUNTY ATTORNEY

By: /s/ Sara M. Forlano
Sara M. Forlano
Assistant Montgomery County Attorney
Texas Bar No. 00796565
Federal Bar No. 29050
sara.forlano@mctx.org
207 W. Phillips, Suite 100
Conroe, Texas 77301
(936) 539-7828
(936) 760-6920 fax

CERTIFICATE OF SERVICE

I hereby certify that on May ___, 2010, a true and correct copy of the foregoing document and of this certificate will be automatically served on known Filing Users through Notice of Electronic Filing and was sent certified mail, return receipt requested, to the following parties of record:

Robert L. Mays, Jr.
8626 Tesoro Drive, Suite 820
San Antonio, Texas 78217
210-657-7772
210-657-7780 fax
ATTORNEY FOR PLAINTIFF,
KAREN MCPETERS

/s/ Sara M. Forlano
Sara M. Forlano