UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

PATRICIA STONE	§	
Plaintiff	§	
VS.	§	**NO: 6:19-CV-00061-H**
	§	
TOM GREEN COUNTY, Texas,	§	
ALLISON PALMER, in her Official	§	
Capacity, and JOHN BEST, in his	§	
Official capacity,	§	
Defendants	§	

DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

TO THE HONORABLE JUDGE PRESIDING:

COME NOW DEFENDANTS Tom Green County, Allison Palmer, in her official capacity, and John Best, in his official capacity, and file this Motion to Dismiss under Rule 12(b)(6) and Brief in support. In support hereof, Defendants would respectfully show the Court as follows:

I.
SUMMARY

The Court should dismiss Plaintiff's claims. Plaintiff complains that Tom Green County, through its district attorneys, required Plaintiff to enter an "admonishment" or "confession" regarding the constitutionality of the Texas plea bargaining system before negotiating any plea bargain with Plaintiff's clients. As a result, Plaintiff claims her clients have been effectively barred from participating in the alleged unconstitutional process, which she claims forced her to withdraw as counsel and turn down potential clients. A motion to dismiss is proper because Plaintiff's allegations fail to support a claim for relief as a matter of law.

Plaintiff's pleadings establish that Tom Green County, the only party that is the subject of Plaintiff's allegations, did not commit *any* of the acts that are the subject of Plaintiff's complaint.

Because the "real party in interest" is the State of Texas, and not Tom Green County, all claims asserted against Tom Green County should be dismissed.

II.
STANDARDS

A. Rule 12(b)(6) Motion to Dismiss.

To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must provide enough facts to state a claim for relief that is plausible on its face. *See* Fed. R. Civ. P. 12(b)(6); *Jebaco, Inc. v. Harrah's Operating Co.,* 587 F.3d 314, 318 (5th Cir. 2009). Dismissal for failure to state a claim "turns on the sufficiency of the 'factual allegations' in the complaint." *Smith v. Bank of Am., N.A.*, 615 F. App'x 830, 833 (5th Cir. 2015) (per curiam) (quoting *Johnson v. City of Shelby, Miss.*, 135 S.Ct. 346, 347 (2014) (per curiam)). Hence, the complaint must allege more than "labels and conclusions," because "a formulaic recitation of the elements of a cause of action will not do" and "factual allegations must be enough to raise a right to relief above the speculative level." *Id.* (quoting *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Courts "will not strain to find inferences favorable to the plaintiff." *Southland Sec. Corp. v. INSpire Ins. Solutions Inc.,* 365 F.3d 353, 361 (5th Cir.2004) (internal quotations omitted). To avoid a dismissal for failure to state a claim, "a plaintiff must plead specific facts, not mere conclusory allegations." *Tuchman v. DSC Commc'ns Corp.,* 14 F.3d 1061, 1067 (5th Cir.1994) (internal quotations and citation omitted).

Generally, a court ruling on a motion to dismiss may rely on only the complaint and its proper attachments. *Fin. Acquisition Partners LP v. Blackwell,* 440 F.3d 278, 286 (5th Cir.2006). A court is permitted, however, to rely on "documents incorporated into the complaint by reference and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 127 S.Ct. 2499, 2509, 168 L.Ed.2d 179 (2007). For example, "it is clearly

proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record." *See Norris v. Hearst Trust,* 500 F.3d 454, 461 n. 9 (5th Cir. 2007). The Court may also take judicial notice of the existence of the docket sheet and public charges pending against a party in state court. *See, e.g., Alexander v. Verizon Wireless Services, L.L.C.*, 875 F.3d 243, 248 (5th Cir. 2017) ("We hereby grant Verizon's request that we take judicial notice, pursuant to Federal Rule of Evidence 201, of a copy of the docket in Alexander's criminal proceeding and a motion he filed in that proceeding."); s*ee, e.g., DHI Group, Inc. v. Kent,* CV H-16-1670, 2017 WL 1088352, at *7 (S.D. Tex. Mar. 3, 2017) ("In this case, the criminal complaint, criminal information, and motion are all matters of public record, and, therefore, the court may take judicial notice of the existence of these documents."), *report and recommendation adopted,* CV H-16-1670, 2017 WL 1079184 (S.D. Tex. Mar. 22, 2017).

B. Judicial Estoppel.

Judicial estoppel is "a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position." *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999). "The purpose of the doctrine is to protect the integrity of the judicial process, by preventing parties from playing fast and loose with the courts to suit the exigencies of self-interest." *Id.* (internal quotations and alterations omitted).

A court may apply judicial estoppel if "(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) the court accepted the prior position; and (3) the party did not act inadvertently." *Reed v. City of Arlington,* 650 F.3d 571, 574 (5th Cir. 2011). "Our cases suggest that doctrine [court acceptance] may be applied whenever a party makes an argument with the explicit intent to induce the district court's reliance." *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 398–99 (5th Cir. 2003).

III.
MATTERS ON WHICH TO TAKE JUDICIAL NOTICE

Defendants respectfully request that the Court take judicial notice of such documents filed with this Court in the case styled *Austin Ray Carpenter v. Bryan Collier et al.*, Cause Number 6:19-cv-00013-H, In the Northern District of Texas-San Angelo Division, the Habeas proceeding at issue in Plaintiff's Complaint (the "Habeas Proceeding"). In support of this motion, Defendant attaches the docket sheet and following documents from that proceeding as follows:

EXHIBIT 1:	Copy of Docket Sheet from the Habeas Proceeding;
EXHIBIT 2:	Doc. No. 18, Motion for Sanctions;
EXHIBIT 3:	Doc. No. 19, Brief in Support of Motion for Sanctions; and
EXHIBIT 4:	Doc. No. 27, Court's Order of Dismissal;

IV.
ARGUMENTS AND AUTHORITIES

1. *The Claims Asserted Against Allison Palmer and John Best in their Official Capacities Should be Dismissed*.

The Court should construe Plaintiff's complaint as asserting claims against Tom Green County *only*. Plaintiff asserts claims against the Tom Green County district attorneys Allison Palmer and John Best in their official capacities and not their individual capacities. Such claims are "merely another way of pleading an action against an entity of which an officer is an agent." *Esteves v. Brock*, 106 F.3d 674, 677 (5th Cir. 1997) (internal quotations omitted). Here, Plaintiff claims, albeit, incorrectly, that Palmer and Best were actors of Tom Green County. As such, Plaintiff's claims are, "in all respects other than name, to be treated as a suit against the entity," here, Tom Green County.[1] *See Kentucky v Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) (noting lawsuit against official in his or her official capacity is "in all respects other

[1] As demonstrated below, the actions for which Plaintiff seeks to hold Defendants responsible were actions of the state and not the county. *See Esteves v. Brock*, 106 F.3d 674, 677–78 (5th Cir. 1997).

than name, to be treated as a suit against the entity"). As such, all of Plaintiff's claims are asserted against Tom Green County. Palmer and Best should be dismissed from this lawsuit.

2. Plaintiff Fails to Plead a Cause of Action as Against the County.

A dismissal is proper because Plaintiff fails to plead a cause of action against Tom Green County. To state a claim against Tom Green County, Texas, Plaintiff must allege facts demonstrating that the County, as a policy maker, created an official policy or custom that was the moving force of the alleged violation. *See Hampton Co. Nat'l Surety, LLC v. Tunica Co.*, 543 F.3d 221, 227 (5th Cir. 2008). There is no vicarious liability under Section 1983. *See Monell v Dept. of Soc. Servs. Of New York*, 436 U.S. 658, 694 (1978) ("[A] local government may not be sued under [Section 1983] for an injury inflicted solely by its employees or agents."). Plaintiff's complaint, however, does not contain ***any*** facts demonstrating that the alleged injuries were the result of an official custom or policy or act of ***the county***. *See, e.g.*, *Roque v. AT & T, Inc.*, 558 Fed. Appx. 480, 481 (5th Cir. 2014) (affirming 12(b)(6) dismissal where complaint "contains no facts showing that defendants violated" statutes at issue).

Plaintiff's allegations concern alleged discriminatory plea-bargaining practices by Tom Green County's district attorneys. These alleged discriminatory practices are not attributable to Tom Green County, but to the state of Texas. "Whether an individual defendant is acting on behalf of the state or the local government is determined by state law and by an analysis of the duties alleged to have caused the constitutional violation." *Esteves v. Brock*, 106 F.3d 674, 677–78 (5th Cir. 1997). Texas law deems that any act taken by district attorneys respecting the plea bargain process is done in their capacities as agents of the state of Texas, not as employees of Tom Green County. *See Wayne v. State*, 756 S.W.2d 724, 728 (Tex. Crim. App. 1988) ("[I]t is clear that the plea bargain process requires (1) that an offer be made or promised, (2) ***by an agent of the State***

in authority, (3) to promise a recommendation of sentence or some other concession such as a reduced charge in the case, (4) subject to the approval of the trial judge." (emphasis added)). As a matter of law, the *only* acts that are the subject of Plaintiff's complaints are those of the state of Texas.

This is not news to Plaintiff. In her complaint, Plaintiff alternatively asserts complaints against Palmer and Best "as state officials." *See* Doc. No. 1, ¶ 59, 62. In a motion for sanctions filed in the Habeas Proceeding, Plaintiff's law firm repeatedly acknowledged that the State of Texas was "the real party in interest" regarding the same alleged violative acts at issue in her complaint. *See* Ex. 2, p. 2, ¶3 ("The real party in interest is The State of Texas"); Ex. 2, p. 2 ¶ 4 ("In criminal prosecutions in Texas, the state is represented by district attorneys who are elected in each Texas county."); Ex. 2, p. 3 ¶6-7 (complaining of the acts of John Best and Allison Palmer). Plaintiff submitted a verified statement and put her name on the brief in support of the motion that attacks "the State" for refusing to negotiate with any client represented by Plaintiff. *See* Ex. 3, p. 1, p. 7 n. 3, p. 9-10. According to Plaintiff, "[t]he State is angry" with Plaintiff for openly challenging the constitutionality of the plea bargain system and "fears the loss" of the "unauthorized procedure". *See* Ex. 3, p. 8. "The State is attempting to force Stone & Stone [Plaintiff] out of the criminal defense business . . . ." and, "has effectively barred Stone & Stone [Plaintiff] from representing any criminal defense clients in Tom Green County, Texas." Ex. 3, p. 9. Ultimately, the Court dismissed the motion for sanctions, taking judicial notice that Plaintiff raised the same claims in this case. *See* Ex. 4, p. 8 & n. 3. In other words, Plaintiff has already acknowledged that the putative violating acts were those of the State of Texas and not the county.[2] Plaintiff should be estopped from arguing otherwise.

[2] While Plaintiff postures the case as an attack on her first amendment rights, the allegations concern the State's negotiations with Plaintiff in her capacity as an attorney representing her clients. The rights implicated, if any, would

V.
CONCLUSION

For each of the reasons stated herein, the Court should grant Defendants' Motion to Dismiss and dismiss each of Plaintiff's claims with prejudice. Defendant requests for such and further relief, in law and in equity, both general and specific, to which they may show themselves to be justly entitled.

Respectfully Submitted,

By: /s/ *R. Layne Rouse*

R. LAYNE ROUSE
State Bar No. 24066007
lrouse@shaferfirm.com

SHAFER, DAVIS, O'LEARY & STOKER
P.O. Drawer 1552
Odessa, TX 79760-1552
(432) 332-0893
(432) 333-5002 – Facsimile

ATTORNEYS FOR DEFENDANTS

be those belonging to Plaintiff's clients not Plaintiff. Even so, the State's plea bargain negotiations do not implicate constitutional rights. *Mabry v. Johnson*, 467 U.S. 504, 507, 104 S. Ct. 2543, 2546, 81 L. Ed. 2d 437 (1984), disapproved on other grounds by *Puckett v. United States*, 556 U.S. 129, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009) ("A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest.").

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document is being served on this 3rd day of January, 2020 to the Plaintiff in accordance with the Federal Rules of Civil Procedure.

/s/ R. Layne Rouse
R. Layne Rouse