IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KIRK GRADY, *Plaintiff,*	§ §	
	§	CIVIL ACTION NO. 3:16-cv-01404-C
	§	
v.	§	
	§	
HUNT COUNTY, TEXAS, *Defendant.*	§ §	

PLAINTIFF'S RESPONSE TO HUNT COUNTY'S MOTION TO DISMISS

Michael R. Goldman
State Bar No. 24025383
Guida, Slavich & Flores, P.C.
750 N. St. Paul Street, Suite 200
Dallas, Texas 75201
Telephone: (214) 692-0009
Facsimile: (214) 692-6610
Email: goldman@gsfpc.com

ATTORNEY FOR PLAINTIFF
KIRK GRADY

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COMES NOW Kirk Grady ("Grady" or "Plaintiff") by and through his undersigned counsel, and hereby files this Response to the Motion to Dismiss filed by Hunt County, Texas ("Hunt County" or "Defendant"), and would respectfully show the Court as follows:

I. BACKGROUND

Hunt County claims that this action was filed for purely strategic reasons to curtail another lawsuit in which the Plaintiff is currently named as a defendant styled *Hunt County et al. v. Republic Waste Services of Texas, Ltd., et al*., No. D-1-GN-15-002833, in the 200th Judicial District Court of Travis County, Texas ("Underlying Lawsuit"). The undersigned counsel wishes that were the case. Unfortunately, the Underlying Lawsuit is part of a growing trend around the country, in which governmental entities delegate their enforcement powers to private attorneys.[1] In nearly every case, including this one, the private attorneys are to be paid on a contingency-fee basis – in other words, they are paid only if they win; and if they do win, they are paid more and

[1] It should be noted that the other lawsuits typically concern whether a state can engage outside-contingency counsel. The Underlying Lawsuit is one step removed, as Hunt County has brought its claims on behalf of the State of Texas which is the primary enforcer of Texas environmental laws. Therefore, this arrangement should receive even greater scrutiny than those brought on behalf of the state governments.

more for each additional dollar they recover. The problem with these arrangements is simple: they entrust the duty of impartially administering justice to attorneys with an overwhelming incentive to "win" the case – even if it is entirely bereft of merit.

This questionable practice has recently attracted both national and local attention. On June 17, 2016, the Wall Street Journal published an article concerning this lawsuit titled "Pay to Play Goes to Court."[2] According to the Wall Street Journal, these contingency fee arrangements are a "seedy side of American law" which oftentimes involve a "widespread collusion between the plaintiffs' bar and government prosecutors, who trade contingency-fee lawsuits for campaign contributions."[3]

On June 24, 2016, the Dallas Morning News also published an article concerning this lawsuit titled "Flower Mound man faces billions in fines for storing wood."[4] According to the Dallas Morning News, a Bexar County Commissioner wanted no part of an effort to enter into similar contingent fee arrangements stating that:

> "I see this as nothing more than ambulance chasing at a different level … It's not fixing anything. ***It's just a way to try and generate fees for a law firm, cloaked in 'revenue for the county' and 'protecting the environment***.'"[5]

As a result of these pressures, the neutral forum assured to defendants by basic principles of due process is incurably tainted. Given the personal interests of counsel, defendants have no hope of persuading them to abandon a meritless case or to settle for any reasonable amount. The

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[2] *See* The Wall Street Journal, *Pay to Play Goes to Court* (June 17, 2016) http://on.wsj.com/1URvPqE
[3] *Id*.
[4] *See* The Dallas Morning News, *Flower Mound man faces billions in fines for storing wood* (June 24, 2016) http://www.dallasnews.com/news/local-news/20160624-flower-mound-man-faces-billions-in-fines-for-storing-wood.ece
[5] *See id*. (emphasis added).

result is guaranteed litigation and, if the government prevails, highly inflated penalties, placing additional burdens on court dockets and harming American businesses.[6]

Unfortunately, that is why Hunt County's contingency counsel (on behalf of Hunt County) is seeking as much as **TWO BILLION DOLLARS!** from Grady in the Underlying Lawsuit even though under current law the State of Texas would only be entitled to a *di minimus* amount for the same alleged violations — if even proven to be true. That is also why Hunt County's contingency counsel are providing "shadow" bills to try to justify their attorney's fees and are purportedly billing at **$900/hour** and have incurred almost **$400,000** prior to the first deposition.[7] Both the total penalties sought as well as the alleged attorney's fees incurred are ridiculous, unconscionable and clear examples of violations of Grady's constitutional rights.

Unfortunately, the engagement of contingency counsel has also led to selective enforcement as contingency counsel (on behalf of Hunt County) have singled out Grady for individual prosecution in the Underlying Lawsuit even though it has not proceeded against other companies that actually operated on the Property during his ownership. It has also led to selective enforcement, by pursuing claims and causes of actions that have never been pursued in the history

[6] Such actions should send a chilling message to any business that has ever conducted operations in Hunt County as it will apparently engage private contingency counsel to enforce any alleged environmental violation against them, no matter how long ago the alleged violation occurred, and no matter how remote the business was involved in the activity that led to the alleged violation to the maximum extent permitted by law. The U.S. Chamber of Commerce and the American Tort Reform Association have filed numerous amicus briefs in matters similar to this one across the country. They claim that experience of other states that have engaged in the practice of entering contingency-fee contracts demonstrates that government-hired private attorneys are often political donors, friends, or colleagues of the hiring governmental official – creating the appearance of impropriety, and sometimes worse. Such practices damage the public's confidence in government. Moreover, these government-endorsed lawsuits have led to financially-motivated litigation and ill-conceived attempts to expand tort law under the cloak of state authority. *See* Exhibits 11-16 attached to Plaintiff's First Amended Complaint.

[7] Hunt County has redacted the billing time keeper rates in its attorney's fee invoices to conceal the fact that it was originally billing this matter at $900/hour. Interestingly, Hunt County's attorney now claims that Hunt County is only seeking to recover attorney's fees for the time incurred in this matter at the rate of $500/hour. Such concession is an obvious attempt to remove the taint of its counsel's earlier excessively high and unconscionable billing rate. Nonetheless, the latest maneuver is clearly inconsistent with the engagement agreement as well as the total fee and disbursements sought in each invoice.

of Texas environmental law. Finally, the engagement of contingency counsel has also led to their seeking excessive fines that are grossly disproportionate and excessive in violation of the Excessive Fines Clause of the Eighth Amendment.

As a result of these actions, Grady filed this lawsuit under the laws and Constitution of the United States, to among other things, order or enjoin Hunt County from further prosecution against Grady in the Underlying Lawsuit on the basis that Hunt County's actions in the Underlying Lawsuit have resulted in: (a) violations of Grady's due process rights which are secured by the Fifth and Fourteenth Amendment of the U.S. Constitution; (b) selective enforcement in violation of Grady's rights which are secured by the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution; and (c) violations of the Excessive Fines Clause which is a violation of Grady's rights secured by the Eighth Amendment of the U.S. Constitution.[8]

II. SUMMARY OF RESPONSE

In its motion, Hunt County claims that Grady's due process and equal protection claims should be dismissed on four separate grounds (*i.e.* Issues A-D).[9] Grady will respond to each of the issues in the order presented in Defendant's motion. The majority of Hunt County's arguments stem from Counts 2, 3, and 4 in Plaintiff's Original Complaint. In his First Amended Complaint, Grady has since withdrawn those counts without prejudice in an effort to narrow the issues before the Court concerning claims for which this Court has exclusive jurisdiction.

Defendant's Issue A: Whether Grady has standing to assert his due process claims under the U.S. Constitution.

Response: The relief requested in Issue A should be denied because Grady has amended

[8] Count 6 concerning the Excessive Fines Violations was added in Grady's First Amended Complaint.
[9] *See* NDTX Docket No. 7, at page 2.

his complaint which eliminates his request for a declaration that the fee agreement between Hunt County and its counsel is invalid. Since Hunt County's argument in Issue A is limited only to this issue, this issue is now moot and there is nothing left for the Court to decide. However, to the extent the Court deems it necessary, Grady has clearly established that he has standing to assert his remaining due process claims.

Defendant's Issue B: Whether Grady has properly asserted his claims in compliance with the standards under *Iqbal/Twombly* pursuant to Rule 12(b)(6) of Federal Rules of Civil Procedure.

Response: The relief requested in Issue B should be denied, as Grady has alleged sufficient factual matters in Count 1 and 5 which are to be accepted as true and state a claim for relief against Hunt County that are plausible on their face.

Defendant's Issue C: Whether this Court should dismiss Grady's claims under Federal Rule 12(b)(7) because he has not joined the TCEQ.

Response: The relief requested in Issue C should be denied, as complete relief is possible among the existing parties. If the Court finds otherwise, Grady will join the State of Texas as a defendant and/or will not object to the State to Texas filing an amicus brief so that its position can be heard in this lawsuit.

Defendant's Issue D: Whether this Court should abstain from exercising its jurisdiction over Grady's claims based upon various doctrines of abstention.

Response: The relief requested in Issue D should be denied because Grady has since amended his complaint which eliminates his request for declaratory relief in Count 1. Since Grady no longer seeks declaratory relief in Count 1, the *Brillhart* Doctrine is simply not applicable.

III. RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Hunt County raises four issues in its motion. Issue A concerns whether Grady has standing to assert his claims under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Specifically, whether Grady has standing to assert his due process claims under the U.S. Constitution. Issue B concerns whether Grady has properly asserted his claims in compliance with the standards under *Iqbal/Twombly* pursuant to Rule 12(b)(6) of Federal Rules of Civil Procedure. Issue C requests the Court to dismiss Grady's claims under Federal Rule 12(b)(7) because he has not joined the TCEQ, which it claims is an indispensable party to this lawsuit. Issue D requests that this Court abstain from exercising its jurisdiction over Grady's claims based upon various doctrines of abstention. Grady will respond to each of these issues in order presented in Defendant's motion.

A. Legal Standard

In Issue A, Defendant have moved to dismiss based on lack of standing pursuant to Rule 12(b)(1). This Court has subject matter jurisdiction over cases arising under federal law.[10] A case arises under federal law if the complaint establishes that federal law creates the cause of action or the plaintiff's right to relief necessarily depends on the resolution of a substantial question of federal law.[11]

A motion under Rule 12(b)(1) should be granted only if it appears beyond doubt that a plaintiff cannot prove a plausible set of facts in support of its claim.[12] The court may find a plausible set of facts by considering: "(1) the complaint alone; (2) the complaint supplemented by

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[10] *Juma v. Futurewei Technologies, Inc*. 2014 WL 786246, at *1 (E.D. Tex. Feb. 19, 2014) (*citing* U.S. CONST. Art. III § 2, cl. 1; 28 U.S.C. § 1331).
[11] *Id*. *(citing Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 689–90 (2006)).
[12] *Id*. (*citing Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir.2008); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57, 127 S.Ct. 1955 (2007)).

the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."[13] This Court should accept all well-pleaded allegations in the complaint as true, and construe those allegations in a light most favorable to the plaintiff.[14]

Issue B concerns whether Grady has properly asserted his claims in compliance with the standards under *Iqbal/Twombly* pursuant to Rule 12(b)(6) of Federal Rules of Civil Procedure. A motion to dismiss under Rule 12(b)(6) is viewed with disfavor and is rarely granted.[15] A Rule 12(b)(6) motion to dismiss argues that, irrespective of jurisdiction, the complaint fails to assert facts that give rise to legal liability of the defendant. The Federal Rules of Civil Procedure require that each claim in a complaint include "a short and plain statement ... showing that the pleader is entitled to relief."[16] The claims must include enough factual allegations "to raise a right to relief above the speculative level."[17] Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' "[18]

In considering a motion to dismiss pursuant to Rule 12(b)(6) the Court must accept as true all well-pleaded facts contained in the plaintiff's complaint and view them in the light most favorable to the plaintiff.[19] In deciding a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level."[20] "The Supreme Court recently

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[13] *Id*. (*citing Lane*, 529 F.3d at 557; *Barrera–Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir.1996)).
[14] *Id*. (*citing Truman v. United States*, 26 F.3d 592, 594 (5th Cir.1994)).
[15] *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (*citing Harrington v. State Farm Fire & Cas. Co*., 563 F.3d 141, 147 (5th Cir. 2009)).
[16] FED. R. CIV. P. 8(a)(2).
[17] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
[18] *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009) (*quoting Twombly*, 550 U.S. at 570).
[19] *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996).
[20] *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009) (*quoting Twombly*, 550 U.S. at 555).

expounded upon the *Twombly* standard, explaining that '[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.' "[21] "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."[22] "It follows, that 'where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—'that the pleader is entitled to relief.' "[23]

In *Iqbal*, the Supreme Court established a two-step approach for assessing the sufficiency of a complaint in the context of a Rule 12(b)(6) motion. First, the Court should identify and disregard conclusory allegations for they are "not entitled to the assumption of truth."[24] Second, the Court "consider[s] the factual allegations in [the complaint] to determine if they plausibly suggest an entitlement to relief."[25] "This standard 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary claims or elements."[26] This evaluation will "be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[27]

B. <u>Response to Issue A:</u> Grady has standing to assert his due process claims under the U.S. Constitution

In Count 1, Grady claims that Hunt County's arrangement with its contingency counsel has resulted in violations of his due process rights under the U.S. Constitution. Hunt County's argument in Issue A is limited ***only*** to whether Grady has standing to "challenge the fee agreement

[21] *Gonzalez*, 577 F.3d at 603 (quoting *Iqbal*, 556 U.S. at 678).
[22] *Id*.
[23] *Id*.
[24] *Iqbal*, 556 U.S. at 664.
[25] *Id*.
[26] *Morgan*, 335 F. App'x at 470.
[27] *Iqbal*, 556 U.S. at 679.

between Hunt County and its attorneys."[28] However, this is not the only claim for relief that was asserted in Count 1. Count 1 also seeks: (1) to enjoin further prosecution of Underlying Lawsuit against Grady; and (2) damages against Hunt County for its conduct which has violated Grady's constitutional rights.[29]

There is clear precedent from other courts which supports that Grady, in fact, does have standing to challenge the fee agreement between Hunt County and its counsel.[30] Nonetheless, in an effort to narrow the issues before the Court for which there should be no legitimate dispute, Grady has amended his complaint which eliminates his request for a declaration that the fee agreement between Hunt County and its counsel is invalid.[31] Since Hunt County's argument in Issue A is limited only to this issue, Issue A is now moot and there is nothing left for the Court to decide. However, to the extent the Court deems it necessary, Grady clearly has standing to assert his remaining due process claims below.

As set forth in the First Amended Complaint, Grady has alleged an "ongoing violation of Grady's right to due process" in the form of a "compromised" enforcement action directly and proximately caused by Hunt County's actions.[32] There is nothing hypothetical or conjectural about any of these allegations. No future events must take place for Grady's rights to be violated – his constitutional rights are being violated now.

Grady has standing to challenge the constitutionality of proceedings where there is a threat

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[28] *See e.g.*, NDTX Docket No. 7, at p. 2 ("This Court should dismiss Counts One and Two under the Federal Rule 12(b)(1) because Grady does not have standing to challenge the fee agreement between Hunt County and its attorneys"), p. 8 ("In Counts One and Two, Grady attempts to litigate various aspects of the fee agreement between Hunt County and its counsel …"), p. 10 ("Grady is not a party to the fee agreement and has no rights under it."), p. 10 ("Because Grady has no rights under the fee agreement, judicial intervention into the fee agreement is unnecessary to protect him.").

[29] *See* NDTX Docket No. 1, paragraph 73, *see also* First Amended Complaint at paragraph 75.

[30] *Meredith v. Ieyoub*, 700 So.2d 478, 479 (La. 1997); *Ieyoub ex rel. State v. W.R. Grace & Co.*, 708 So.2d 1227, 1230 (La. Ct. App. 1998).

[31] *See* Plaintiff's First Amended Complaint at paragraph 75.

[32] *See id*. at paragraphs 71-72.

that he will not receive a fair hearing. In *Fieger v. Ferry*, for example, the plaintiff, Geoffrey Fieger, a prominent attorney and politician, had an "acrimonious and well-publicized dialogue" with several Justices of the Michigan Supreme Court.[33] After those justices denied the plaintiff's recusal motions and issued adverse rulings against the plaintiff's clients, Fieger filed a section 1983 action in federal district court seeking a declaration that their recusal policies were unconstitutional.[34]

The Sixth Circuit *sua sponte* elected to consider whether Fieger had standing to assert his claims. It noted first that, to establish standing to bring suit, a plaintiff must show that (1) he or she has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[35] In the context of a declaratory judgment action, the court went on to explain, "allegations of past injury alone are not sufficient to confer standing. The plaintiff must allege and/or demonstrate actual present harm or a significant possibility of future harm."[36]

The Sixth Circuit then turned to whether Fieger had demonstrated that he had standing to assert a claim based on the "threat that the Plaintiff cannot, and will not, receive a fair hearing before an impartial and independent tribunal."[37] Given the number of cases that Fieger had litigated in the past, the Sixth Circuit found it "reasonable to conclude that there is a significant, rather than a remote, possibility that Fieger's present and future cases will someday reach the

[33] 471 F.3d 637, 639 (6th Cir. 2006).
[34] *Id*. at 640-41.
[35] *Id*. at 643 (*quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)).
[36] *Id*. (*quoting Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 527 (6th Cir. 1998)).
[37] *Id*. (internal quotation marks and citation omitted).

Michigan Supreme Court."[38] Fieger thus had "standing to pursue his claim for declaratory relief in this case."[39] Notably, the Sixth Circuit did not require Fieger to demonstrate that the Justices he had challenged would rule against him, or that the bias of individual Justices would affect the outcome of his cases, in reaching this conclusion.

Like Fieger, Grady faces injury in the form of subjection to a proceeding that is tainted by an unconstitutional biasing influence. Like Fieger, Grady has sued the governmental entity who has caused the unconstitutional influence. And like Fieger, Grady is seeking relief that will redress the alleged harm, in this case by requiring Hunt County to discontinue its use of contingency-fee counsel in this proceeding. But Grady's basis for standing is even stronger and more direct than was Fieger's. After all, while Fieger was relying on the possibility that he would someday have another case before the Michigan Supreme Court, Grady is subject to a pending action in which his due-process rights are currently being violated. Grady therefore has standing to assert his due-process claim.

Further, Grady's claim for relief is not too abstract. "The Due Process Clause has been implemented by objective standards that do not require proof of actual bias." In *Pashaian v. Eccelston Props., Ltd.,* the Second Circuit held that "the possibility of this compensatory bias by an interested judge is sufficiently immediate to constitute the 'personal injury' necessary to confer standing under Article III."[40] In *Esso Standard Oil Co. (P.R.) v. Lopez Freytes,* the court stated that "merely being forced to defend oneself in a [tainted] proceeding . . . is enough to constitute an ongoing injury."[41] Finally, in *Thomas v. Union Carbide Agric. Prods. Co.,* the U.S. Supreme Court

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[38] *Id*.
[39] *Id*. at 644.
[40] *Pashaian v. Eccelston Props., Ltd*., 88 F.3d 77, 83 (2d Cir. 1996); *see also Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868,129 S. Ct. 2252, 2263 (2009).
[41] *Esso Standard Oil Co. (P.R.) v. Lopez Freytes*,467 F.Supp. 2d 156, 162 (D.P.R. 2006), *aff'd*, 552 F.3d 136 1st Cir. 2008).

stated that "one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough."[42] Thus, Grady's harm is sufficiently concrete for standing purposes.

In any event, Grady has alleged facts that evidence a biasing influence, and those facts are admitted and undisputed. Outside counsel is prosecuting the Underlying Lawsuit under a simple arrangement: if Grady prevails, it will not get paid. If Hunt County prevails, outside counsel's compensation is directly related to how much Grady pays in civil penalties. It is hard to imagine facts that more clearly suggest a biasing influence.

Without citing any additional authority, Hunt County also claims that Grady also cannot demonstrate causation or redressability. However, Grady does not allege that his due-process rights might be violated if the contingency-fee motivation caused outside counsel to recover higher penalties than Hunt County or the State of Texas otherwise would; rather, Grady contends that his due-process rights are currently being violated because he is being subjected to a biased proceeding. Properly understood, Grady's allegations leave no doubt that Hunt County has caused Grady's injury by initiating the Underlying Lawsuit while relying on contingency-fee counsel.

Finally, Grady satisfies the redressability requirement as well. Procedural due-process jurisprudence entitles a defendant to procedures – not outcomes. And the Court is well positioned to vindicate Grady's due-process right to a proceeding free from improper influences such as a prosecutor with a direct financial stake in the outcome. Declaring the contingency-fee arrangement unconstitutional and enjoining Hunt County from relying on contingency-fee counsel will redress Grady's harm by restoring the neutral procedures to which Grady is entitled as a matter

[42] *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581-82 (1985).

of constitutional right.

This Court also has exclusive jurisdiction over the subject matter of Grady's due process claims under the U.S. Constitution pursuant to 28 U.S.C. §§ 1331, 1343. Based upon the foregoing, Grady has clearly established a plausible set of facts that he has standing to assert his due process violations against Hunt County under the U.S. Constitution. Hunt County's relief requested in Issue A should be denied.

C. <u>Response to Issue B:</u> In Counts 1 and 5, Grady has stated claims for relief that are plausible on their face

Grady went to great lengths to discuss the factual background in support of his U.S. Constitutional violations on pages 2-13 of the Original Complaint.[43] The factual background was then incorporated into each of the counts which then applied the facts to the various causes of actions. Despite the extensive detail provided in the complaint, Hunt County nonetheless argues the complaint still fails to state claims for relief that are plausible on their face in compliance with the standards under *Iqbal/Twombly* pursuant to Rule 12(b)(6) of Federal Rules of Civil Procedure.

In Count 1, Grady pleaded sufficient factual allegations to state a plausible claim that Hunt County's use of contingency fee attorneys violates his due process rights. The First Amended Complaint pleads facts to support a conclusion that the nature of the action and civil penalties sought establish that the action is "coercive" and penal in nature.[44] It also alleges that Hunt County has entered into a contingency fee contract with private attorneys, thereby "granting those individuals or entities a stake in the outcome" of the Underlying Lawsuit.[45] Finally, the complaint alleges numerous facts that support the contention that "Hunt County has allowed contingency-fee

[43] *See also* factual background in the First Amended Complaint at paragraphs 6-62.
[44] *Id*. at paragraph 32.
[45] *Id.* at paragraph 37.

counsel to assume the lead role in prosecuting the action."[46] For instance, Plaintiff asserts that "all relevant correspondence and other communications have come from contingency-fee counsel."[47] This, in turn, supports a claim that "the contingency-fee arrangement amounts to a biasing influence" that deprives Grady of his right to an impartial tribunal.[48] These are not "conclusory allegations of harm." Rather, the amended complaint states a plausible claim that Hunt County's contingency-fee arrangement violates Grady's right to due process of law guaranteed by the Fourteenth Amendment. For all of these reasons, Grady has alleged sufficient factual matters in Count 1 which are to be accepted as true and state a claim for relief against Hunt County that is plausible on its face.

Additionally, Hunt County claims that Grady has failed to state a due process claim because: (1) the Underlying Lawsuit is a civil lawsuit – not a criminal prosecution – so the due process provisions governing criminal cases do not apply; and (2) there is no authority which supports that use of a private counsel on a contingency-fee basis in a civil-penalty case violates Grady's due process rights. Grady objects to both arguments as Hunt County is improperly seeking summary judgment relief through Rule 12 of Federal Rules of Civil Procedure. To the extent Hunt County seeks such relief, it is required to file the appropriate motion under Rule 56, not Rule 12.

In addition, Hunt County's arguments are simply wrong. Several cases from other jurisdictions have likewise applied the due process provisions to similar civil lawsuits as referenced in the various amicus briefs which are attached to the First Amended Complaint.[49] The Columbia Law Review Article, "*State Attorneys General and Contingency Fee Arrangements: an*

[46] *Id*. at paragraph 48.
[47] *Id*. at paragraph 50.
[48] *Id.* at paragraph 58.
[49] *See* Exhibits 11-16 attached to Plaintiff's First Amended Complaint.

Affront to the Neutrality Doctrine" also discusses cases that have been filed in Oklahoma, Louisiana, California, and Rhode Island which each concerned due process violations in civil lawsuits.[50] In addition, contrary to Hunt County's argument, the Houston Court of Appeals in *International Paper, Co. v. Harris County*, ***did recognize*** that due process considerations should apply to these types of cases.[51] Although the court did not interpret the due process clause as to provide a "blanket prohibition" against a governmental entity's engagement of private counsel on a contingent fee-basis it likewise ***did rule out the possibility*** that due process violation could occur "***under some circumstances***."[52] In that case, the defendants did not implicate other constitutionally protected interests which have, however, been alleged by Grady in his First Amended Complaint.[53] As a result, Grady's claims fit squarely within the circumstances as

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[50] Leah Godesky, S*tate Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine*, 42 COLUM. J.L. & SOC. PROBS. 587, 590 (2009).

[51] *International Paper, Co. v. Harris County*, 445 S.W.3d 379, 391-394 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

[52] *Id.* (emphasis added).

[53] *See e.g*, Plaintiff's First Amended Complaint, Paragraphs Nos. 65 ("Hunt County has deprived Grady of Property without due process of law, namely a fair and ethical prosecution"), 67 ("Grady is mismatched in his legal resources as compared to Hunt County"), 68 ("Several provisions in the contingent-fee arrangement actually promote inefficient litigation strategies and incentivize contingency-counsel to needlessly drag the lawsuit out as long as possible so that they can seek greater amounts in attorney's fees at trial. That is why Hunt County' contingency-counsel are billing this matter at **$900/hour** and have incurred almost **$400,000** prior to the first deposition or hearing. The extremely high billing rate and unreasonably high attorney's fees incurred to date (in relationship to the posture of the case) is clear of evidence of the overreaching and violation of due process by Hunt County."), 70 ("The contingent-fee arrangement has caused the contingency-counsel to disregard the heightened standards to which a lawyer performing government functions is subject. In addition, Hunt County' City attorney, Joel Littlefield, does not appear on any pleadings and has not participated at any depositions to date."), 71 ("As a direct and proximate result of the Defendant's actions, coercive powers have been delegated to private lawyers having a clear, direct and substantial financial stake in the outcome of the Underlying Lawsuit, an enforcement action that must be prosecuted in the public interest or not at all."), 72 ("Consequently, as a direct and proximate result of Hunt County' actions under color of state law, the fairness of the enforcement action has been compromised, and, in turn, Grady's right to due process under the Fifth and Fourteenth Amendment have been infringed."), 79 ("Hunt County's actions in the Underlying Lawsuit have amounted to selective enforcement which is a violation of Grady's rights secured by the Equal Protection Clause of the Fourteenth Amendment.") 80 ("For instance, contingency-counsel (on behalf of Hunt County) have singled out Grady for individual prosecution in the Underlying Lawsuit even though it has not proceeded against other companies that actually operated on the Property during his ownership. The selectivity of Grady was intentional, invidious, and based on impermissible considerations. Alternatively, the decision to single out Grady was irrational and wholly arbitrary. In effect, an illegitimate animus or ill-will motivated Hunt County to intentionally treat Grady differently from others similarly situated and no rational basis exists for such treatment."), 81 ("In addition, Hunt County has also selectively enforced against Grady by asserting claims that exceed its authority under Section 7.351(a) of the Texas Water Code.").

discussed in the Houston Court's opinion which provides a basis for a violation of Grady's due process rights. In any event, such arguments are more appropriate under Rule 56, and Grady once again objects to Hunt County seeking summary judgment relief in its Rule 12 motion to dismiss.

In Count 5, Grady has also pleaded sufficient factual allegations to state a plausible claim that Hunt County deprived Grady of his rights secured by the Equal Protection Clause of the Fourteenth Amendment. In order to assert a claim for selective enforcement, a party must allege that he or she has been singled out for prosecution or enforcement while others similarly situated and committing the same acts have not.[54] Hunt County claims that Grady has not shown that he is in a protected group, and, therefore, he is not entitled to assert an equal protection claim. As before, Grady objects to this argument as Hunt County is improperly seeking summary judgment relief through Rule 12. To the extent Hunt County seeks such relief, it is required to file the appropriate motion under Rule 56, not Rule 12.

In any event, Hunt County's argument has been rejected by several courts. In *Maguire Oil Co. v. City of Houston*, an oil and gas company claimed selective enforcement when the City of Houston revoked its permit to drill near Lake Houston.[55] The City likewise claimed the oil and gas company had not shown that it was in a protected group, and, therefore, was is not entitled to assert an equal protection claim.[56] The court referenced the U.S. Supreme Court case, *Vill. of Willowbrook v. Olech*, where a municipality refused to connect a water line to the plaintiff's property unless the plaintiff granted it a thirty-three-foot easement, rather than the fifteen-foot easement required of her neighbors.[57] In that case, the U.S. Supreme Court recognized a

[54] *Kellogg Co. v. Mattox*, 763 F.Supp. 1369, 1382 (N.D. Tex. 1991).
[55] *Maguire Oil Co. v. City of Houston*, 69 S.W.3d 350, 356 (Tex. App.—Texarkana 2002, pet. denied).
[56] *Id.* at 371.
[57] *Id.* at 371 (*citing Vill. of Willowbrook v. Olech*, 528 U.S. 562, 563, 120 S.Ct. 1073, 145 L.Ed.2d 1060, 1062 (2000)).

cognizable equal protection claim brought by a "class of one," where the plaintiff alleged that he or she had been intentionally treated differently from others similarly situated and that there was no rational basis for the difference in treatment.[58]

Based upon the *Olech* case, the *Maguire* Court then held that a party may be able to maintain an equal protection claim, even though he or she does not belong to a protected class.[59] And at the summary judgment hearing, the court held that a party must only present some evidence that he or she was intentionally treated differently than others who were similarly situated and that there was no rational basis for the differential treatment.[60] The *Maguire* Court then rejected the City's argument and ultimately found that a fact issue existed on the plaintiff's selective enforcement claim.[61]

Here, Grady alleges that contingency-counsel (on behalf of Hunt County) have singled out Grady for individual prosecution in the Underlying Lawsuit even though it has not proceeded against other companies that actually operated on the Property during his ownership.[62] Grady claims that the selectivity was intentional, invidious, and based on impermissible considerations.[63] Alternatively, the decision to single out Grady was irrational and wholly arbitrary.[64] In effect, an illegitimate animus or ill-will motivated Hunt County to intentionally treat Grady differently from others similarly situated and no rational basis exists for such treatment.[65] In addition, Grady claims that Hunt County has also selectively enforced against him by asserting claims that exceed its

[58] *Id.*
[59] *Id.* at 371.
[60] *Id.*
[61] *Id.* at 372.
[62] *See* Plaintiff's First Amended Complaint, at paragraph 80.
[63] *Id.*
[64] *Id.*
[65] *Id.*

authority under Section 7.351(a) of the Texas Water Code.[66] In fact, Hunt County has asserted claims in the Underlying Lawsuit the likes of which have never been advanced in the history of Texas environmental litigation by the State of Texas through the TCEQ.[67]

For instance, Hunt County claims that Grady violated the SWDA because it claims that Grady unlawfully stored and disposed solid waste on the Property which he once owned between September 1998 and January 2002.[68] According to Hunt County, the alleged "solid waste" relates to a pile of wood that was allegedly left on the Property after Grady sold the Property to Republic Waste in January 2002 for which Hunt County claims was never removed until very recently.[69]

However, to the extent a pile of wood existed on the Property at the time of the sale in 2002, such wood simply did not qualify as "solid waste."[70] As a result, Hunt County's claims are contrary to Texas law.[71] Further, Hunt County's recent storm water claims are likewise contrary to Texas law as there is no evidence that the operations at the Property were subject to storm water permitting rules.[72] In addition, Grady was never the "owner" or "operator" of a facility that operated at the Property and as a result, such requirements (to the extent even applicable) simply did not apply to him.[73] Finally, the TCEQ has never brought an enforcement action against an owner (like Grady) due to an alleged failure of one of the owner's tenants in operating without a storm water permit 13 years earlier.[74]

When considering a Rule 12 motion to dismiss, the Court is to accept all factual matters as

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[66] *Id*. at 81.
[67] *Id.*
[68] *Id*. at 82.
[69] *Id*.
[70] *Id*. at 83.
[71] *Id*.
[72] *Id*.
[73] *Id*.
[74] *Id*.

true. As such, Grady has clearly satisfied the pleadings requirements for an equal protection claim based upon selective enforcement. Grady's claims are not "conclusory." The First Amended Complaint provides detailed and specific instances of how Hunt County has committed selective enforcement in violation of Grady's rights secured by Equal Protection Clause of the Fourteenth Amendment. For all of these reasons, Grady has alleged sufficient factual matters in Count 5 which are to be accepted as true and state a claim for relief against Hunt County that is plausible on its face. Hunt County's relief requested in Issue B should be denied.

D. Response to Issue C:

Issue C seeks dismissal of Grady's claims under Rule 12(b)(7) because he has not joined the TCEQ, which it claims is an indispensable party to this lawsuit. Although Rule 12(b)(7) permits dismissal of a complaint for failure to join a party under Rule 19, courts are generally reluctant to grant motions to dismiss of this type.[75] Under Rule 19, an absent party is required if complete relief is not possible among the existing parties.[76] Dismissal of a case under Rule 12(b)(7) is a "drastic remedy [that] should be employed only sparingly."[77] As an alternative to dismissal, the court can order the plaintiff to amend its pleadings by restructuring the relief requested, thus changing the status of the absent party to that of a required party under Rule 19(a).[78]

Hunt County did not notify the TCEQ prior to filing the Underlying Lawsuit. The TCEQ and the State of Texas have taken a relatively minor role in the Underlying Lawsuit to date. Instead, the State of Texas has repeatedly claimed that it is only a party to the Underlying Lawsuit

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[75] *16th & K Hotel, LP v. Commonwealth Land Title Ins. Co.*, 276 F.R.D. 8, 12 (D.D.C. 2011) (*quoting* 5C Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1359 (3d ed. 2004)); *see also Askew v. Sheriff of Cook Cnty., Ill.*, 568 F.3d 632, 634 (7th Cir. 2009) ("Dismissal, however, is not the preferred outcome under the Rules.").

[76] FED. R. CIV. P. 19(a)(1)(A); *School Dist. Of Pontiac v. Secretary of the U.S. Dept. of Educ*., 584 F.3d 253, 265 (6th Cir. 2009)

[77] *Teamsters Local Union No. 171 v. Keal Driveaway Co*., 173 F.3d 915, 918 (4th Cir.1999).

[78] *Jota v. Texaco, Inc.*, 157 F.3d 153, 162 (2d Cir. 1998).

as required by statute. If the Hunt County is enjoined from proceeding with the Underlying Lawsuit, there is nothing more for the State of Texas to do and therefore, complete relief is possible among the existing parties. Nonetheless, Grady's counsel has kept the State of Texas apprised of this matter and of Hunt County's desire that the State of Texas be joined as a defendant. If the Court believes that the State of Texas should be joined, Grady will add it as a defendant. Alternatively, Grady has invited the State of Texas to file an amicus brief if necessary, so that its position could be heard in this matter. In any event, the drastic relief sought by Hunt County in Issue C should be denied as it will join the State of Texas if required by the Court.

E. <u>Response to Issue D:</u> Abstention is not warranted in this case

In Issue D, Hunt County claims that this Court should abstain from exercising jurisdiction over Grady's claims based on his claims for "declaratory-judgment."[79] Specifically, Hunt Count claims that "pursuant to the Federal Declaratory Judgment Act and the *Brillhart* abstention doctrine, this court should abstain from hearing Counts One through Five."[80]

However, as stated earlier, Grady has withdrawn Counts 2, 3 and 4 so Hunt County's argument for abstention based upon those claims is no now moot. Therefore, the only remaining argument is whether this Court should abstain from exercising jurisdiction of Grady's due process and equal protection claims under the U.S. Constitution (Count 1 and 5) pursuant to the *Brillhart* Doctrine.

The Supreme Court has held that "[t]he doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication

[79] *See* NDTX Docket No. 7, at p. 17.
[80] *See id.*, at p. 17.

of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest."[81]

With respect to both Counts 1 and 5, Grady has since amended his complaint which eliminates his request for declaratory relief in both counts.[82] The *Brillhart* Doctrine only applies "[w]hen a district court is considering abstaining from exercising jurisdiction over a declaratory judgment action."[83] Since Grady is no longer seek declaratory relief in Counts 1 and 5, the *Brillhart* Doctrine is simply not applicable. Accordingly, Hunt County has not established that the case fits within the extraordinary and narrow exception which warrants abstention of Counts 1 and 5. Hunt County's relief requested in Issue D should be denied.

IV. REQUEST TO AMEND

If for some reason the Court determines that Grady's pleadings do not sufficiently allege a factual basis to support the challenged causes of actions as pled, then the Court should give the Grady an opportunity to amend his pleadings. It is well settled under Rule 15(a) that leave to amend should be "freely given when justice so requires." The Supreme Court has emphasized that "[t]his mandate is to be heeded."[84] *Moore's Federal Practice* explains that "[a] liberal, pro-amendment ethos dominates the intent and judicial construction of Rule 15(a)."[85] *Moore's* advises that "[i]n exercising its discretion, the court should be guided by the underlying purpose of allowing amendments to facilitate a decision on the merits" and "[t]he policy in favor of allowing

[81] *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 813, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (*quoting County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188–189, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959)).
[82] *See* First Amended Complaint at paragraph 75 and 85.
[83] *Southwind Aviation, Inc. v. Bergen Aviation, Inc*., 23 F.3d 948, 950 (5th Cir.1994).
[84] *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227 (1962).
[85] MOORE'S FED. PRAC. § 15.14[1] at 15-24, 25 (3d ed. 2013).

amendments is extremely liberal."[86]

Should the Court determine that one or more of the challenged claims fail to state a claim or are otherwise barred, then Grady should be permitted to amend, since there is no undue delay, bad faith, dilatory motive, or undue prejudice.

V. RELIEF REQUESTED

WHEREFORE, Plaintiff Kirk Grady prays that this Honorable Court deny Defendant Hunt County's Motion to Dismiss, and for all other relief, both general and special, at law and in equity, to which he justly may be entitled.

Respectfully submitted,

GUIDA, SLAVICH & FLORES, P.C.

/s/ Michael R. Goldman
Michael R. Goldman
State Bar No. 24025383
750 N. St. Paul Street, Suite 200
Dallas, Texas 75201
Telephone: (214) 692-0009
Facsimile: (214) 692-6610
Email: goldman@gsfpc.com

ATTORNEY FOR PLAINTIFF KIRK GRADY

CERTIFICATE OF SERVICE

The undersigned certifies that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5 on this 3rd day of July 2016.

/s/ Michael R. Goldman
Michael R. Goldman

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[86] *Id.* at 15-25, 26.