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

SUSAN POLGAR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA	)	
CHESS FEDERATION, INC., et al.,	)	
	)	Civil Action No. 5:08-CV-169-C
Defendants.	)	ECF

ORDER

On this day the Court considered all pending Motions to Dismiss, Motions for More Definite Statement, Motion for Summary Judgment, and Motions to Strike, together with all Responses and Replies.[1]

I. PROCEDURAL HISTORY

On August 20, 2008, this lawsuit was removed from the 72nd Judicial District Court of Lubbock County, Texas. The case was removed based upon alleged diversity jurisdiction. Plaintiff, Susan Polgar, alleges that she is a citizen of the State of Texas and each of the Defendants is a citizen of various other states. Prior to removal, the state court had entered a temporary restraining order on August 7, 2008, which has long since expired. Plaintiff failed to seek an extension of said restraining order in this Court.

[1]Although no leave was sought for the filing of any of the Replies on file in this case, the Court fully considered each Reply on file. *See http://www.txnd.uscourts.gov/judges/scummings_req.html* ¶ II.B., Requirements for District Judge Sam R. Cummings ("Judge Cummings will entertain only motions and responses but no replies unless otherwise ordered.").

On September 26, 2008, Defendants Karl Kronenberger; Kronenberger Burgoyne, LLP; Continental Chess Incorporated; Jerome Hanken; Bill Hall; Randall Hough; Randy Bauer; Jim Berry; Bill Goichberg; and the United States of America Chess Federation, Inc. ("USCF") each filed separate Motions to Dismiss for Plaintiff's Failure to State a Claim under Federal Rule of Civil Procedure 12(b)(6), or in the Alternative, Motion for a More Definite Statement Pursuant to Federal Rule of Civil Procedure 12(e).[2] On October 16, 2008, Plaintiff filed her Responses to each of the September 26, 2008 Motions filed by the respective Defendants. These same Defendants filed their Replies to Plaintiff's Responses on October 30, 2008.

On November 19 and 21, 2008, Defendants Brian Lafferty, Brian Mottershead, Hal Bogner, and Chess Magnet, LLC filed an additional set of Motions to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2) and (3), and Subject to the Court's Ruling on the Same, Motion to Dismiss for Plaintiff's Failure to State a Claim Under 12(b)(6), or in the Alternative, Motion for a More Definite Statement Pursuant to Federal Rule of Civil Procedure 12(e).[3] Plaintiff filed her Responses on December 12, 2008, to the respective Defendants' November 19 and 21, 2008 Motions. The Respective Defendants filed their Replies on December 24, 2008, along with Motions to Strike Plaintiff's Improper Evidence and Memorandum in Support filed by Defendants Brian Lafferty, Hal Bogner, and Chess Magnet, LLC.[4]

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[2]This set of Motions is substantially similar in all regards, as are the Responses and Replies thereto.

[3]Defendant Brian Lafferty filed his Motion on November 19, 2008, and Defendants Brian Mottershead, Hal Bogner, and Chess Magnet, LLC filed their Motions on November 21, 2008. These Motions are substantially similar in all regards as are the Responses and Replies thereto.

[4]Defendant Brian Mottershead did not file a Motion to Strike.

On September 10, 2008, Sam Sloan filed his Answer and Counterclaim to Plaintiff's Petition, bringing suit against Plaintiff/Counter-Defendant Polgar and her husband, Hoainhan "Paul" Truong, as a Third-Party Defendant. On September 30, 2008, Plaintiff/Counter-Defendant Polgar filed her Motion to Dismiss for Failure to State a Claim Under Federal Rule of Civil Procedure 12(b)(6), or in the Alternative, Motion for a More Definite Statement Pursuant to Federal Rule of Civil Procedure 12(e). Six days later, on October 6, 2008, Counter-Plaintiff Sloan filed his Motion for Summary Judgment on his Counterclaim against Polgar, along with attached supporting evidentiary materials. Counter-Plaintiff Sloan, on October 27, 2008, then filed a Supplemental Affidavit in Support of Motion for Summary Judgment.[5] Counter-Defendant Polgar filed her Response to Counter-Plaintiff's Motion for Summary Judgment on November 25, 2008.

All of these above-noted Motions remain pending and are the subject of this Order.

II.
BACKGROUND

In this removed action, Plaintiff's state court Petition, the live pleading on file, alleges claims against fifteen (15) assorted Defendants. Of the fifteen Defendants, four are individuals sued in their individual and representative capacities as members of the executive board of the

[5]It appears this Supplemental Affidavit was to inform the Court and supplement the record with the fact that another lawsuit involving the matters relevant to this instant action had been filed in San Francisco, California. Counter-Plaintiff Sloan attached a copy of a file-marked amended pleading indicating that it was filed on October 24, 2008, in the Superior Court of California, County of San Francisco as Case No. 08-476777. Although Sloan also alleges, and the attached copy of said litigation pleadings confirms, that certain allegations are made in that litigation pursuant to criminal statutes, it is not at all clear how those criminal allegations will be pursued by a private entity in civil litigation. The Court takes judicial notice of the fact that said litigation was removed to the United States District Court for the Northern District of California, San Francisco Division on November 10, 2008.

USCF. Another of the individual Defendants is the executive director of USCF. Claims are also brought against the USCF. Plaintiff further brings claims against another six of the fifteen Defendants solely in their individual capacities. Finally, Plaintiff sues three other entities besides the USCF, one of which is a law firm.

Plaintiff alleges claims for (1) slander, libel, defamation, and slander per se; (2) business disparagement; (3) tortious interference with contracts and business relationships; (4) intentional infliction of emotional distress; (5) negligent infliction of emotional distress; (6) negligence and negligence per se; (7) civil conspiracy; (8) gross negligence; (9) breach of fiduciary duty/legal malpractice; (10) attorneys' fees; (11) exemplary damages; and (12) injunctive relief. Plaintiff merely alleges generically that "each of the above-named [D]efendants" is liable for all of these claims, with the exception of the breach of fiduciary duty/legal malpractice claim—it applies only to Defendants Kronenberger and the law firm Kronenberger Burgoyne, LLP.

Furthermore, Defendant Sloan, appearing *pro se*, has asserted counterclaims against Plaintiff.[6] The Court notes that other cases involving at least some of the parties named herein and based upon the same set of facts and occurrences giving rise to this lawsuit and the counterclaims herein have either proceeded or are proceeding at this time.[7]

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[6]From the *pro se* pleadings, it is not clear to the Court exactly what claims Defendant Sloan is pursuing against Plaintiff, though it appears he is asserting claims almost identical to Plaintiff's, only directed back at her for internet postings allegedly done by her or at her request.

[7]Those cases involve three other United States District Courts in New York, Pennsylvania, and California. A fourth case is also proceeding in Illinois.

This countersuit filed by Defendant/Counter-Plaintiff Sam Sloan is filed in the form of a verified "Answer and Counterclaim," filed September 10, 2008.[8] Counter-Plaintiff has also included several documents attached to his September 10, 2008 filing. The Court can only surmise that Counter-Plaintiff intends these attached documents to be part of his Counterclaim.

In the Statement of Facts section of her Petition, Plaintiff focuses on the alleged wrongful conduct of the fifteen named Defendants in two paragraphs recited as follows:

> The USCF and the other defendants herein have become increasingly antagonistic and vocal in their jealous attacks fomented by Polgar's fame, notoriety and widespread fan appeal. In August 2007, Susan Polgar was overwhelmingly elected to the Executive Board of the USCF and became the first chairman of the federation. However, despite this nationwide showing of support by USCF members, certain members of the Executive Board and others within the USCF have become embittered and have conspired to unlawfully use the internet and international media outlets to slander, defame, and disparage Polgar personally, to damage her business relationships and to inflict emotional distress upon this very popular and gifted person.
>
> Each of the above named defendants, individually and as directors acting in furtherance of the improper and unlawful objections of the USCF, has published or has caused to be published on the internet and in national and international media outlets, including the Lubbock Avalanche Journal and the New York Times, slanderous, defamatory and untrue statements about Polgar intended to destroy her career. Each of the above-named defendants has caused negative telephone calls and contacts to be made to the offices of the President, Chancellors and Provosts of Texas Tech University in an effort to destroy and cease Polgar's participation in the SPICE [Susan Polgar Institute for Chess Excellence] program and perhaps in the very existence of the SPICE program itself. Each of the above-named defendants has

[8]Counter-Plaintiff Sloan incorporated by reference "each and every allegation set forth above in his answer" as part of his verified Counterclaim. (Counter-Pl.'s Counterclaim at 9, ¶ 18.)

> conspired to plan and orchestrate their unlawful attacks upon Susan Polgar.

(Notice of Removal at Ex. A, Pl.'s Orig. Pet.)

The essence of Defendant/Counter-Plaintiff Sam Sloan's Counterclaim is that Plaintiff, Polgar, and her husband, Hoainhan "Paul" Truong, posted various "Fake Sam Sloan" postings on the internet in effort to impersonate and discredit Sam Sloan in the chess realm so that he would be defeated in an election for a seat on the executive board of the USCF and they, in turn, would be elected. Sloan filed his own lawsuit relating to these alleged facts in the United States District Court for the Southern District of New York. *See Sam Sloan v. Hoainhan "Paul" Truong, et al.*, 573 F. Supp. 2d 823 (S.D.N.Y. Aug. 28, 2008) (dismissed on non-merits grounds—jurisdiction). Many of the same parties involved in this lawsuit were involved in the New York lawsuit. Most of the allegations contained in the New York case appear to be repeated in Sloan's Counterclaim here. In the Counterclaim before this Court, Sloan alleges that when he sued the USCF in New York, because Polgar and Truong were on the USCF executive board, the USCF was in a position of defending against Sloan's lawsuit alleging that two of the USCF's own executive board members (Polgar and Truong) were responsible for posting thousands of "Fake Sam Sloan" postings on the internet. Sloan alleges that the USCF then determined that it should obtain separate counsel to represent Polgar and Truong in the New York lawsuit. The USCF also formed a litigation subcommittee because of the allegations that Polgar and Truong had posted these fake and impersonating web postings. Sloan further alleges that the USCF, in investigating the "Fake Sam Sloan" postings became aware that Truong refused to sign a statement verifying under oath and penalty of perjury that he was not responsible for any of the "Fake Sam Sloan" postings. Sloan also alleges that after the litigation

subcommittee was formed, attorney-client confidential emails were sent to members of the litigation subcommittee and that some of these confidential emails appeared in Polgar's possession.[9]

Sloan further alleges that in an effort to track down who was posting the "Fake Sam Sloan" postings and how Polgar came to be in possession of confidential emails, certain investigative procedures were conducted by members of the USCF and its counsel. Apparently, according to Sloan's allegations, the San Francisco litigation, *see supra* note 5, is a result of attempting to obtain certain electronic records to track down where the postings originated.

As mentioned above, besides this lawsuit and those already discussed, the Court notes that the United States District Court for the Eastern District of Pennsylvania is also handling litigation arising from the facts alleged in this case. *See Parker v. Goichberg, et al.*, Civil Action No. 08-CV-829 (E.D. Pa. Jan. 2, 2009) (dismissing all defendants except for Polgar and Truong, quashing service, and allowing additional discovery on the issue of jurisdiction over the persons of Polgar and Truong). Finally, there is apparently also litigation ongoing related to these matters in Illinois, as such litigation is mentioned in Sloan's verified filings in this instant action. (*See* Counter-Pl.'s Mot. Summ. J. at ¶ 1.)

[9]Sloan advances his own theories as to how Polgar improperly obtained these confidential attorney-client emails. He also alleges that copies of these emails were then distributed to third parties.

III.
STANDARDS

Rule 12(b)(2) Jurisdiction Over the Person

Motions filed under Rule 12(b)(2) of the Federal Rules of Civil Procedure seek to dismiss a complaint or a counterclaim for lack of personal jurisdiction. Fed. R. Civ. P. 12(b)(2). A Rule 12(b)(2) motion to dismiss must be asserted in a motion to dismiss or in an answer; otherwise, the motion is waived. Fed. R. Civ. P. 12(h).

When a nonresident defendant presents a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that *in personam* jurisdiction exists. *Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir. 1994). The plaintiff need not, however, establish personal jurisdiction by a preponderance of the evidence; *prima facie* evidence of personal jurisdiction is sufficient. *WNS, Inc. v. Farrow*, 884 F.2d 200, 203 (5th Cir. 1989). The court may resolve a jurisdictional issue by reviewing pleadings, affidavits, interrogatories, depositions, oral testimony, exhibits, any part of the record, and any combination thereof. *Command-Aire Corp. v. Ontario Mech. Sales & Serv. Inc.*, 963 F.2d 90, 95 (5th Cir. 1992). Conflicts in the facts alleged by the parties must be resolved in the plaintiff's favor. *Jones v. Petty-Ray Geophysical, Geosource, Inc.*, 954 F.2d 1061, 1067 (5th Cir. 1992).

In a diversity action, personal jurisdiction over a nonresident may be exercised if (1) the nonresident defendant is amenable to service of process under the law of the forum state; and (2) the exercise of jurisdiction under state law comports with the due process clause of the Fourteenth Amendment. *Wilson*, 20 F.3d at 646-47. Because the Texas long-arm statute has been interpreted as extending to the limits of due process, the only inquiry therefore is whether

the exercise of jurisdiction over a nonresident defendant would be constitutionally permissible. *Bullion v. Gillespie*, 895 F.2d 213, 216 (5th Cir. 1990).

Under federal law, the exercise of jurisdiction over a nonresident defendant is proper if two prongs are satisfied. First, the defendant must have purposefully availed himself of the forum state, thereby establishing "minimum contacts." *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Second, exercise of jurisdiction must comport with "traditional notions of fair play and substantial justice." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987). Once the plaintiff has established the first prong by a *prima facie* showing, the burden "shifts to the defendant to show, under the second prong of the constitutional due process inquiry, that the exercise of jurisdiction would not comply with 'fair play' and 'substantial justice.'" *Freudensprung v. Offshore Technical Servs., Inc.*, 379 F.3d 327, 343 (5th Cir. 2004).

Minimum contacts with a forum state occur when the nonresident defendant "purposefully avail[s] himself of the benefits and protections of the forum state." *Felch v. Transportes Lar-Mex S.A. de CV*, 92 F.3d 320, 323 (5th Cir. 1996). The minimum-contacts prong of the due process requirement can be satisfied by a finding of either "specific" or "general" jurisdiction over the nonresident defendant. *Bullion*, 895 F.2d at 216. For specific jurisdiction to exist, the foreign defendant must purposefully do some act or consummate some transaction in the forum state and the cause of action must arise from or be connected with such act or transaction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Even if the controversy does not arise out of or relate to the nonresident defendant's purposeful contacts with the forum, general jurisdiction may be exercised when the nonresident defendant's contacts are sufficiently continuous and systematic so as to support the reasonable exercise of

jurisdiction. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416 (1984); *Wilson*, 20 F.3d at 647. When general jurisdiction is asserted, the minimum-contacts analysis is more demanding and requires a showing of substantial activities within the forum state. *Jones*, 954 F.2d at 1068.

Only if the nonresident defendant's related or unrelated minimum contacts with the forum state are sufficient does the court consider whether the "fairness prong" is satisfied. *Felch*, 92 F.3d at 324 (citation omitted). The following factors are to be considered in conducting the fairness inquiry: (1) the burden upon the nonresident defendant; (2) the interests of the forum state; (3) the plaintiff's interests in securing relief; (4) the interstate judicial system's interests in obtaining the most efficient resolution of controversies; and (5) the shared interests of the several States in furthering fundamental substantive social policies. *Id.* at 324 n.9 (quotations and citations omitted).

Rule 12(b)(3) Lack of Proper Venue

Federal Rule 12(b)(3) allows defendants to move for dismissal based on improper venue. Fed. R. Civ. P. 12(b)(3); *Bigham v. Envirocare of Utah, Inc.*, 123 F. Supp. 2d 1046, 1047-48 (S.D. Tex. 2000). A defendant moving to dismiss under Rule 12(b)(3) on the ground of improper venue bears the burden of demonstrating that the plaintiff filed the lawsuit in an improper venue. *See Middlebrook v. Anderson*, 2005 WL 350578, *5 (N.D. Tex. 2005) (Fitzwater, J.) (citing *Myers v. Am. Dental Ass'n*, 695 F.2d 716, 724-25 (3d Cir. 1982)); *Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966). Venue is proper in this forum if it is a "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(a)(2). Even if venue would lie in another district as well, "[v]enue,

of course, may be proper in more than one district." *TIG Ins. Co. v. NAFCO Ins. Co.*, 177 F. Supp. 2d 561, 567 (N.D. Tex. 2001) (Sanders, J.).

Rule 12(b)(6) Failure to State a Claim

Motions to dismiss for failure to state a claim are appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim. Fed. R. Civ. P. 12(b)(6). The United States Supreme Court has set out the test for determining the sufficiency of a complaint under Rule 12(b)(6) as follows: "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007).

A motion to dismiss under Rule 12(b)(6) "admits the facts alleged in the complaint, but challenges plaintiff's rights to relief based upon those facts." *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1137 (5th Cir. 1992). Accordingly, when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court must examine the complaint to determine whether the allegations provide relief on any possible theory. *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994). The plaintiff's complaint must be stated with enough clarity to enable a court or an opposing party to determine whether a claim is sufficiently alleged. *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989). In addition, "[t]he complaint must contain either direct allegations on every material point necessary to sustain a recovery . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) (internal quotation marks omitted). In the complaint, the plaintiff must assert more than "conclusory allegations or legal conclusions masquerading as factual conclusions" to avoid dismissal.

Jefferson v. Lead Indus. Ass'n, Inc., 106 F.3d 1245, 1250 (5th Cir. 1997). The complaint, however, "is to be construed in a light most favorable to the plaintiff, and the allegations contained therein are to be taken as true." *Oppenheimer v. Prudential Sec., Inc.*, 94 F.3d 189, 194 (5th Cir. 1996). This is consistent with the well-established policy that the plaintiff be given every opportunity to state a claim. *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977).

Rule 12(e) More Definite Statement

Federal Rule of Civil Procedure 12(e) is the correct avenue for seeking a more definite statement. Federal Rule of Civil Procedure 12(e) states:

> A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

Fed. R. Civ. P. 12(e).

"If a complaint is ambiguous or does not contain sufficient information to allow a responsive pleading to be framed, the proper remedy is a motion for a more definite statement under Rule 12(e)." *Sisk v. Texas Parks & Wildlife Dep't*, 644 F.2d 1056, 1059 (5th Cir. 1981). A motion for more definite statement should not be granted if the information a party wishes to obtain can be obtained through discovery. *Mitchell v. E-Z Way Towers, Inc.*, 269 F.2d 126, 132-33 (5th Cir. 1959); *Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563, 572-73 (N.D. Tex. 1997). Orders made pursuant to a motion for more definite statement under Rule

12(e) are reviewed under the abuse-of-discretion standard. *Old Time Enters. v. Int'l Coffee Corp*., 862 F.2d 1213, 1217 (5th Cir. 1989) (citations omitted).

IV.
DISCUSSION

Defendants Brian Lafferty, Brian Mottershead, Hal Bogner, and Chess Magnet, LLC's Motions to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2) and (3)

Although Plaintiff's state court Petition meets the Rule 8(a) liberal notice pleading requirements (*see infra*), the generic use of the term "Defendants" does little to enlighten the Court as to the jurisdictional basis for Plaintiff's claims against Defendants Lafferty, Mottershead, Bogner, and Chess Magnet, LLC. Likewise, it is unclear to the Court whether venue is proper as to these respective Defendants based upon Plaintiff's sparse state court Petition. Accordingly, Plaintiff **SHALL FILE** an amended pleading setting forth the bases for jurisdiction and venue over Defendants Lafferty, Mottershead, Bogner, and Chess Magnet, LLC. Plaintiff's amended pleading shall conform to the Federal Rules of Civil Procedure and the Local Rules of this Court. Plaintiff's amended pleading shall be due on or before 3:00 p.m. on March 16, 2009. Thus, the respective Motions to Dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(2) and (3) by Defendants Lafferty, Mottershead, Bogner, and Chess Magnet are **DENIED**, without prejudice to re-filing following the filing of Plaintiff's amended pleading.

Defendants' Motions to Dismiss Pursuant to Rule 12(b)(6), or in the Alternative, for a More Definite Statement

The question in a Rule 12(b)(6) motion is whether the complaint states a valid cause of action when it is viewed in the light most favorable to the plaintiff and with every doubt resolved in favor of the plaintiff. *Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). The court does not evaluate the plaintiff's likelihood of success; instead, it only determines

whether the plaintiff has a legally cognizable claim. *United States ex rel. Riley v. St. Lake's Episcopal Hosp.*, 355 F.3d 370, 376 (5th Cir. 2004).

It is obvious from the various Defendants' Motions to Dismiss Pursuant to Rule 12(b)(6), or in the Alternative, for a More Definite Statement, that no additional pleading clarity is required for Rule 8(a)'s liberal notice pleading standard to be met. Thus, a Rule 12(e) ruling is inappropriate. After all, the Defendants obviously were able to formulate a responsive pleading such that further clarification of Plaintiff's pleadings does not appear to be required. The Defendants are certainly on notice of the claims asserted. As argued by Plaintiff, a motion for a more definite statement should not be granted if the information the party wishes to obtain can be obtained through discovery. *Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563, 572-73 (N.D. Tex. 1997). Thus, the various Defendants' Alternative Motions for a More Definite Statement are **DENIED**. Plaintiff's state court Petition clearly lays forth her various causes of action. Although the Court finds the generic pleading of "Defendants" (plural) to be lacking and a poor pleading style, such group-style pleading is not disallowed, except under various fraud and securities claims. *See Gammon v. J.W. Steel and Supply, Inc.*, 2006 WL 2505631, *1 (S.D. Tex. Aug. 28, 2006) (unpub.) (citing *Melder v. Morris*, 27 F.3d 1097 (5th Cir. 1994)).

As to the Defendants' Motions to Dismiss Pursuant to Rule 12(b)(6), the Court finds that dismissal is proper at this time as to Plaintiff's claim for intentional infliction of emotional distress and for negligent infliction of emotional distress. Moreover, Plaintiff has apparently chosen not to contest dismissal of her claims for negligence and negligence per se as she failed to address those claims in her Responses to the Defendants' Motions to Dismiss, even though

each Defendant moved for dismissal of Plaintiff's negligence and negligence per se claims.[10] As argued by the various Defendants, Texas does not recognize a claim for negligent infliction of emotional distress. *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993). Likewise, where other causes of action exist to provide a remedy, a plaintiff in Texas may not assert a claim for intentional infliction of emotional distress. *Hoffman-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004) (recognizing that a claim for intentional infliction of emotional distress is "a "gap-filler" tort, judicially created for the limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress"). Plaintiff's state court petition has clearly pleaded a multitude of other theories of redress.

Thus, the Defendants' Motions to Dismiss pursuant to Rule 12(b)(6) are **GRANTED IN PART** such that Plaintiff's causes of action for negligence, negligence per se, negligent infliction of emotional distress, and intentional infliction of emotional distress are **DISMISSED**.[11]

As to the Plaintiff's other causes of action, it cannot be said that Plaintiff has failed to plead a cause of action for which relief can be granted. The Court makes no determination as to

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[10]None of the Defendants moved for dismissal of Plaintiff's cause of action for gross negligence. However, without negligence, there can be no gross negligence. *See, e.g., Shell Oil Co. v. Humphrey*, 880 S.W.2d 170, 174 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *Wright v. E. P. Operating Ltd. Partnership*, 978 S.W.2d 684, 687 (Tex. App.—Eastland 1998, writ denied) (citing authorities). The parties may wish to address this point at the summary judgment stage.

[11]Although Defendant/Counter-Plaintiff Sloan failed to move for dismissal of Plaintiff's claims for negligence, negligence per se, negligent infliction of emotional distress, and intentional infliction of emotional distress, the Court finds that dismissal of these claims is also proper as to Defendant Sloan.

the merits of such claims as to any particular Defendant and whether these remaining claims will survive summary judgment as to any particular Defendant.

Defendant/Counter-Plaintiff Sloan's Motion for Summary Judgment

Though the standard for summary judgment differs from the standard for motions to dismiss or for a more definite statement, the Court need not recite the summary judgment standard in disposing of Defendant/Counter-Plaintiff Sloan's Motion for Summary Judgment because the Motion is not being disposed of on the merits. Sloan has moved for summary judgment on his Counterclaim. However, because the Court finds merit in Plaintiff/Counter-Defendant Polgar's Alternative Motion for a More Definite Statement, the pending Motion for Summary Judgment filed by Sloan is **DENIED AS MOOT** without prejudice to refiling.

Plaintiff/Counter-Defendant Polgar's Motion to Dismiss, or in the Alternative, for a More Definite Statement

The Court finds Sloan's Counterclaim to be unclear as to exactly what claim or claims he is intending to advance. Thus, Polgar's Alternative Motion for a More Definite Statement is **GRANTED**. Sloan **SHALL FILE** an amended Counterclaim in such a format as to clearly delineate exactly what claim(s) he intends to advance based upon a concise and clear set of factual allegations set forth in his pleading that conforms with Federal Rule of Civil Procedure 8(a)'s liberal notice-pleading requirements. The deadline for filing Sloan's amended counterclaim is on or before 3:00 p.m. on March 16, 2009.

Polgar's Motion to Dismiss is **DENIED** without prejudice to re-filing following the filing of Sloan's amended counterclaim.

V.
CONCLUSION

For the reasons stated herein, IT IS ORDERED that

(1) Plaintiff's causes of action for negligence, negligence per se, negligent infliction of emotional distress, and intentional infliction of emotional distress are **DISMISSED** as against all Defendants;

(2) Plaintiff **SHALL FILE** an amended pleading in conformity with this order and setting forth the bases for jurisdiction and venue over Defendants Lafferty, Mottershead, Bogner, and Chess Magnet, LLC on or before 3:00 p.m. March 16, 2009;

(3) Defendants' Motions to Dismiss pursuant to Rule 12(b)(6) are **GRANTED IN PART**;

(4) Defendants' Alternative Motions for a More Definite Statement are **DENIED**;

(5) Defendant/Counter-Plaintiff Sloan's Motion for Summary Judgment is **DENIED AS MOOT** without prejudice to refiling;

(6) Plaintiff/Counter-Defendant Polgar's Motion to Dismiss is **DENIED** without prejudice to refiling;

(7) Plaintiff/Counter-Defendant Polgar's Motion for a More Definite Statement regarding Defendant/Counter-Plaintiff Sloan's Counterclaim is **GRANTED**;

(8) Counter-Plaintiff Sloan **SHALL FILE** an amended counterclaim on or before 3:00 p.m. on March 16, 2009, conforming to Federal Rule of Civil Procedure 8(a)'s requirement of a "short and plain" statement of the claim showing that Counter-Plaintiff Sloan is entitled to relief;

(9) Defendants' Motions to Strike are **DENIED AS MOOT**; and

(10) Plaintiff's request for temporary injunction remains pending until the issue of personal jurisdiction is resolved as to Defendants Lafferty, Mottershead, Bogner, and Chess Magnet, LLC.

A failure by Plaintiff or Counter-Plaintiff to file said amended pleadings by the deadline set forth herein may result in the imposition of sanctions, including the striking of all or portions of their current pleadings.

All relief not granted herein is denied.

SO ORDERED.

Dated February 19, 2009.

SAM R. CUMMINGS
UNITED STATES DISTRICT COURT