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., AND BILL GOICHBERG, JIM BERRY, RANDY BAUER, AND RANDALL HOUGH, ALL INDIVIDUALLY AND IN THEIR REPRESENTATIVE CAPACITIES AS MEMBERS OF THE EXECUTIVE BOARD OF THE UNITED STATES OF AMERICA CHESS FEDERATION; BILL HALL, INDIVIDUALLY AND IN HIS REPRESENTATIVE CAPACITY AS EXECUTIVE DIRECTOR OF THE UNITED STATES OF AMERICA CHESS FEDERATION; BRIAN MOTTERSHEAD; HAL BOGNER; CONTINENTAL CHESS INCORPORATED; JEROME HANKEN; BRIAN LAFFERTY; SAM SLOAN; KARL S. KRONENBERGER; AND KRONENBERGER BURGOYNE, L.L.P., DEFENDANTS.	)	CAUSE NO. 5:08-CV-0169-C

****

UNITED STATES OF AMERICA CHESS FEDERATION, INC., AN ILLINOIS NOT-FOR-PROFIT CORPORATION, AND RANDALL D. HOUGH, AN INDIVIDUAL, PLAINTIFFS V. SUSAN POLGAR, AN INDIVIDUAL, AND DOES 1-20, INCLUSIVE, DEFENDANTS	)	

SUSAN POLGAR,	)
COUNTER-PLAINTIFF AND	)
THIRD-PARTY PLAINTIFF	)
	)
V.	)
	)
BILL GOICHBERG, BILL HALL, RANDY BAUER,	)
JIM BERRY, KARL KRONENBERGER,	)
THIRD-PARTY DEFENDANTS	)
AND	)
	)
RANDALL HOUGH,	)
COUNTER-DEFENDANT	)

PLAINTIFF SUSAN POLGAR'S MOTION TO DISMISS HER CLAIMS AGAINST SAM SLOAN PURSUANT TO RULE 41(a)(2) AND MOTION TO DISMISS SLOAN'S COUNTERCLAIMS AGAINST POLGAR AND THIRD PARTY CLAIMS AGAINST PAUL TRUONG PURSUANT TO RULE 41(b)

TO THE HONORABLE UNITED STATES DISTRICT JUDGE SAM R. CUMMINGS:

NOW COMES **SUSAN POLGAR,** Plaintiff and Counter Defendant, files this her *Motion to Dismiss Her Claims Against Sam Sloan Pursuant to Rule 41(a)(2)* and *Motion to Dismiss Sloan's Counterclaims Against Polgar and Third Party Claims Against Paul Truong Pursuant to Rule 41(b)*, and in support thereof would respectfully show the Court as follows:

1. All claims in the above styled and numbered cause by and between Polgar and all other parties have been settled, save and except the claims by and between Polgar and Samuel H. Sloan, Defendant, Counter-Plaintiff, and Third-Party Plaintiff herein. Polgar, in her first motion, respectfully requests the Court dismiss all of Polgar's claims against Sloan pursuant to Fed. R. Civ. P. 41(a)(2), because, having settled all other claims in this matter, no reasonable benefit would accrue to her or any other party by trying this case against Sloan. In the second motion, Polgar respectfully requests

the Court dismiss all claims of Sam Sloan against Polgar and Paul Truong pursuant to Fed. R. Civ. P. 41(b), because Sloan has met all prongs of the test espoused by the Fifth Circuit for involuntary dismissal under this rule.

2. Polgar believes, based on the Court's order, Document 242, filed January 25, 2010, that all claims pending by and against Paul Truong in this litigation have been dismissed. No claims ever brought by Sloan against Truong are properly before the Court because Sloan failed to execute service on or request a waiver of service from Truong; however, in an abundance of caution, Polgar respectfully requests the Court dismiss whatever claims remain against Truong by Sloan in accordance with the two motions set forth below.

I.
PLAINTIFF'S MOTION FOR VOLUNTARY DISMISSAL OF HER CLAIMS AGAINST SLOAN PURSUANT TO RULE 41(a)(2)

3. In accordance with FED. R. CIV. P. 41(a)(2), Polgar moves the Court to dismiss her claims against Sloan without prejudice. Pursuant to Rule 41(a)(2), a plaintiff may seek voluntary dismissal "only by court order, on terms which the court considers proper." FED. R. CIV. P. 41(a)(2). Rule 41(a)(2) requires that any counterclaim the defendant pleaded before being served with plaintiff's motion to dismiss must be capable of independent adjudication. A plaintiff may seek voluntary dismissal of an action under Rule 41(a)(2) so long as it does not prejudice the defendant by causing him to suffer some legal harm. *LeCompte v. Mr. Chip, Inc.*,528 F.2d 601, 604 (5th Cir. 1976). This harm must cause the defendant to suffer some plain prejudice other than the prospect of another lawsuit. *Durham v. Florida E.C. Ry.*, 385 F.3d 366, 268 (5th Cir. 1967). When a plaintiff moves for a voluntary dismissal by court order, the court must determine whether the dismissal would cause the defendant to lose a substantial right. *Id*. at 368. The Fifth Circuit has not adopted a set of factors

that will determine whether dismissal will result in prejudice; therefore legal prejudice is decided on a case by case basis. *Hartford Accident & Indemnity Co. v. Costa Lines Cargo Servs.*, 903 F.2d 352, 360 (5 th Cir. 1990). District courts have identified some important aspects to consider when determining whether prejudice occurs, including the stage in which the motion to dismiss is made, the defendant's effort and the expense involved in preparing for trial, and excessive delay and lack of diligence on the part of the plaintiff prosecuting the action. *Id*. at 360; *Radiant Technology v. Electrovert USA Corp.*, 122 F.R.D., 201, 204 (N.D. Tex. 1985); 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL, § 2364 (1971).

4. Sloan will not be prejudiced by this Court's dismissal of Polgar's claims against him. First, Plaintiff has settled all other claims against the defendants previously parties to this cause, and Plaintiff has no desire to try this case against Sloan alone. Such would only result in a waste of this Court's time and taxpayer money. The only legal detriment Sloan could face is the prospect of another lawsuit, but under *Durham*, this prospect alone fails as grounds for denial of a Rule 41(a) motion. In addition, should Sloan face a future lawsuit, he has the remedies and protections afforded to him under Rule 41(d).

5. Second, Sloan will lose no substantial rights by this Court's dismissal of Polgar's claims against him because Sloan has expended zero effort in preparing for trial, and he has engaged in excessive delay in the prosecution of his counterclaims and third party claims. As explained further below, despite court order, Sloan has failed to re-plead his counterclaims and third party claims with the clarity required by Rule 12. Sloan has served no discovery on Plaintiff, and Sloan has failed to serve or request a waiver of service from Paul Truong pertaining to Sloan's third party claims against

Truong. As a result of his own failures, Sloan will lose no ground in this lawsuit and will lose no substantial right by this Court's dismissal of Polgar's claims against him. The dismissal of Sloan's claims is fully within the discretion of the Court, and Sloan will not suffer substantial legal harm. Sloan has demonstrated his lack of concern for the procedures of this Court and the prosecution of his own claims. Dismissal of Polgar's claims against Sloan would neither cause any loss of a substantial right nor cause Sloan plain legal prejudice. Therefore, Polgar respectfully requests this Court dismiss her claims against Sloan.

II.

PLAINTIFF'S MOTION TO DISMISS SLOAN'S COUNTERCLAIMS AGAINST POLGAR AND THIRD PARTY CLAIMS AGAINST TRUONG PURSUANT TO RULE 41(b)

6. Sam Sloan appears to have brought counterclaims against Polgar and third party claims against Truong in his *Answer and Counterclaim*, Documents 8 through 8-2 in the Court's docket, but the text of these documents makes only nebulous factual allegations and fails to allege any intelligible causes of action. Because Polgar has moved for dismissal of her own claims against Sloan and because Sloan has failed to follow this Court's order of February 19, 2009, a copy of which is attached hereto as Exhibit A, Polgar now respectfully requests this Court dismiss Sloan's counterclaims against Polgar and third-party claims against Truong with prejudice.

A. Sloan's Failure to Comply with a Court Order Merits Dismissal of All His Claims

7. A defendant may move to dismiss any action or claim against it if the plaintiff fails to prosecute his case by failing to comply with a court order or the Rules of Civil Procedure. FED. R. CIV. P. 41(b); *Gist v. Lugo*, 165 F.R.D. 474, 477 (E. D. Tex. 1996). The same rule also governs

counterclaims and third-party claims. Fed. R. Civ. P. 41(c). The Fifth Circuit requires that, in order to dismiss a plaintiff's case with prejudice, "(1) the history of the particular case disclose a clear record of delay or contumacious conduct by the plaintiff; and (2) [a] finding by the district court that a lesser sanction would not prompt diligent prosecution or that lesser sanctions were employed but proved futile." *Gist*, 165 F.R.D. at 477, *citing Berry v. Cigna/RSI-Cigna*, 975 F.2d 1188, 1191 (5th Cir. 1992). The Fifth Circuit also requires that one of three aggravating factors be present: 1) delay caused by the plaintiff himself and not his attorney; 2) actual prejudice to the defendant of the claim; and 3) delay resulting from intentional conduct. *Id*.

1. <u>Sloan's Actions Satisfy the Fifth Circuit's Two-Prong Test</u>

8. Both factors required by the Fifth Circuit justify dismissal of Sloan's claims. First, Sloan's clear record of delay and contumacious conduct manifests itself most clearly in Sloan's refusal to re-file his *Answer and Counterclaim* as ordered by the Court on February 19, 2009. *See* Exh. A, Document 77. This Court's order required Sloan to file an amended counterclaim on or before 3:00 p.m. on March 16, 2009. Sloan has failed to comply with this order for nearly a full calendar year, and in so doing, Sloan has failed to apprise Polgar and Truong of what claims he intends to pursue against them. Sloan's only complaint on file, his *Answer and Counterclaim*, makes scurrilous and often severely deluded factual claims and operates only to disparage the names of those mentioned without stating a real cause of action. Sloan's complaint itself epitomizes Sloan's constant, contumacious conduct.

9. Second, this Court can conclude from Sloan's filings, in this and in other cases, that a sanction lesser than dismissal with prejudice would fail to prompt diligent prosecution by Sloan of his claims

and that the same has actually been employed and failed. District Judge Chin, of the Southern District of New York, dismissed one of Sloan's many wild and fanciful claims with prejudice after Sloan's complaint, very similar to his *Answer and Counterclaim* in this cause, failed to allege intelligible causes of action and failed to establish subject matter jurisdiction. *See* the Memorandum Decision, dated August 8, 2008, in cause 07 Civ. 8537 (DC), attached hereto as Exhibit B. Judge Chin notes in his order on page 5, in footnote 3, that Sloan is a serial litigant, having filed such complaints as in *Matter of Sloan v. Graham*, 10 A.D. 3d 433 (2d Dep't 2004), wherein he petitioned to designate himself as a candidate for the 2004 Republican Party primary election. *See Id*. Judge Chin also stated that Sloan's complaint "largely interweaves purported 'facts' with Sloan's own subjective rantings and commentary about defendants and their alleged shortcomings." *See Id.* at page 12. Here, Sloan merely re-filed a complaint sharing similar allegations to the New York case with nearly identical defects and absurdities. Judge Chin has already employed the sanctions requested in this motion, to little avail. As a result, Sloan's conduct satisfies the two-prong test and warrants dismissal with prejudice of his claims.

2. <u>Sloan's Actions Satisfy the Three Aggravating Factors Portion of the Test</u>

10. In addition to meeting the Fifth Circuit's two prong portion of the test for involuntary dismissal, Sloan's actions clearly show all three aggravating factors to be present as well. First, Sloan represents himself *pro se*; therefore, his unreasonable delay in amending his pleadings and effectuating service on Truong is attributable to no one but Sloan. Second, Sloan's unreasonable delay as well as the nebulous nature of any claims Sloan believes he has brought against Polgar and Truong have prejudiced Polgar and Truong by denying them apprisal of the claims against them. The repetitive

nature of Sloan's conduct and Sloan's outright refusal to amend for nearly a year evidence what could only be intentional conduct by Sloan himself. Accordingly, because Sloan's actions more than satisfy the Fifth Circuit's two-prong test and carry additional aggravating factors for involuntary dismissal, Polgar respectfully requests this Court dismiss all of Sloan's counterclaims against Polgar and all of Sloan's third party claims against Paul Truong with prejudice, pursuant to Rule 41(b).

B. Sloan Never Properly Served Truong with his Answer and Counterclaim

11. Sloan's conduct further satisfies the Fifth Circuit's test for dismissal in that he has failed to serve Paul Truong with any pleading in this cause for far longer than the 120 days required by FED. R. CIV. P. 4(m). Polgar would respectfully request this Court take judicial notice of its own docket, and recognize that Sloan has never filed any document indicating service on Truong, nor has Sloan filed any document demonstrating that service has been waived. Sloan's unwillingness to cure this defect for over a year after filing his *Answer and Counterclaim* in September 2008 further evidences his contumacious conduct and further supports the conclusion that no lesser sanction other than dismissal with prejudice could cure such a defect. Accordingly, Polgar respectfully requests this Court dismiss with prejudice any claims brought by Sloan against Truong.

III.
CONCLUSION

12. WHEREFORE, premises considered, Polgar respectfully requests this Court grant her motions and dismiss any and all claims by and between Polgar, Truong and Sloan in accordance with the above motions, and grant Polgar such other and further relief to which she may be justly entitled, at law or in equity.

Respectfully submitted,

KILLION LAW FIRM
2521 74th Street
Post Office Box 64670
Lubbock, Texas 79424-4670
(806) 748-5500 Telephone
(806) 748-5505 Facsimile

/s/ Samantha Peabody Estrello
James L. Killion
SBN: 11409100
Samantha Peabody Estrello
SBN: 24056112

Attorneys for Plaintiff Susan Polgar

CERTIFICATE OF CONFERENCE

I hereby certify that on the 25th day of January, 2010, I conferred with Sam Sloan via telephone regarding the foregoing motions, and he is opposed to the filing of the same.

/s/ Samantha Peabody Estrello
Samantha Peabody Estrello

CERTIFICATE OF SERVICE

I hereby certify that on the27th day of January, 2010, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court, Northern District of Texas, using the ECF system of the Court. The ECF system sent a "Notice of Electronic Filing" to the following attorneys of record, all of whom have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Samantha Peabody Estrello
Samantha Peabody Estrello

Jeffrey B. Jones
Christopher B. Slayton
JONES, FLYGARE, BROWN & WHARTON, P.C.
1600 Civic Center Plaza
P.O. Box 2426
Lubbock, Texas 79408-2426
Attorneys for USCF, Goichberg, Berry, Bauer, Hough, and Hall

William P. Huttenbach
Hirsch & Westheimer, P.C.
Bank of America Center
700 Louisiana, 25th Floor
Houston, Texas 77002-2772
Attorneys for Kronenberger, Kronenberger Burgoyne, Hanken, Continental Chess, Mottershead, Bogner, Chess Magnet, L.L.C., and Lafferty

Bill LaFont
Brent Hamilton
LaFont, Tunnell, Formby, LaFont & Hamilton, L.L.P.
P.O. Box 1510
Plainview, Texas 79073-1510
Local Counsel for Kronenberger, Kronenberger Burgoyne, Hanken, Continental Chess, Mottershead, Bogner, Chess Magnet, L.L.C., and Lafferty

Samuel H. Sloan, Pro Se
1664 Davidson Ave., Apt. 1B
Bronx, New York 10453
(917) 507-7226
(917) 659-3397
samhsloan@gmail.com

Exhibit A

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]

---

[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]

---

[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

---

[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

Exhibit B

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 8/28/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAM SLOAN,

Plaintiff,

- against -

HOAINHAN "PAUL" TRUONG, ZSUZSANNA "SUSAN" POLGAR, JOEL CHANNING, WILLIAM GOICHBERG, THE UNITED STATES CHESS FEDERATION, BILL HALL, HERBERT RODNEY VAUGHN, GREGORY ALEXANDER, FRANK NIRO, GRANT PERKS WILLIAM BROCK, RANDALL HOUGH, RANDY BAUER, JIM BERRY, TEXAS TECH UNIVERSITY, and THE UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM DECISION

07 Civ. 8537 (DC)

APPEARANCES: (see last page)

CHIN, District Judge

In this case, pro se plaintiff Sam Sloan accuses certain members of the United States Chess Federation (the "USCF") of posting thousands of obscene messages under his name on an internet discussion forum (the "Issues Forum"), and propagating a sordid array of rumors that purportedly caused him to lose his bid for re-election to the USCF Executive Board (the "Board"). Sloan seeks $20 million in damages, reinstatement to the Board, and other injunctive relief, including a court order directing the Department of Justice ("DOJ") to oversee a new round of Board elections.

Defendants move to dismiss the case pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(2), and 12(b)(6). For the reasons that

follow, the motion is granted and the complaint is dismissed for lack of subject matter jurisdiction.

BACKGROUND

A. Facts

The facts are drawn principally from the complaint, the allegations of which are assumed to be true for the purposes of these motions. As there is a challenge to the existence of subject matter jurisdiction, the Court also considers facts relevant to the jurisdictional question, set forth in affidavits submitted by the parties.

1. The Parties

Sloan is an investigative "chess journalist" and a member of the USCF. (Compl. ¶¶ 7, 10). He sat on the USCF Board from 2006-2007, before losing his bid for re-election the following year. (Id. ¶ 10).

Defendants consist primarily of certain USCF members, including past and present officers of the Board. (Id. ¶¶ 11-42). Among them are Susan Polgar and Paul Truong, Sloan's opponents in the 2007 Board election, who purportedly "engaged in a wide-ranging disinformation campaign to discredit their rivals." (Id. ¶¶ 3-4). Polgar sits on the faculty at Texas Tech and was elected over Sloan to a four-year term on the Board in 2007. (Id. ¶¶ 8, 16). Truong, Polgar's husband, also is on the faculty at Texas Tech, and won election to the Board in 2007. (Id. ¶¶ 17-18).

The complaint also names as defendants Texas Tech, the USCF, the United States, and numerous USCF members, described collectively as "an entourage" of "supporters [of Polgar and Truong] and sycophants who have become known as 'Polgarites' or the 'Polgaristas.'" (Id. ¶ 19). The majority of the individually named defendants serve, or have previously served, on the Board.

2. The "Fake Sam Sloan" Postings

The Issues Forum functions as an online discussion board, providing USCF members with the means by which to debate and post opinions on matters affecting the chess community. (Id. ¶ 13). Beginning June 2005, a series of combative postings attributed to Sloan appeared on the Issues Forum.[1] (Id. ¶ 44). The postings, which debuted as Sloan was running for election to the Board, sharply, and often profanely, attacked various candidates and Board members, including then-USCF President Beatriz Marinello. (Id. ¶¶ 44-49). Even after Sloan lost the 2005 election, the postings continued, varying in length and style, but repeatedly disparaging Marinello and castigating select USCF members. (Id. ¶ 50).

In 2006, Sloan successfully ran for election to the Board and, upon securing a seat, wrote an open letter to the

---

[1] The postings appeared to originate from a variety of email addresses bearing Sloan's name or otherwise attributed to Sloan, including samsloan@usa.com, samsloan@ishiipress.com, sloan@journalist.com, sloan@whocares.com, and whocares@registerednurses.com. (Id. ¶ 50).

Board, accusing Truong of authoring "Fake Sam Sloan" postings to discredit Sloan and other chess rivals. (Id. ¶ 50). Asserting that "Truong had the knowledge, the resources, the motivation and the capability to perpetuate this hoax," Sloan lobbied Board members William Goichberg and Joel Channing to launch an investigation into the "real" identity of the "Fake Sam Sloan," and in particular, to determine whether the IP addresses corresponding to the offending messages could be traced back to Polgar and Truong. (Id. ¶ 52). Rather than comply, Goichberg and Channing reprimanded and "publicly censured" Sloan for his insistence on investigating fellow Board members. (Id.).

3. Accusations of Sexual Impropriety with Minors

In addition to the "Fake Sam Sloan" postings, from 2005 to 2007, various USCF members posted "accusations that Plaintiff [wa]s a child molester, a pornographer and a purveyor of 'kiddie porn.'" (Id. ¶ 62). Among the repeat posters, the complaint asserts, the "main purveyor" was William Brock, who "continued to post to other public forums . . . including even on the Wikipedia Encyclopedia where he listed Sloan under the category of 'child molesters.'" (Id. ¶ 63). The postings often alluded, in explicit terms, to Sloan's alleged sexual activity with minors.[2]

---

[2] As examples, the complaint cites postings with the subject headings: "Sam Sloan soliciting 8 year old girls," "Actions against a child rapist Sam Sloan," "Actions against Sam Sloan for molesting children," "Sam Sloan went down on a 12 year old Japanese girl." (Id. ¶ 5). The complaint also states that various Board members publicized "the well-known fact that in 1992 Sloan was convicted in a child custody case in Virginia involving his daughter" to further disparage him. (Id. ¶ 24; see

Adding to the allegations of sexual impropriety, shortly after the 2006 election, Polgar declared that Sloan had "asked to sleep with her" in 1986, while she was still a minor. (Id. ¶ 55). The Polgar accusation spurred further debates between Sloan and the Board, and despite Sloan's denial of wrongdoing, culminated in yet another censure. (Id. ¶¶ 56-60).

B. Prior Proceedings

After losing the 2007 Board election, Sloan commenced this action on October 2, 2007, "to redress identity theft, impersonation, election fraud, accounting fraud, insider self-dealing and other insider wrong doing in connection with the United States Chess Federation. (Id. ¶ 1).[3] In particular, the complaint charged Troung and Polgar with violating "47 USC § 223(h)(1) by sending over the Internet thousands of obscene messages likely to be read by children while . . . impersonating Plaintiff and other well known chess personalities." (Id. ¶ 3).

All defendants moved to dismiss the action pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

Pl. Aff. in Opp. to MTD on Fed. Question Issue ¶¶ 28-29).

[3] Sloan is no stranger to litigation, as he has been engaged in litigation at all levels of state and federal court. See, e.g., S.E.C. v. Sloan, 436 U.S. 103 (1978); Sloan v. Murphy, 15 F.3d 1089 (9th Cir. 1994); Sloan v. Nixon, 60 F.R.D. 228 (S.D.N.Y. 1973) (suing to enjoin President Nixon from continuing in office); Matter of Sloan v. Graham, 10 A.D.3d 433 (2d Dep't 2004) (petitioning to designate himself as a candidate for the 2004 Republican Party primary election). Sloan has also unsuccessfully appealed orders of protection issued against him on behalf of his family for "disorderly conduct and two separate offenses of harassment in the second degree." See Matter of Rankoth v. Sloan, 44 A.D.3d 863 (2d Dep't 2007).

The individually named defendants additionally moved to dismiss for lack of personal jurisdiction under Rule 12(b)(2), and Texas Tech moved to dismiss under Rule 12(b)(6) for failure to state a claim.

DISCUSSION

The complaint alleges that "[j]urisdiction is based on diversity of citizenship, federal questions, election fraud and the constitution and laws of the United States." (Id. ¶ 2). Accordingly, I consider whether Sloan has shown that this Court has subject matter jurisdiction over this action. Construing plaintiff's pro se complaint liberally, I consider three possible grounds for subject matter jurisdiction: (1) the United States is named as a defendant; (2) diversity jurisdiction; and (3) federal question jurisdiction. I consider each ground in turn, after I first discuss the standards generally applicable to Rule 12(b)(1) motions. Because I conclude that the Court lacks subject matter jurisdiction over this action, I do not reach the other prongs of defendants' motions.

A. 12(b)(1) Motions to Dismiss

In considering a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), federal courts "need not accept as true contested jurisdictional allegations." Jarvis v. Cardillo, No. 98 Civ. 5793 (RWS), 1999 WL 187205, at *2 (S.D.N.Y. Apr. 6, 1999). Rather, a court may resolve disputed jurisdictional facts by referring to evidence outside the pleadings, such as affidavits. See Zappia Middle E. Constr. Co.

v. Emirate of Abu Dhabi, 215 F.3d 247, 253 (2d Cir. 2000); Filetech S.A. v. France Telecom S.A., 157 F.3d 922, 932 (2d Cir. 1998). As the party "seeking to invoke the subject matter jurisdiction of the district court," Scelsa v. City Univ. of New York, 76 F.3d 37, 40 (2d Cir. 1996), the plaintiff must demonstrate by a preponderance of the evidence that there is subject matter jurisdiction. Aurecchione v. Schoolman Transp. Sys., Inc., 426 F.3d 635, 638 (2d Cir. 2005). Though "no presumptive truthfulness attaches to the complaint's jurisdictional allegations," Guadagno v. Wallack Ader Levithan Assocs., 932 F. Supp. 94, 95 (S.D.N.Y. 1996), a court should "'construe all ambiguities and draw[] all inferences' in a plaintiff's favor." Aurecchione, 426 F.3d at 638 (quoting Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)).

B. United States as Defendant

Although Sloan does not specifically assert the involvement of the United States as a basis for subject matter jurisdiction, district courts have original jurisdiction over certain civil actions where the United States is named as a defendant. See, e.g., 28 U.S.C. § 1346(a) (certain contract actions), (b) (certain tort actions). Here, as Sloan has named the United States as a defendant, I consider whether the Court has subject matter jurisdiction by virtue of that fact.

It is well-settled that the United States is protected from suit by the doctrine of sovereign immunity. See United States v. Mitchell, 445 U.S. 535, 538 (1980). Hence, the United

States can be sued only when it consents to be sued and "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." Id. at 538.

Here, plaintiff has not articulated a legal theory for suing the United States, nor has he identified any statute that would permit him to sue. He seeks, without citation of any legal authority, to compel DOJ to "supervise a new election" for the Board. While the claim could be construed as a claim for mandamus under 28 U.S.C. § 1361, the complaint does not assert sufficient facts to render a mandamus claim against the United States plausible. First, such claims may be brought only against an officer, employee, or agency of the United States, 28 U.S.C. § 1361, and here Sloan has sued only the United States itself rather than any federal officer or agency. Second, even assuming Sloan named a federal officer or agency, he has not alleged -- nor could he -- that he has a "clear right" to have DOJ supervise a board election of an association such as the USCF, or that DOJ has a "plainly defined and peremptory duty" to perform that act. See Anderson v. Bowen, 881 F.2d 1, 5 (2d Cir. 1989). Hence, he does not meet the requirements for mandamus relief. Even when a party specifically cites § 1361 (and Sloan does not), the district court lacks jurisdiction when the requirements for mandamus are not met. See Sprecher v. Graber, 716 F.2d 968, 973 (2d Cir. 1983); City of Milwaukee v. Saxbe, 546 F.2d 693, 700 (7th Cir. 1976).

Accordingly, the Court lacks subject matter jurisdiction over the claims against the United States, and these claims are therefore dismissed. The assertion of claims against the United States thus is not a basis for subject matter jurisdiction in this case.

C. Diversity Jurisdiction

Under 28 U.S.C. § 1332(a), the federal district courts have original jurisdiction over all civil actions where there is diversity of citizenship between the parties and "the matter in controversy exceeds the sum or value of $75,000." 28 U.S.C. § 1332(a)(1). With respect to the "diversity" requirement, "[a] case falls within the federal district court's 'original' diversity 'jurisdiction' only if diversity among the parties is complete, i.e., only if there is no plaintiff and no defendant who are citizens of the same State." Wis. Dep't of Corr. v. Schact, 524 U.S. 381, 388 (1998).

Here, diversity jurisdiction does not exist for Sloan has failed to allege, much less prove, complete diversity. On its face, the complaint asserts that Sloan "resides" in New York and that defendant Goichberg "resides in Arcadia, California near the Santa Anita Race Track when the horses are running and in New York when the Mets are playing and spends the rest of his time moving about the country." (Compl. ¶ 22). Because the complaint fails to identify either state as Goichberg's "domicile," it fails to properly allege subject matter jurisdiction. Moreover, Goichberg has submitted ample evidence to show that he is a

"citizen" of New York for the purposes of diversity jurisdiction, including: the deed to his house in Orange County, New York; property tax records for his New York residence; and affidavits attesting that he votes, pays taxes, and resides exclusively in New York. (See Goichberg Aff. & Suppl. Aff.). In contrast, Sloan offers only speculation as he fails to offer any evidence to controvert Goichberg's specific and concrete evidence.[4] As the complaint fails to identify Goichberg as a "citizen" of any State, and I find on the incontrovertible evidence that Goichberg is a citizen of New York for these purposes, the Court does not have diversity jurisdiction over the matter.

D. Federal Question Jurisdiction

Federal courts also have jurisdiction over actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. An action does not arise under federal law for jurisdictional purposes, however, simply because it involves a federal statute. As the Supreme Court recently reiterated, "a case 'aris[es] under' federal law within the meaning of § 1331 . . . if 'a well-pleaded complaint establishes either that federal law creates the cause of action or that the

---

[4] In his opposition, Sloan asserts, among other things, that he has been unable to find Goichberg's home on "google maps," that Goichberg never answers the phone when Sloan calls him at his New York phone number, that "Goichberg lives a vagabond life," and that, as of Sloan's opposition, Goichberg had been in Southern California for four months. (Pl. Aff. in Opp. to MTD on Diversity Issue ¶¶ 7-14). Even here, however, Sloan neither claims that Goichberg is a "citizen" of another state nor offers any evidence to that effect.

plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" Empire Healthchoice Assur., Inc. v. McVeigh, 126 U.S. 677, 690 (2006) (citation omitted).

Even liberally construed, Sloan fails to present a federal question sufficient to confer subject matter jurisdiction on this Court. While Sloan grounds jurisdiction on the "constitution and laws of the United States," the complaint makes no reference to violations of Sloan's constitutional rights, nor does it specify which constitutional provisions are implicated. Nor does Sloan cite any statutory authority that supports his claims of "election fraud" and demands for relief. Indeed, the only statute Sloan references with respect to the internet postings -- the Communications Decency Act, 47 U.S.C. § 223 -- is a criminal statute that prohibits the making of "obscene or harassing" telecommunications, but creates no private right of action.[5] See Ghartey v. Chrysler Credit Corp., No. CV-92-1782 (CPS), 1992 WL 373479, at *5 (E.D.N.Y. Nov. 23, 1992).

The complaint recites a laundry list of additional grievances -- including that Goichberg "refused to put the name and ID Number of Bobby Fischer on the USCF website"[6]; the Board's

---

[5] The complaint cites to § 223(h)(1), but that specific provision merely defines the term "telecommunication device" as it pertains to the rest of the section. 47 U.S.C. § 223(h)(1)

[6] In its only other statutory reference, the complaint broadly suggests that the USCF refused to recognize Fischer as a member "because Fischer is anti-Semitic" and that in so doing, the organization violated 42 U.S.C. § 1983 (adding that Fischer's status as a "fugitive from justice" was irrelevant to his

decision to move to Tennessee did not meet "the legal requirements" necessary for "a not-for-profit corporation to bring about such a major move"; and the Board's "refus[al] to appoint Sloan as a liaison to any committee . . . denied [him] the influence that a board member is entitled to have" -- without providing sufficient detail as to how any of these grievances amount to federal claims. Instead, the complaint largely interweaves purported "facts" with Sloan's own subjective rantings and commentary about defendants and their alleged shortcomings. For the most part, these are simply personal, vindictive, and nonsensical attacks that do not belong in a pleading filed in a judicial proceeding.

Sloan's bare assertion that the complaint raises "a great abundance of federal questions" (Pl. Aff. in Opp. to MTD on Fed. Question Issue ¶ 2) does not suffice to invoke the Court's jurisdiction, nor does his blanket demand for intervention by DOJ. As to Sloan's assertion that Texas Tech "has allowed Polgar and Truong to use the computers of the University to impersonate Sam Sloan," that claim is also dismissed because the complaint fails to allege that Texas Tech, a state institution, has waived sovereign immunity with respect to such claims. See United States v. Texas Tech Univ., 171 F.3d 279, 289 (5th Cir. 1999)

---

membership as "the USCF has 600 prison members, some of whom are psychopathic mass murderers"). (Id. ¶ 85). Sloan does not claim to have standing to vindicate Fischer's rights and the Court notes that Fischer died in January 2008, after the complaint had been filed. Moreover, clearly the USCF -- a private not-for-profit organization -- does not act under "color of law."

("The Eleventh Amendment cloaks Texas Tech University . . . with sovereign immunity as [a] state institution[].").

CONCLUSION

For the foregoing reasons, defendants' motions to dismiss are granted and the complaint is dismissed with prejudice and with costs. The Clerk of the Court shall enter judgment accordingly and close the case.

SO ORDERED.

Dated: New York, New York
August 28, 2008

DENNY CHIN
United States District Judge

APPEARANCES:

For Plaintiff:

SAM SLOAN
Pro Se
1664 Davidson Avenue, Apt. 1B
Bronx, New York 10453

For Defendant Texas Tech University:

GREG ABBOTT, Esq.
Attorney General of Texas
By: Scot M. Graydon, Esq.
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711

For Defendant United States of America:

MICHAEL J. GARCIA, Esq.
United States Attorney for the
Southern District of New York
By: Emily E. Daughtry, Esq.
Special Assistant United States Attorney
86 Chambers Street
New York, New York 10007

For Defendant William Brock:

HANDLER & GOODMAN, LLP
By: Arthur M. Handler, Esq.
805 Third Avenue, 8th Floor
New York, New York 10022

LAW OFFICE OF PATRICK M. O'BRIEN
By: Patrick M. O'Brien, Esq.
309 Elmore Street
Park Ridge, Illinois 60068

For Defendants Susan Polgar and Paul Truong:

NIXON PEABODY, LLP
By: Joseph J. Ortego, Esq.
50 Jericho Quandrangle, Suite 300
Jericho, New York 11753

For Defendants United States Chess Federation, Joel Channing, William Goichberg, Bill Hall, Herbert Rodney Vaughn, Gregory Alexander, Grant Perks, Randall Hough, Randy Bauer, and Jim Berry:

PROSKAUER ROSE, LLP
By: Jeremy M. Brown, Esq.
One Newark Center, 18th floor
Newark, New Jersey 07102