71289-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-60817-CIV-Williams/Seltzer

GEORGE R. SIMPSON,

Plaintiff,

v.

RANDAL JAMES HAMILTON ZWINGE a/k/a JAMES RANDI, D.J. GROTHE, PRESIDENT OF JAMES RANDI EDUCATIONAL FOUNDATION, JAMES RANDI EDUCATIONAL FOUNDATION,

Defendants.
_____/

MOTION TO DISMISS AMENDED COMPLAINT

COMES NOW Defendants, RANDAL JAMES HAMILTON ZWINGE aka JAMES RANDI (hereinafter "James Randi"), D.J. GROTHE, PRESIDENT OF THE JAMES RANDI EDUCATIONAL FOUNDATION (hereinafter "Grothe") and the JAMES RANDI EDUCATIONAL FOUNDATION (hereinafter "JREF"), by and through their undersigned counsel, and pursuant to the applicable rules of civil procedure, hereby files its Motion to Dismiss the Plaintiff's, GEORGE R. SIMPSON, (hereinafter, "Plaintiff") Amended Complaint, and as support thereof would state as follows:

FACTUAL BACKGROUND

The Plaintiff's Amended Complaint stems from his allegation that he was "visited by extraterrestrial presence 26 years ago." *See,* Exhibit "I" attached to Amended Complaint. He alleges that he has been in contact with an ET presence on a daily basis

since then. The ET presence, according to Plaintiff has disclosed a hidden language in the English language that he is required to decode and tell the world about. He claims to have documented thousands of such translations. He claims that each of these translations is "proof of the paranormal." He alleges a copy of the ET translations was published at http:/www.cropcircleconnector.com/2011/2011 html.

JREF maintains a contest called the "One Million Dollar Challenge" which will award:

> . . . US$1,000,000 (One Million US Dollars) ("The Prize") to any person who demonstrates and psychic, supernatural, or paranormal ability under satisfactory observation. Such demonstration must take place under the rules and limitations described in this document. An applicant can be from or in any part of the world. Gender, race, and educational background are not factors for acceptance. . . .

See, Amended Complaint ¶ 14.

Plaintiff applied for the "One Million Dollar Challenge," purporting that he had fulfilled the requirements for applicants contained on the website. *See*, Amended Complaint ¶ 15. Plaintiff claims to have discovered the "ET Corn Gods" language embedded in the English language. *See*, Amended Complaint ¶¶20-24. Plaintiff claims that this is proof of the "paranormal." *See*, Amended Complaint ¶23.

Consequently, on May 2, 2012, filed a seven count Complaint against the Defendants alleging: fraud; misrepresentation and breach of contract; misfeasance; malfeasance; an action for damages; an action for specific performance; conspiracy under 42 U.S.C. 1985 & 1986; and is requesting punitive damages as part of his relief. On June 5, 2012, Plaintiff filed an Amended Complaint, adding four paragraphs to his original Complaint, describing how "the filing of the lawsuit was predestined". *See*, Amended

Complaint ¶ 75. Plaintiff's claims are without merit to all counts and this Court should respectfully dismiss the Amended Complaint, in its entirety, with prejudice.[1]

MEMORANDUM OF LAW

I. Legal Standard Governing Motion to Dismiss

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that dismissal of a complaint is appropriate "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hirshon v. King & Spotting,* 467 U.S. 69, 73 (1984). "A motion to dismiss for failure to state a claim [generally] tests the sufficiency of the complaint." *Hazel v. Schl. Bd. of Dade County*, 7 F.Supp.2d 1349 (S.D. Fla. 1998). A motion to dismiss for failure to state a claim will be granted when "'it appears beyond doubt that the plaintiff can prove no set of facts in support of [their] claim which would entitle [them] to relief.'" *Hazel*, 734 F.Supp.2d at 1352 (*quoting Conely v. Gibson*, 355 U.S. 41, 45-46 (1957)). It is of great importance that a complaint alleges facts properly setting forth the essential elements of a cause of action. *Hazel*, 734 F.Supp.2d at 1352.

Moreover, the Court "may not consider documents outside the pleadings on Rule 12(b)(6) motions." *Leonard F. v. Israel Disc. Bank*, 199 F.3d 99, 107 (2d Cir.1999). However, the Court "may consider documents alleged or referenced in the complaint."

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[1] Plaintiff filed a substantially similar action on November 10, 2007, amending that pleading on November 30, 2007. That action raised nearly identical causes of action against Defendants for fraud, misrepresentation and breach of contract, misfeasance, malfeasance, defamation, intentional infliction of emotional distress, violations of the First Amendment to the Constitution of the United States of America, Violation of Fourth Amendment to the Constitution of the United States of America, Conspiracy as define under 42 U.S.C. § 1985 and 1986, and an independent action for damages. That lawsuit (Case No. 07-cv-22951-PCH) was voluntarily dismissed to the imposition of sanctions as it too completely lacked merit as to all counts.

Cortec Indus., Inc. v. Sum Holding, L.P., 949 F.2d 42, 47 (2d Cir.1991); Fed.R.Civ.P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes"). Additionally, dismissal is appropriate when no construction of factual allegations of a complaint will support the cause of action. *Marshall Cty Bd. of Educ. v. Marshall Cty Gas Dist.,* 992 F.2d 1171 (11th Cir. 1993). A complaint is subject to dismissal when its allegations clearly indicate the existence of an affirmative defense. *See,* 5A Wright & Miller, Federal Practice and Procedure § 1357 n.51, *citing, Herron v. Herron*, 255 F.2d 589 (5th Cir. 1958) and *Wallkingford v. Zenith Radio Corp.,* 310 F.2d 693 (7th Cir. 1962) (defense of privilege raised on the face of the complaint required its dismissal). A Complaint should be dismissed for failure to state a cause of action if it appears beyond doubt that the Plaintiff can prove no set of facts that would entitle him to relief. *Royal Palm Sav. Ass'n v. Pine Trace Corp.*, 716 F.Supp. 1416 (M.D. Fla. 1989) citing *Conley v. Gibson*, 355 U.S. 41 (1957). As will be explained below, dismissal of the Amended Complaint is proper.

II. Plaintiff has Failed to State a Claim under Count I for Fraud

Florida case law firmly establishes that in order to maintain an action for fraud, the Plaintiff must establish the existence of (1) a false statement concerning a material fact; (2) knowledge by the person making the statement that the representation is false; (3) the intent by the person making the statement that the representation will induce another to act on it; and (4) reliance on the representation to the injury of the other party. *Waters v. Int'l Precious Metals Corp.*, 172 F.R.D. 479 (S.D. Fla. 1996); *Bruhl v. Price Waterhousecoopers Intern.*, 2007 WL 983263 (S.D. Fla. 2007); *Mergens v. Dreyfoos*, 166 F.3d 1114 (11th Cir. 1999). In summary, there must be an intentional material

misrepresentation upon which the other party relies to his detriment. *Waters*, 172 F.R.D. at 501. Further, under Federal Rule of Civil Procedure 9(b), a party is required to state with particularity the circumstances constituting fraud or mistake. *Raber v. Osprey Alaska, Inc.*, 187 F.R.D. 675 (M.D. Fla. 1999) ("Federal Rules of Civil Procedure 9(b) is satisfied if there is a sufficient identification of the circumstances constituting fraud to allow a defendant to adequately answer the plaintiff's allegations"). Lastly, to be actionable, fraudulent misrepresentation must be of material fact rather than mere opinion. *Capps Agency, Inc. v. MCI Telecommunications Corp.*, 863 F. Supp. 1555 (M.D. Fla. 1993). The Plaintiff in this matter has failed to allege any facts which would establish these elements, simply making conclusory statements that "he was treated in a fraudulent way" when his calls and emails were not returned in a timely manner, and once responses were made, Defendants had a "total lack of understanding Plaintiff's proposal". *See*, Amended Complaint ¶¶ 45-46. Such allegations fall short of fraud.

A. Pleading with Particularity

A claim of fraud plead without particularity is deficient on its face. The Eleventh Circuit has stated that: "Allegations of date, time, or place satisfy the Rule 9(b) requirement that circumstance of the alleged fraud must be plead with particularity." *Durham v. Business Management Assoc.*, 847 F.2d 1505, 1512 (11th Cir. 1988). When pleading fraud, the plaintiff generally should specifically identify the individuals who made the alleged misrepresentations, the time of the alleged fraud, and the place of the alleged fraud. *See Anthony Distributors, Inc. v. Miller Brewing Co.*, 904 F. Supp. 1363, 1365 (M.D. Fla. 1995). In his Claim, the Plaintiff has failed to satisfy the Rule of 9(b)

that fraud be alleged with particularity. This requirement is designed to (a) ensure that allegations are specific enough to provide Defendants notice of the acts of which Plaintiff complains so that Defendants may respond adequately; (b) eliminate complaints filed as a pretext for attempts to discover unknown wrongs; and (c) protect Defendants from unfounded charges of immoral and fraudulent behavior. *See Vicomi v. Paine, Webber, Jackson & Curtis, Inc.*, 596 F. Supp. 1537 (S.D. Fla. 1984).

B. False Statement

In establishing the first element of common law fraud, the Plaintiff must prove a false statement was made concerning a material fact. *First Union Discount Brokerage Services, Inc. v. Milos*, 744 F. Supp. 1145 (S.D. Fla. 1990). The Plaintiff has failed to allege any false statement made by any of the named Defendants. Evidence of an express false statement or writing is pivotal in leading to a court's finding that a false statement was actually made. *In re Crown Auto Dealerships, Inc.*, 187 B.R. 1009 (M.D. Fla. 1995) (plaintiff failed to prove employees of a car dealership made an express statement or writing which evidenced any false representation to a customer). The failure of Plaintiff to allege any evidence that a false statement was ever made requires this Court to dismiss Count One for failure to state a cause of action.

C. Knowledge of False Representation

The second prong of a claim for fraud requires a Plaintiff to allege the Defendant made the false statement knowing of its falsity at the time it was made. *Bailey v. Trenam Simmons, Kemker, Scharf, Barkin, Frye*, 938 F. Supp. 825 (S.D. Fla. 1996). This knowledge requirement is one requiring the maker of the false statement to possess

specific intent while undertaking the act of making such statement. *Gutter v. E.I. Dupont De Nemours*, 124 F. Supp.2d 1291 (S.D. Fla. 2000). It is not enough under a claim of fraud for the Plaintiff to assert the Defendant "knew or should have known" of the falsity of their statement, as this is at most a constructive knowledge on the part of the defendant and this is insufficient to prove actual knowledge of the falsity. *WESI, LLC v. Compass Environmental, Inc.*, 509 F. Supp.2d 1353 (N.D. Ga. 2007) (finding that an allegation that defendant "knew or should have known" that representations were false is "insufficient to plead scienter and intent). The scienter requirement for a common law fraud claim is stringent, requiring one to plead actual knowledge of falsity, as opposed to the scienter requirement of severe recklessness. *Bruhl v. Price Waterhousecoopers Intern.*, 2007 WL 983263 (S.D. Fla. 2007).

Not only has the Plaintiff failed to assert that a false statement was made, Plaintiff has wholly failed to make any allegations of specific intent on the part of the Defendants to make a false statement. Even assuming a false statement was made, which Plaintiff has not alleged, Plaintiff has not represented this action to be undertaken with the Defendants' knowledge of its falsity, thus warranting dismissal.

D. Intent to Induce Another to Act

The third element that a Plaintiff must meet requires a showing that the false statement was made with the direct purpose of inducing another to act in reliance thereon. *Tucci v. Smoothie King Franchises, Inc.*, 215 F.Supp.2d 1295 (M.D. Fla. 2002). Despite the continued absence of any allegation that a false statement was even made, Plaintiff has further failed to allege the Defendants misrepresented the million dollar contest with

the intent to induce the Plaintiff to rely and act on it. *See Third Party Verification, Inc. v. Signaturelink, Inc.*, 492 F.Supp.2d 1314 (M.D. Fla. 2007) (finding that a party relying upon misleading advertising must still prove the element of intent to induce). To the contrary, the Plaintiff has alleged that these Defendants engaged in "stonewalling and inactivity" subsequent to the alleged correspondence between the parties. *See*, Amended Complaint ¶¶ 41,45, 49. Consequently, the Plaintiff has failed to state a cause of action for fraud.

E. Justifiable Reliance

Lastly, a Plaintiff must prove that he justifiably relied upon the representation to his detriment. *First Union Discount Brokerage Services, Inc. v. Milos*, 744 F. Supp. 1145 (S.D. Fla. 1990). The Plaintiff's fails to allege that he engaged in any activity based upon false representations by the Defendants. If anything, the alleged "stonewalling" of the Defendants is evidence that the Plaintiff acted on his own accord. Further, any decoding activity related to Plaintiff's contest application was previously completed or part of ongoing activities which the Plaintiff has undertaken over the last 27 years. *See*, Exhibit "I" attached to the Amended Complaint. Moreover, the Plaintiff fails to state with any specificity the damages that the allegedly fraudulent actions caused to him, merely stating he was "greatly damaged." *See,* Amended Complaint ¶ 77. The Amended Complaint fails to state that the Plaintiff detrimentally relied upon any representation made by any of the Defendants.

III. Plaintiff has Failed to State a Claim under Count II for Misrepresentation or Breach of Contract

Plaintiff's Amended Complaint is procedurally deficient on its face as it purports to combine two distinct claims: (1) Misrepresentation and (2) Breach of Contract. The combining of such claims in one count renders the Complaint confusing and deficient. *Bearelly v. Florida Dept. of Corrections*, 2002 WL 400779 (M.D. Fla. 2002) (plaintiff attempts to combine two distinct claims of termination of employment due to disability and retaliatory termination, to which the courts orders the claims to be separated by filing an amended pleading). In any event, these claims, even if plead individually, have no legal basis as discussed below.

A. Misrepresentation

Florida case law firmly establishes that in order to maintain an action for misrepresentation, the Plaintiff must establish the existence of (1) a misrepresentation of a material fact; (2) knowledge by the representative as to the truth or falsity of the representation, or that the representation was made under circumstances in which he ought to have known of its falsity; (3) intent by the representator that the representation induces another to act on it; and (4) injury to the Plaintiff as a result of acting in justifiable reliance on the misrepresentation. *Waters v. International Precious Metals Corp.*, 172 F.R.D. 479 (S.D. Fla. 1996). The elements required for common law fraud and misrepresentation are essentially the same for purposes of analysis. *In re Checkers Securities Litigation*, 858 F.Supp. 1168, 1179 (M.D. Fla. 1994). Based upon the above and similar analysis for Plaintiff's failure to allege fraud, a similar argument applies to Plaintiff's claim of misrepresentation. Specifically, Plaintiff fails to allege and impart a misrepresentation of a material fact, or any facts that show Defendants knew, or should

have known, of the misrepresentation's falsity. There is also no allegation of intent by the Defendants to induce Plaintiff to act upon the misrepresentation. *See,* Amended Complaint ¶¶ 82-84.

B. Breach of Contract

The elements needed to bring a proper claim for breach of contract are (1) the existence of a valid contract; (2) a material breach; and (3) resulting damages. *Beck v. Lazard Freres & Co., LLC*, 175 F.3d 913 (C.A.11 1999) citing *Abruzzo v. Haller*, 603 So.2d 1338, 1340 (Fla. 1st DCA 1992); *Hodges v. Buzzeo*, 193 F.Supp.2d 1279 (M.D. Fla. 2002). Parties must also establish performance of their obligations under the contract in order to maintain a cause of action for breach of contract. *Warfield v. Stewart*, 2007 WL 3378548 (M.D. Fla. 2007). Plaintiff has not plead any facts to establish the elements of this a breach of contract, and accordingly, Count II should be dismissed.

In fact, Plaintiff fails to allege that a contract was properly executed between himself and the Defendants. Instead, the facts appear to operate on an assumption that JREF's one million dollar contest and the subsequent correspondence is a contractual agreement. *See,* Amended Complaint ¶ 44. However, contained within the allegations of the Complaint, the JREF website expressly states that the applicant must "demonstrate[s] any psychic, supernatural, or paranormal activity ability under satisfactory observation" and that "Such demonstration must take place under the rules and limitations described in this document". *See,* Amended Complaint ¶ 14. The mere fact that the Plaintiff has failed to allege any demonstration taking place "under satisfactory observation" prevents this contest, even if viewed as an offer to enter into a contract, from being accepted or

performed by Plaintiff. The offer of a prize for the performance of a specified act in a contest . . . constitutes the first part of the normal offer-acceptance-consideraton equation for the formation of an enforceable contract. By competing in the contest, a competitor accepts the offer; by performing the specified act required for winning the contest, he provides the necessary consideration. *Nat'l Amateur Bowlers, Inc. v. Tassos*, 715 F. Supp. 323, 325 (D. Kan. 1989) citing, *Las Vegas Hacienda, Inc. v. Gibson,* 77 Nev. 25, 359 P.2d 85, 86 (1961). The decoding referenced by the Plaintiff in Exhibit "I" attached to the Amended Complaint does not qualify as performance of the contest. The rights of a contestant who has performed the act required in the promoter's offer are limited, however, by the terms of the offer, *i.e.,* by the conditions and rules of the contest. *Bowlerama of Texas, Inc. v. Miyakawa,* 449 S.W.2d 357 (Tex.Civ.App.1970). Again, there has been no demonstration "under satisfactory observation" as required by the contest. The alleged correspondence between the Plaintiff and Defendants, attached to the Complaint as Exhibits "I" and "II", demonstrate no meeting of the minds regarding the material terms of a contract, and can be no more than negotiations prior to any demonstration of the paranormal by Plaintiff. Without alleging performance, the Plaintiff fails to meet the first element required to prove breach of contract, mainly the existence of a valid contract.

Additionally, the Plaintiff fails to meet the basic definition of a contract being mutual promises between two parties for consideration. *Craddock v. Greenhut Const. Co.*, 423 F.2d 111 (C.A.Fla. 1970) stating *Restatement of Contracts, § 12*. Providing past services rendered without the expectation of compensation is not

adequate consideration to support a contract. *Fla. Nat'l Bank & Trust Co. v. Brown,* 47 So.2d 748, 760 (Fla.1949). The Amended Complaint alleges that the Plaintiff has been decoding hidden meanings in the English language for over 27 years and that "one objective" of the ET Corn Gods language has been to apply for and win the One Million Dollar Challenge. *See,* Amended Complaint ¶¶ 20-25. Based on his submissions, Plaintiff applied to the contest on August 18, 2011, and his application directed the Defendants to observe the decoding he had already completed, visible on web-sites. *See,* Amended Complaint ¶ 15 and Exhibit "I" attached to Amended Complaint. The Plaintiff has failed to allege any additional submission of his proof of the paranormal to the contest. As can be seen in Exhibits "II" and "III" attached to Amended Complaint, there is further communication between the parties but no additional proof of paranormal is submitted by the Plaintiff for the contest. In fact, when Defendants attempt to further understand the Plaintiff's claim, the Plaintiff explains he discovered the translation system and compares his system to the discovery of an ancient language. *See,* Exhibit "III" attached to the Amended Complaint. Such a discovery would not be proof of paranormal, but rather proof of history. Plaintiff has failed to perform the contest.

As to the second element requiring a material breach of contract, the court may consider the following factors in determining whether the breach actually rises to the level of being material as opposed to immaterial: (1) the extent to which the injured party will be deprived of the benefit which can reasonably be expected; (2) the extent to which the injured party can be adequately compensated for the part of the benefit of which she

will be deprived; (3) the extent to which the breaching party will suffer forfeiture; (4) the likelihood that the breaching party will cure; and (5) the extent to which the behavior of the breaching party comports with the standards of good faith and fair dealing. *Northern Ins. Co. of New York v. Pelican Point Harbor*, 2006 WL 1285078 (N.D. Fla. 2006) citing *Bland v. Freightliner LLC*, 206 F.Supp.2d 1202, 1210 (M.D. Fla. 2002). Even assuming that a contract actually exists, there is no allegation contained in the Amended Complaint of a timeline for performance of the terms of the contract. Plaintiff has failed to allege any specific conditions of breach, let alone a material breach.

Plaintiff has failed to show the presence of a contract or the existence of a material breach thus warranting dismissal of the Plaintiff's claim for breach of contract.

IV. Plaintiff has Failed to State a Claim under Counts III and IV for Misfeasance and Malfeasance

Misfeasance and Malfeasance are addressed under Florida law through statute and articles of the state Constitution. Misfeasance and malfeasance relate mostly to a public official's performance of duties while in office. In rare occasions these terms can also be related to wrongful conduct of corporate officers while acting in their official capacities. *See In re Airlift Intern, Inc.*, 18 B.R. 787 (Bkrtcy. Fla. 1982).

Violations of duties by a public officer often result in a finding of misfeasance, malfeasance, or neglect of duty. FL ST § 112.317. Under Article IV, § 7 of the Florida Constitution, F.S.A., as codified in FL ST § 943.11, the Governor may remove from office any such public official for misfeasance, malfeasance, neglect of duty, incompetence, or permanent inability to perform official duties. *Fair v. Kirk*, 317 F.Supp. 12 (D.C. Fla 1970); *Betts v. City of Edgewater*, 646 F.Supp. 1427 (M.D. Fla. 1986) *Guido*

v. City of Crystal River, Florida, 2006 WL 1232815; Article IV, § 7 of the Florida Constitution, F.S.A; FL ST § 943.11.

Malfeasance in office can occur when an officer exercises official duties or acts "under color of office," resulting from evil conduct or an illegal deed, the doing of that which one ought not to do, or the performance of an act by an officer in his or her official capacity that is wholly illegal and wrongful. *63C Am. Jur. 2d, Public Officers and Employees § 191*. Misfeasance is the performance by an officer in his or her official capacity of a legal act in an improper or illegal matter. *Id.* To constitute malfeasance or misfeasance, the wrongful act must be accompanied by some evil intent or motive, or with such gross negligence as to be equivalent to fraud. *Id.*

The Plaintiff's allegations are clearly misplaced and severely deficient as they apply to the instant discussion of misfeasance and malfeasance. Indeed, at no time did Defendants' ever hold office as a public or corporate officer. Furthermore, no specific allegations of wrongdoing, other than an overbroad description of "deliberately failing to honor their commitment" have been alleged under the facts. *See*, Amended Complaint ¶¶ 85-90. The utter failure of Plaintiff to allege facts with any description of the alleged wrongdoing or how damaged resulted, in addition to the statutory definitions of misfeasance and malfeasance relating to public officials, warrants dismissal of the allegations regarding misfeasance and malfeasance as against Defendants.

V. No Independent Cause of Action Exists for Damages and Specific Performance

It is clear that Florida law does not allow for an independent cause of action for punitive or personal damages. *See Jarzynka v. St. Thomas University School of Law*, 310

F.Supp.2d 1256, 1263, 1269 (S.D. Fla. 2004). Moreover, personal and punitive damages are a remedy, not a cause of action by themselves. *Morrison v. Morgan Stanley Properties*, 2007 WL 2316495 (S.D. Fla. 2007) (Court dismissed two counts of the pleading exclusively alleging personal and punitive damages, without pleading any viable claim upon which relief could be granted). Thus, this Court must dismiss Plaintiff's action for damages alone.

Likewise, "[S]pecific performance is an equitable remedy for a breach of contract, rather than a separate cause of action." *Cho v. 401–401 57th St. Realty Corp.,* 300 A.D.2d 174, 175, 752 N.Y.S.2d 55 (1st Dept.2002); *see also Champion Motor Group v. Visone Corvette,* 992 F.Supp. 203, 209 (E.D.N.Y.1998) ("[S]pecific performance is a remedy for breach of contract ... not a distinct claim."). The Court's task on a motion to dismiss is to "consider the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief," *Iqbal,* 129 S. Ct, at 1951, and not to determine the appropriate remedy. It is improper for a party to plead specific performance as a separate cause of action since it is a remedy not a cause of action. See *Capital, S.A. v. Lexington Capital Funding III, Ltd.,* 2011 WL 3251554 (S.D.N.Y. July 28, 2011). In addition, the issue of specific performance is moot because the Plaintiff failed to state a cause of action for breach of contract. Accordingly, the Court should dismiss counts V and VI of Plaintiff's Amended Complaint with prejudice.

VII. Plaintiff has Failed to State a Claim for Conspiracy 42 U.S.C. 1985 and 1986

Plaintiff's Amended Complaint fails to state a cause of action for Civil Conspiracy under 42 U.S.C. § 1985 and § 1986 and, as such, it must be dismissed. The

Plaintiff's conclusory factual assertions solely claim, "Defendants were parties to this vicious conspiracy" failing to address the specific statutory sections violated or facts necessary to meet the required elements of proving same. *See,* Amended Complaint ¶¶ 96-97. The Court should not be required to guess as to what cause of action a plaintiff intends to assert, or to draft the pleading for him. *Connor v. Halifax Hosp. Medical Center*, 135 F.Supp.2d 1198 (M.D. Fla. 2001). The failure of the Plaintiff to assert sufficient facts or to describe the statutory section that has been allegedly violated, necessitates the Court's dismissal of this action. At the very least, Plaintiff has failed to assert an agreement between two or more parties, of which is the basis of a conspiracy claim, and without which a claim cannot stand.

A. 42 U.S.C. § 1985

42 U.S.C. § 1985(1) and (2) address interference with the performance of duties of an officer of the United States government and obstruction of justice in a federal court, neither of which are applicable here or addressed in the Amended Complaint. *See Connor*, 135 F.Supp.2d at 1220. 42 U.S.C. § 1985(1) relates solely to federal officers and federal office holders. *Smith v. City of Unadilla*, 510 F.Supp.2d 1335 (M.D. Ga. 2007) quoting *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 718 (9th Cir. 1981). Congress meant 42 U.S.C. § 1985(2) to protect a party based on his physical presence while attending or testifying in court. *Smith*, 510 F.Supp.2d at 1347 quoting *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 348 (5th Cir. 1981). Although Plaintiff fails to assert the section of 42 U.S.C. § 1985 in which a claim is asserted, the facts clearly do not address a claim as it relates to sections (1) or (2) of same.

The elements of a cause of action under § 1985(3) are (1) a conspiracy, (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy, (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. *Trawinski v. United Technologies*, 313 F.3d 1295 (11th Cir. 2002); *Childree v. UAP/GA AG CHEM, Inc.*, 92 F.3d 1140, 1146-47 (11th Cir. 1996); *Griffin v. Breckinridge*, 403 U.S. 88 (1971); *McLellan v. Mississippi Power & Light, Co.*, 545 F.2d 919, 923 (5th Cir. 1977) (en banc), vac'g in part & aff'g in part, 526 F.2d 870 (5th Cir. 1976).

In *Poirier*, the [Fifth] Circuit held that a private conspiracy aims at depriving equal protection of the law, under 42 U.S.C. § 1985(3), only if the object of the conspiracy, and the acts done in furtherance of it, would constitute an independent violation of some law other than § 1985(3). *Poirier v. Hodges*, 445 F.Supp. 838, 845 (D.C. Fla. 1978). If the object of the defendants' conspiracy did not include a violation of some law (independent of 1985(3) itself) which protects the plaintiff, the conspiracy could not have deprived the plaintiff of the "protection of the laws". *Id.* Put more simply, there can only be a deprivation of the rights of a plaintiff when the action of the defendants is otherwise illegal. *Id.* If the defendants have not conspired to act contrary to the law, an object of a section 1985(3) conspiracy has not been made out and the section is inoperable, regardless of whether the legal rights of the plaintiff are somehow affected. *Id.* To successfully allege the second element of a § 1985(3), therefore, one must assert that a private conspiracy has as its object and overt acts the independent violation of

some other legal rights. *Id.* citing *Stevenson v. International Paper Co.*, 432 F. Supp. 390, 395 n. 7 (W.D. La. 1977). In the instant matter, the actions of the Defendants' were not otherwise illegal. For Plaintiff's conspiracy claim to survive a dismissal, the allegations of violation of the First and Fourth Amendments under Counts Seven and Eight would have to be valid. However, as clearly illustrated in the applicable sections of this memorandum, Plaintiff's claims of same are entirely deficient and completely inapt. Hence, Plaintiff's conspiracy allegation under § 1985(3) must be dismissed as well, based upon the nonexistent independent violation of some other legal right.

Even if one sufficiently alleges independent illegality as the object and acts of a private conspiracy, however, it is still necessary to allege, regardless of whether a conspiracy is among private individuals or persons acting under color of state law, that the conspiracy was motivated by a class-based bias. *Id.* The language "equal protection of the laws" and "equal privileges and immunities under the laws" means that an alleged conspiracy "must aim at a deprivation of the equal enjoyment of rights secured by the law to all" in other words, class-based bias, whether racial or otherwise. *Griffin*, 403 U.S. at 102. Simply put, in the unlikely circumstance Plaintiff's argument could succeed to this point, it would fail due to the facts inability to assert a class-based bias. For all of the aforementioned reasons, Plaintiff's claim for conspiracy under 42 U.S.C. § 1985 must be dismissed.

B. 42 U.S.C. § 1986

Once the court recognizes that plaintiff has failed to state a remediable claim under § 1985(3), it has consequently found plaintiff to fail to state a claim under § 1986

as well. *Poirier*, 445 F. Supp. at 847. The derivative character of a claim under 42 U.S.C. § 1986 is universally recognized. *Id.* Only if a § 1085 claim is stated can there also be a § 1986 claim. *Id*. quoting *Taylor v. Nichols*, 558 F.2d 561, 568 (10th Cir. 1977), aff'g 409 F.Supp. 927, 936 (D.Kan.1976); *Kermit Constr. Corp. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. 1976); *Hamilton v. Chaffin*, 506 F.2d 904, 914 (5th Cir. 1975); *Dowsey v. Wilkins*, 467 F.2d 1022, 1026 (5th Cir. 1972); *Azar v. Conley*, 456 F.2d 1382, 1385 n. 2 (6th Cir. 1972); *Rowe v. Tennessee*, 431 F.Supp. 1257, 1259 n. 1 (E.D.Tenn.1977); *Martin Hodas E. Coast Cinematics v. Lindsay*, 431 F.Supp. 637, 645 (S.D.N.Y.1977); *Schoone v. Olsen*, 427 F.Supp. 724, 725 (E.D.Wis.1977); *Shore v. Howard*, 414 F.Supp. 379, 388 (N.D.Tex.1976); *Weaver v. Haworth*, 410 F.Supp. 1032, 1036 (E.D.Okl.1975); *Schoonfield v. Mayor & City Council of Baltimore*, 399 F.Supp. 1068, 1087 (D.Md.1975), aff'd 544 F.2d 515 (4th Cir. 1976).

XI. Conclusion

In ruling on a Motion to Dismiss, the Court is constrained to review the allegations as contained within the four corners of the complaint and may not consider matters outside the pleading. *Crowell v. Morgan, Stanley, Dean Witter Services, Co.*, 87 F.Supp.2d 1287 (S.D. Fla. 2000); Fed.R.Civ.P. 12(b)(6); *Payne v. United States*, 181 F.R.D. 676, 677 (M.D. Fla. 1998). The fundamental question a court must consider when ruling on a motion to dismiss, is whether the allegations of the complaint state a cause of action. *Johnson v. Dade County Public Schools*, 1992 WL 466902 (S.D. Fla. 1992); *Scelta v. Delicatessen Support Services, Inc.*, 57 F.Supp.2d 1327 (M.D. Fla. 1999). The instant claim has not alleged a single fact nor satisfied the elements which would give

rise to a single cause of action alleged in the Amended Complaint. Moreover, once a *pro se* litigant is in court, [s]he is subject to the relevant law and rules of court, including the Federal Rules of Civil Procedure, the same as any other litigant would be. *See Jarzynka*, 310 F.Supp.2d at 1264. As such, the Plaintiff's claims must fail.

WHEREFORE, the Defendants, RANDAL JAMES HAMILTON ZWINGE aka JAMES RANDI, D.J. GROTHE, PRESIDENT OF JAMES RANDI EDUCATIONAL FOUNDATION and JAMES RANDI EDUCATIONAL FOUNDATION, respectfully requests this Honorable Court grant its Motion to Dismiss, and for such further relief this Court deems equitable and proper.

I HEREBY CERTIFY that on June 22, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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