

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
GREENBELT DIVISION**

BRETT KIMBERLIN,)	
Plaintiff)	
)	
v.)	Case No. PWG 13 3059
)	
NATIONAL BLOGGERS CLUB,)	
<i>Et. al.</i>)	
)	
Defendants)	

**MOTION TO DISMISS AMENDED COMPLAINT UNDER
RULE 12(b)(6) FOR FAILURE TO STATE A CLAIM**

Comes now, Defendant DB Capitol Strategies PLLC (hereinafter "DBCS"), by and through counsel, hereby moves to dismiss Plaintiff Brett Kimberlin (hereinafter "Plaintiff") Amended Complaint for the reasons stated herein. Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted and is not susceptible to adjudication.

Background

Last year, Judge Motz of this Court dismissed the matter of *Walker v. Kimberlin*, U.S. Dist. Court, Dist. of MD (Civil Case No. 8:12-cv-01852-JFM) (Order dated 11/28/12). That matter involved the instant plaintiff and one of the defendants in this matter, Aaron Walker (hereinafter "Walker"). In dismissing the suit, Judge Motz stated, "I deem it unwise to intervene in the bitter political disputes between the parties." *Walker v. Kimberlin*, U.S. Dist. Court, Dist. of MD (Civil Case No. 8:12-cv-01852-JFM) (Judge Motz Memorandum dated 11/28/12). The entirety of the involvement between DBCS and Plaintiff involves the representation of Walker in that case and a Prince William County

Virginia Circuit Court case that was subsequently dismissed based on Judge Motz's ruling. *Walker v. Kimberlin*, U.S. Dist. Court, Dist. of Md., (Civil Case No. 8:12-cv-01852- JFM)

LEGAL STANDARD

Federal Rules of Procedure Rule 12(b)(6) provides that a complaint may be dismissed "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). A plaintiff's complaint must contain "a short and plain statement of a claim showing that the pleader is entitled to relief, in order to give a defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Though the *Twombly* standard requires only a short and plain statement, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* A satisfactory claim for relief "demand[s] more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint is subject to dismissal under Rule 12(b)(6) if it merely "offers labels and conclusions or a formulaic recitation of the elements of a cause of action" [or] if it tenders naked assertions devoid of further factual enhancement." *Id.*

ARGUMENT

I. Plaintiff's first claim for relief should be dismissed because Plaintiff failed to allege sufficient facts to show conduct, an enterprise, and racketeering activity under 18 U.S.C. §1962(c)-(d).

Plaintiff accuses DBCS of engaging in an ongoing conspiracy against him in violation of the Federal Racketeer Influenced and Corrupt Organizations Act (hereinafter "RICO") 18 U.S.C. § 1961-1968. To state a claim under §1962(c), a plaintiff must allege, " (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima v. Imrex Co.*, 473 U.S. 479, 496 (1985). As the Court discussed in *Sedima*, conduct is the "conducting or participating in the conduct of an enterprise

through a pattern of racketeering activity." *Id.* Pursuant to 18 U.S.C. §1961, an enterprise is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961. Racketeering activity is any act "chargeable" under several generically described state criminal laws, any act "indictable" under numerous specific federal criminal provisions, including mail and wire fraud, and any "offense" involving bankruptcy or securities fraud or drug-related activities that is "punishable" under federal law. 18 U.S.C. §1961(1). Finally, a pattern of racketeering requires "at least two acts of racketeering activity." 18 U.S.C. §1961.

Plaintiff's First Claim for Relief should be dismissed because the Amended Complaint fails to allege the required elements of conduct, an enterprise, racketeering activity or a pattern of racketeering activity as required by 18 U.S.C. 1962(c). The representation of Walker by DBCS in a lawsuit against Plaintiff is insufficient to implicate it in conduct comprising racketeering activity. DBCS wrote about the progress of its litigation against Plaintiff on one or more websites and raised money to support its pro bono representation of Walker. (Amended Complaint, ¶¶76, 77, 78; Blogger's Defense Team, "about" page, attached hereto as "Exhibit A"; Blogger's Defense Team, "narrative" page, attached hereto as "Exhibit B"). The Amended Complaint fails to identify any conduct that would constitute "racketeering" under the applicable standard, or conduct chargeable under a criminal statute, let alone a pattern of such racketeering activity. These facts are insufficient to state a claim under 18 U.S.C. 1962(c), and, as such, Plaintiff's first claim should be dismissed.

II. Plaintiff's second claim for relief should be dismissed because Plaintiff failed to state a claim against DBCS under 42 U.S.C. §1983

Plaintiff fails to state a claim against DBCS under 42 U.S.C. §1983 (Amended Complaint, ¶¶154-160). Plaintiff's only allegation under 42 U.S.C. §1983 is against Defendant Patrick Frey. Thus, his second claim against DBCS should be dismissed.

III. Plaintiff's third claim for relief should be dismissed because Plaintiff failed to allege sufficient facts to show obstruction of justice, intimidation of a party, witness, or juror, and unlawful deprivation of rights and privileges under 42 U.S.C. §1985(2)-(3)

A. Plaintiff fails to state a claim under 42 U.S.C. §1985(2)

Plaintiff claims DBCS violated 42 U.S.C. §1985(2). (Amended Complaint, ¶¶162-166). Under 42 U.S.C. §1985(2), it is unlawful to obstruct justice, intimidate a party, witness, or juror. To demonstrate a valid §1985(2) claim, a plaintiff must show: (1) a conspiracy between two or more persons and (2) to deter witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) results in injury to plaintiff. *Haigh v. Matsushita Electric Corp.*, 676 F. Supp. 1332, 1343 (E.D. Va. 1987).

A conspiracy "has not been stated" where "plaintiffs have not alleged a conspiracy between defendant and any other person or entity." *Lamont v. Forman Bros., Inc.*, 410 F. Supp. 912, 918 (D.D.C. 1976). A plaintiff must also, "allege facts showing that defendants agreed to violate his constitutional rights," in order to prove a conspiracy under §1985(2). *Clark v Maryland Dep't of Pub. Safety & Corr. Servs.*, 247 F. Supp. 2d 773, (D. Md. 2003). Plaintiff did not allege a conspiracy between DBCS and any other person or entity, and did not allege facts showing that DBCS agreed with any other person or entity to violate his constitutional rights. (Amended Complaint ¶¶ 76-79).

Plaintiff has also not alleged that DBCS, or any hypothetical conspirator, used force, intimidation or threats under §1985(2). Neither of the websites referenced in Plaintiff's Amended Complaint contain

threatening or intimidating language. (See Exhibits A and B). Rather, the websites described the representation of Walker by DBCS against Plaintiff and then described the progress of the litigation.

Plaintiff has similarly failed to state a claim under 42 U.S.C. §1985(2). The Amended Complaint provides insufficient facts to show that a conspiracy existed, that any such hypothetical conspiracy used force, intimidation or threats under §1985(2), or that any such hypothetical conspiracy deterred an unnamed, hypothetical witness from testifying freely or attending court. Plaintiff's factual allegations against DBCS are that DBCS represented Walker in a lawsuit against Plaintiff, posted information related to this litigation on one or more websites and raised money to fund its pro bono representation of Walker. (Amended Complaint, ¶76, 77, 78). As Plaintiff failed to allege facts that raise a right to relief above the speculative level, dismissal is appropriate under the *Twombly* standard.

B. Plaintiff fails to state a claim under 42 U.S.C. §1985(3)

Plaintiff similarly claims DBCS unlawfully deprived him of rights or privileges under 42 U.S.C. §1985(3). A claim asserted under 42 U.S.C. §1985(3) requires (1) a conspiracy; (2) for the purpose of depriving, 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 overt act in furtherance of the object of the conspiracy; and (4) that the plaintiff (a) was injured in his person or property, or (b) was deprived of having and exercising any right or privilege of a United States citizen. *Simmons v. Baker*, 842 F. Supp. 883, 889 (E.D. Va. 1994). Independent acts of two or more alleged wrongdoers do not constitute a conspiracy under §1985(3). *Murdaugh Volkswagen, Inc. v. First Nat'l Bank*, 639 F.2d 1073, 1075 (4th Cir. 1981).

The factual allegations in Plaintiff's Amended Complaint fail to support Plaintiff's 42 U.S.C. §1985(3) claim. As stated above, Plaintiff's allegations against DBCS are as follows: (1) DBCS

represented Walker in a prior lawsuit against Plaintiff, (2) DBCS posted information related to the progress of the lawsuit on one or more websites, and (3) DBCS raised money to fund its pro bono representation of Walker. (Amended Complaint, ¶¶76, 77, 78). These facts do not allege a conspiracy claim, do not allege a hypothetical conspiracy that was carried out through an overt act for the purpose of depriving Plaintiff equal protection of the laws or equal privileges and immunities under the laws, and do not allege that Plaintiff was injured or was deprived of exercising a right or privilege. As these factual allegations fail to raise a right to relief above the speculative level under a §1985(2) claim, dismissal is appropriate under the *Twombly* standard..

IV. Plaintiff failed to state a claim for Fraud and Negligent Misrepresentation

A. Fraud

An allegation of fraud requires that a plaintiff allege the following:

(1) a representation made by a party was false; (2) its falsity was either known to the party or made with such reckless indifference to the truth as to impute knowledge; (3) the misrepresentation was made for the purpose of defrauding some other person; (4) that person reasonably acted in reliance upon the misrepresentation with full belief in its truth, and he would not have done the thing from which damage resulted had it not been made; and (5) the person so acting suffered damage directly resulting from the misrepresentation. *Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623, 629 (4th Cir. Md. 1977).

Plaintiff failed to allege facts sufficient to support allegations that DBCS made any false representations, knew of the falsity of any such representations (of which there were none), or that DBCS recklessly ignored the alleged and unproved falsity of any such representations (again, of which there were none). The representation by DBCS of Walker in a prior lawsuit, the posting of information related to the litigation on one more websites and fundraising to offset litigation expenses do not support a fraud claim under Maryland law. (Amended Complaint, ¶¶76, 77, 78). Plaintiff has not claimed, and cannot possibly claim based on his factual allegations, that he took action in reliance on statements made

by DBCS. He further has not claimed that he suffered any actual damage based on that reliance or that he suffered any actual damage based on his reliance. As Plaintiff has failed to allege a sustainable cause of action for fraud under Maryland law, this claim should be dismissed in accordance with *Twombly*.

B. Negligent Misrepresentation

Negligent misrepresentation requires that a plaintiff allege the following:

1) the defendant, owing a duty of care to the plaintiff, negligently asserts a false statement; 2) the defendant intends that his statement will be acted upon by the plaintiff; 3) the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury; 4) the plaintiff, justifiably, takes action in reliance on the statement; and 5) the plaintiff suffers damage proximately caused by the defendant's negligence. *Martens Chevrolet, Inc. v. Seney*, 292 Md. 328, 336-337, 439 A.2d 534 (Md. 1982).

DBCS did not owe Plaintiff a duty of care, and DBCS did not negligently assert a false statement. Rather, Plaintiff attempts to assert that DBCS uttered a false statement when it posted that it was suing Plaintiff in federal court to defend bloggers from "swatting". Plaintiff has not, and cannot, assert that he in any way relied upon that statement. Further, DBCS did not intend that this statement would be acted upon by Plaintiff nor has Plaintiff alleged such action. DBCS's representation of Walker, the information posted on the internet related to the litigation and the fundraising initiated to support DBCS's pro bono representation of Walker do not support a claim of negligent misrepresentation. (Amended Complaint, ¶¶76, 77, 78). As Plaintiff's negligent misrepresentation claim fails to raise a right to relief above the speculative level, this claim should be dismissed under the *Twombly* standard.

V. Plaintiff has failed to state a claim for Defamation

Under Maryland law, Plaintiff's allegation of defamation *per se* fails to state a claim upon which relief may be granted. To assert a defamation claim, a plaintiff must show that: (1) the defendant

made a defamatory statement regarding the plaintiff to a third person; (2) the statement was false; (3) the defendant was legally at fault in making the statement; and (4) the plaintiff suffered harm thereby.ö *S. Volkswagen, Inc. v. Centrix Fin., LLC*, 357 F. Supp. 2d 837 (D. Md. 2005). Plaintiff is a public figure and is therefore further required to allege sufficient facts to show actual malice on the part of DBCS. *Dobkin v. Johns Hopkins Univ.*, 1996 U.S. Dist. LEXIS 6445, 45-46 (D. Md. Apr. 17, 1996). Public figures are defined as those who ðthrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.ö *Fitzgerald v. Penthouse Int'l*, 525 F. Supp. 585, 588-589 (D. Md. 1981). Plaintiff is a public figure because he had a book written about his convictions for various heinous and grievous crimes, including wholesale drug trafficking, perjury, and domestic terrorism¹. Plaintiff is, in fact, the notorious ðSpeedway Bomberö who terrorized the town of Speedway Indiana in 1978². Throughout Plaintiffsø incarceration, he sought the media spotlight by claiming to have sold marijuana to former Vice President Dan Quayle and sought to tell his tale through a jailhouse press conference³. These facts support the conclusion that Plaintiff is a public figure and must thus show actual malice by DBCS.

As Plaintiff alleges defamation *per se*, he must also show that DBCS acted with malice. *Samuels v. Tschechtelin*, 763 A.2d 209, 245 (Md. Ct. Spec. App. 2000). To act maliciously, Defendant must have acted with either ðreckless disregard for its truth or with actual knowledge of its falsity.ö *Id.* at 242. Plaintiff did not allege DBCS acted with reckless disregard for the truth of its statements nor does he allege DBCS had actual knowledge of (alleged) falsity of the statements.

¹ Singer, Mark. *Citizen K: The Deeply Weird American Journey of Brett Kimberlin*. Knopf Doubleday Publishing Group, 1996. Print. Alfred A. Knopf. ISBN 978-0679429999.

² ² Singer, Mark. *Citizen K: The Deeply Weird American Journey of Brett Kimberlin*. Knopf Doubleday Publishing Group, 1996. Print. (p. 90-91).

³ Singer, Mark. *Citizen K: The Deeply Weird American Journey of Brett Kimberlin*. Knopf Doubleday Publishing Group, 1996. Print. (p. 117-119).

Paragraph 76 of the Amended Complaint alleges that: (1) DBCS "posted on its website that it was suing Plaintiff in federal court to defend bloggers from "swatting,"⁴ imputing that Plaintiff was responsible for those swattings," (2) DBCS "wrote on its blog that Plaintiff's "victims" were "swatted," implying that Plaintiff was involved with the swattings," and (3) DBCS stated that "Kimberlin[s] "associates" are suspected in far more sinister forms of harassment " including the "SWATting" of an Assistant DA in California." Plaintiff failed to plead facts sufficient to sustain a claim for defamation, failed to plead that DBCS made false statements, has failed to allege facts to support his claim that DBCS acted with reckless disregard for the truth or with actual knowledge of the falsity of statements, and has not plead sufficient facts to allege an injury was suffered as a result of statements made by DBCS.

First, Plaintiff's sole allegation is that DBCS "posted on its website that it was suing Plaintiff in federal court to defend bloggers from "swatting," imputing that Plaintiff was responsible for those swattings." (Amended Complaint, ¶76). This statement fails to state a claim for defamation because Plaintiff failed to allege that this statement was false, that DBCS acted with knowledge of its falsity, or that Plaintiff suffered injury as a result of its publication. Second, Plaintiff alleges that DBCS "wrote on its blog that Plaintiff's "victims" were "swatted," implying that Plaintiff was involved with the swattings." (Amended Complaint, ¶76). This statement explains the nature of Walker's lawsuit against Plaintiff, and is therefore not defamatory. Finally, Plaintiff alleges that DBCS wrote on its blog that "Kimberlin "associates" are suspected in far more sinister forms of harassment " including the "SWATting" of an Assistant DA in California." (Amended Complaint, ¶76). This statement is not defamatory because it is true that persons associated with Plaintiff were *suspected* in such incidents.

⁴ Swatting is the making of a hoax telephone call to 9-1-1 to draw a response from law enforcement, usually a SWAT team. <http://www.fbi.gov/news/stories/2013/september/the-crime-of-swatting-fake-9-1-1-calls-have-real-consequences/>.

Taken in totality, the facts alleged by Plaintiff fail to show actual malice on the part of DBCS. Plaintiff has failed to state a Maryland defamation claim and dismissal of this claim is appropriate under the *Twombly* standard.

VI. Plaintiff has failed to state a claim for False Light Invasion of Privacy

To properly allege a false light invasion of privacy claim in Maryland, a plaintiff must allege:

(1) that the defendant gave publicity to a matter that places the plaintiff before the public in a false light; (2) that a reasonable person would find that the false light in which the other person was placed highly offensive; and (3) that the defendant had knowledge of or acted with reckless disregard as to the falsity of the publicized matter and the false light in which the defendant placed the plaintiff. *Mazer v. Safeway, Inc.*, 398 F. Supp. 2d 412 (D. Md. 2005).

Plaintiff's Sixth Claim for Relief should be dismissed because he merely recites the elements of a false light claim (Amended Complaint, ¶¶197-207), fails to specifically name DBCS, and fails to challenge the veracity of statements made by DBCS.

Plaintiff provides only a recitation of the elements of a false light invasion of privacy claim (Amended Complaint, ¶¶197-207), but fails to support this claim with sufficient factual allegations. A complaint is subject to dismissal under Rule 12(b)(6) if it merely "offers labels and conclusions or a formulaic recitation of the elements of a cause of action" [or] if it tenders naked assertions devoid of further factual enhancement. *Ashcroft*, 556 U.S. at 678. Plaintiff also fails to challenge the actual truth and veracity of the statements made by DBCS and therefore fails to state a claim for false light invasion of privacy. (Amended Complaint ¶76, ¶¶197-207). Under Maryland law, "[w]here the truth is so close to the facts, the court will find that no legal harm has been done." *Dobkin v. Johns Hopkins Univ.*, 1996 U.S. Dist. LEXIS 6445, 29 (D. Md. Apr. 17, 1996). Additionally, Plaintiff fails to specifically name

DBCS in its Sixth Claim for Relief and instead names "Defendants" without any attribution to specific activity committed by DBCS.

Plaintiff's Amended Complaint includes the following factual allegations: (1) DBCS "posted on its website that it was suing Plaintiff in federal court to defend bloggers from 'swatting,' imputing that Plaintiff was responsible for those swattings," (2) DBCS "wrote on its blog that Plaintiff's 'victims' were 'swatted,' implying that Plaintiff was involved with the swattings," and (3) DBCS stated that "Kimberlin[s] 'associates' are suspected in far more sinister forms of harassment - including the 'SWATting' of an Assistant DA in California." (Amended Complaint, ¶76). These factual allegations are insufficient to support a false light invasion of privacy claim because they do not allege any conduct by DBCS that relates to the elements of a false light invasion of privacy claim. Additionally, the claim fails to meet the standards for defamation, and "the Fourth Circuit, interpreting Maryland law, has refused to allow a claim for false light invasion of privacy to stand where the claim failed to meet the standards for defamation. *Dobkin v. Johns Hopkins Univ.*, 1996 U.S. Dist. LEXIS 6445, 37 (D. Md. Apr. 17, 1996); *See supra* Section V. Under *Twombly*, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 55. Therefore, this claim should be dismissed.

VII. Plaintiff has failed to state a claim for Intentional Infliction of Emotional Distress

A claim for intentional infliction of emotional distress requires the following: "(1) The conduct must be intentional or reckless; (2) The conduct must be extreme and outrageous; (3) There must be a causal connection between the wrongful conduct and the emotional distress; (4) The emotional distress must be severe." *Mitchell v. Baltimore Sun Co.*, 164 Md. App. 497, 883 A.2d 1008, 1024 (Md. Ct. Spec. App. 2005) (citations omitted). Maryland courts have cautioned that the tort of intentional infliction of

emotional distress is to be used "sparingly" and only for "opprobrious behavior that includes truly outrageous conduct." *Kentucky Fried Chicken Nat'l Mgmt. Co. v. Weathersby*, 607 A.2d 8, 11 (Md. 1992).

Plaintiff's Seventh Claim for Relief should be dismissed because he provides insufficient facts to allege that DBCS's conduct was extreme or outrageous. The Amended Complaint fails to allege a causal connection between DBCS's conduct and the emotional distress. Plaintiff only alleged that DBCS represented Walker in a prior lawsuit against Plaintiff, posted information related to the status and progress of the litigation on a website, and raised money to support DBCS's pro bono representation of Walker. (Amended Complaint, ¶¶76, 77, 78). These facts, even if true, do not support a claim for intentional infliction of emotional distress under Maryland law. Plaintiff's seventh claim should be dismissed under the *Twombly* standard.

CONCLUSION

For the foregoing reasons, DBCS respectfully requests that this Court dismiss Plaintiff's First, Second, Third, Fourth, Fifth, Sixth, and Seventh Claims for Relief for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

PRAYER FOR RELIEF

Wherefore, having stated its Motion to Dismiss, Defendant DBCS prays for relief as follows:

1. An Order dismissing the instant case.
2. An Order granting attorney's fees and costs.
3. An Order for injunctive relief to enjoin Plaintiff Brett Kimberlin from initiating any further frivolous and meretricious litigation without the prior approval by a court appointed special

master or the posting of a bond in accordance with such order to be paid as fees for the dismissal of such claims;

4. For such other and further relief as the Court deems just and proper.

Respectfully submitted,

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
GREENBELT DIVISION**

BRETT KIMBERLIN,)	
Plaintiff,)	
)	
v.)	Case No. PWG 13 3059
)	
NATIONAL BLOGGERS CLUB,)	
<i>Et. al.</i>)	
)	
Defendants.)	

PROPOSED ORDER

For the reasons set out in Defendant DB Capitol Strategies PLLC's Motion to Dismiss, it is this ____ day of _____, 2014, by the U.S. District Court for the District of Maryland, Greenbelt Division,

ORDERED that the Motion to Dismiss be, and hereby is, GRANTED,

ORDERED that attorney's fees and costs be awarded to Defendant DBCS

and

ORDERED that Plaintiff, Brett Kimberlin, be enjoined from initiating any further frivolous, meretricious litigation without the prior approval by a court appointed special master or the posting of a bond.

Paul W. Grimm
United States District Judge
U.S. District Court
for the District of Maryland,
Greenbelt Division