IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-01881-REB-MJW

GREG SHRADER,

Plaintiff,

v.

DR. ALAN BIDDINGER,
EARIK BEANN,
WAVE 59 TECHNOLOGIES INT'L INC.,
WILLIAM BRADSTREET STEWART,
INSTITUTE OF COSMOLOGICAL ECONOMICS,
SACRED SCIENCE INSTITUTE, and
WAVE 59 TECHNOLOGIES INT'L INC. OWNER'S [sic] AND OFFICERS,

Defendants.

RECOMMENDATION ON
(1) MOTION OF DEFENDANTS WAVE 59 TECHNOLOGIES INT'L INC. AND EARIK BEANN TO DISMISS THIS MATTER PURSUANT TO F.R.C.P. [sic] 12(b)(6) (Docket No. 98),
(2) MOTION BY DEFENDANTS WILLIAM BRADSTREET STEWART, INSTITUTE OF COSMOLOGICAL ECONOMICS, INC., AND SACRED SCIENCE INSTITUTE: (1) TO DISMISS FOR LACK OF PERSONAL JURISDICTION; (2) TO DISMISS FOR FAILURE TO STATE A CLAIM; (3) TO DISMISS FOR IMPROPER VENUE, AND (4) FOR ATTORNEYS' FEES AND SANCTIONS (Docket No. 118),
(3) PLAINTIFF [sic] REQUEST TO CLERK OF COURT FOR DEFAULT IN ACCORDANCE WITH F.R.C.P. [sic] 55 (Docket No. 154),
(4) MOTION OF DEFENDANTS WAVE 59 TECHNOLOGIES INT'L INC. AND EARIK BEANN TO INCLUDE WAVE 59 TECHNOLOGIES INT'L INC. OWNERS AND OFFICERS IN MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR LEAVE TO AMEND ANSWER (Docket No. 168), and
(5) PLAINTIFF'S MOTION OF SUMMARY OF JUDGMENT AGAINST WAVE59 TECHNOLOGIES INT'L INC, and EARIK BEANN (Docket No. 245)

MICHAEL J. WATANABE
United States Magistrate Judge

This case was referred to this court pursuant to an Order of Reference to United States Magistrate Judge issued by District Judge Robert E. Blackburn on August 9, 2010 (Docket No. 2).

The pro se plaintiff, Greg Shrader, who lived in Oklahoma when the Complaint was filed, commenced this action with the filing of his pleading entitled "Complaint for Civil Conspiracy, Libel, Publicity Placing a Person in False Light, and Intentional Infliction of Emotional Distress, Conspiracy Publicity Placing a Person in False Light, Conspiracy to Commit Libel, Conspiracy to Commit Publicity Placing a Person in False Light, Conspiracy to Commit Intentional Infliction of Emotional Distress." (Docket No. 1). In that Complaint, which is not a model pleading, plaintiff alleges the following. Plaintiff had a business relationship with defendant William Bradstreet Stewart ("Stewart"), a California resident, that allowed Stewart and his companies, Sacred Science Institute ("SCI") (a California business) and the Institute of Cosmological Economics ("ICE") (a Nevada corporation) (hereinafter Stewart, SCI, and ICE when referred to collectively will be called "the Stewart defendants"), to edit, publish, and sell plaintiff's courses and books about market trading. In July 2009, there was some contention between plaintiff and Stewart, and their relationship deteriorated to the extent that plaintiff e-mailed Stewart, telling him to remove all of plaintiff's information, books, and courses from the websites of Stewart's companies. Stewart made threats about how he would destroy plaintiff and plaintiff's books and courses, using Stewart's friends in this endeavor if Stewart and his companies were not allowed to keep selling plaintiff's books and courses. Stewart claimed he removed plaintiff's material from his websites,

but he actually only blocked plaintiff's access to plaintiff's material on Stewart's sites and continued to have a complete list of and information on plaintiff's books and materials for sale on his sites.

After the business relationship between plaintiff and Stewart terminated, former defendant Dr. Alan Biddinger[1] posted an e-mail ("the posting," which plaintiff refers to as "Exhibit H") that was sent by Stewart. It was posted on a forum on defendant Wave59 Technologies' Int'l Inc.'s ("Wave59") website. Wave59 is owned in whole or in part by defendant Earik Beann ("Beann") (when referred to collectively, Beann and Wave59 will be referred to as the "Wave59 defendants"). The posting was done by Biddinger in response to an inquiry from another forum member (Julia) about plaintiff's work. The e-mail is attached to the Complaint as plaintiff's Exhibit H and reads:

> Julia,
>
> This e-mail was sent by Brad Stewart at SS which summarizes the situation well:
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> "There are some new developments which I must share with you regarding Greg Shrader and the Level 2 Andrews material. I will not be working with or publishing any of Greg's work anymore. We had a disagreement around the Level 2 Andrews course, which after about 6 months of my researching everything available on Andrews to write the course for him, and to introduce all of Andrews' techniques as the first part of the course, I discovered that most of what Greg claimed were his new ideas already existed in variation in other published material, leaving very little truly new and original content. For the $7500 price tag which he was insisting upon, I just didn't feel that his work justified the price, and I couldn't sell something to my customers that was not up to much higher standards. Many are already very knowledgeable about Andrews and

[1]On April 27, 2011, Judge Blackburn dismissed the claims against defendant Dr. Alan Biddinger without prejudice for lack of personal jurisdiction over defendant in this forum. (Docket No. 128). Shrader v. Biddinger, 2011 WL 1597669 (D. Colo. Apr. 27, 2011).

> keep asking me if I'm SURE there is anything new in there, and knowing that most of the ideas that comprise Greg's book can be found elsewhere at much more affordable prices, there is just no way, in good faith, that I could back this work. Needless to say, this really pissed Greg off, so we have decided to part ways and go in our own directions, and our partnership is now officially dissolved."
>
> Al

(Docket No. 1-1 at 16).

The posting remained on the Wave59 site notwithstanding that the plaintiff had commenced the same suit as the one before this court in the United States District Court for the Eastern District of Oklahoma on September 28, 2009. Even after sending out copies of the Complaint in that action to the defendants, defendants kept the posting on the Wave59 website for months. In the past, Beann has removed posts on the Wave59 site that Beann did not agree with or felt served no purpose to educate the traders who viewed that site.

Beann wrote to several traders by personal e-mail, directing them to the posting. Beann implied in his personal e-mails that plaintiff was committing a fraud upon his clients. The Wave59 web site shows over 24,000 visitors. Beann knows that the site is viewed by thousands of traders from around the world. Beann was using the site to catch e-mails from potential buyers of plaintiff's books and courses.

Stewart used his e-mail list from his companies to send out a bulk e-mail to his clients to send them a copy of the posting.

Defendants coordinated their efforts to launch a massive joint defamatory attack on the plaintiff and his work.

Plaintiff seeks substantial compensatory and punitive damages.

Now before the court for a report and recommendation are the following motions: (1) Motion of Defendants Wave 59 Technologies Int'l Inc. and Earik Beann to Dismiss this Matter Pursuant to F.R.C.P. [sic] 12(b)(6) (Docket No. 98); (2) Motion by Defendants William Bradstreet Stewart, Institute of Cosmological Economics, Inc., and Sacred Science Institute: (1) to Dismiss for Lack of Personal Jurisdiction; (2) to Dismiss for Failure to State a Claim; (3) to Dismiss for Improper Venue, and (4) for Attorneys' Fees and Sanctions (Docket No. 118); (3) Plaintiff [sic] Request to Clerk of Court for Default In Accordance with F.R.C.P. [sic] 55 (Docket No. 154); (4) Motion of Defendants Wave 59 Technologies Int'l Inc. and Earik Beann to Include Wave 59 Technologies Int'l Inc. Owners and Officers in Motion to Dismiss Or, in the Alternative, for Leave to Amend Answer (Docket No. 168); and (5) Plaintiff's Motion of Summary of Judgment Against Wave59 Technologies Int'l Inc, and Earik Beann (Docket No. 245). The court has considered these motions as well as the respective responses (Docket Nos. 244, 142, 173, 179, 249) and replies (Docket Nos. 249, 167, 189, 252). In addition, the court has considered applicable Federal Rules of Civil Procedure and case law. Also, the court has taken judicial notice of the court's file. The court now being fully informed makes the following findings, conclusions of law, and recommendations.

With regard to review of Rule 12(b)(2):

> In reviewing a Motion to Dismiss pursuant to Rule 12(b)(2), the plaintiff bears the burden of establishing that personal jurisdiction exists. . . . Where a court chooses not to conduct an evidentiary hearing, the plaintiff need only make a *prima facie* showing of jurisdiction by showing, through affidavits or otherwise, facts that, if true, would support jurisdiction over the defendant. . . . The allegations of a complaint must be taken as true unless contradicted by the defendant's affidavits, . . . and to the extent that the affidavits contradict allegations in the complaint or opposing affidavits, all disputes must be resolved in the plaintiff's favor and the plaintiff's *prima*

facie showing is sufficient. . . .

> Colorado's long-arm statute provides that a non-resident party subjects itself to the jurisdiction of Colorado courts for claims arising from the party's "(a) transaction of any business within this state; [or] (b) the commission of a tortious act within this state." . . . The statute codifies the "minimum contacts" test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and extends the courts' jurisdiction to the maximum extent consistent with the Due Process clause of the 14th Amendment. . . . Thus, the Court's analysis is limited to the question of whether the exercise of jurisdiction is consistent with the principles of due process. . .
>
> For purposes of personal jurisdiction, due process is satisfied when the defendant has sufficient "minimum contacts" with the forum state to suffice such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." . . . The "minimum contacts" test examines whether the defendant has purposefully directed its activities at residents of the forum state, whether the claims asserted arise out of that purposeful direction of activity, and whether the assertion of jurisdiction under the circumstances is reasonable and fair. . . .

Iselo Holdings, LLC v. Coonan, 2010 WL 3630125, at *3-4 (D. Colo. Sept. 10, 2010) (quotations omitted).

Under Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A motion to dismiss pursuant to Rule 12(b)(6) alleges that the complaint fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "A complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) if it does not plead 'enough facts to state a claim to relief that is plausible on its face.'" Cutter v. RailAmerica, Inc., 2008 WL 163016, at *2 (D. Colo. Jan. 15, 2008) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and

a formulaic recitation of the elements of a cause of action will not do . . . ." Twombly, 550 U.S. at 555 (citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." Id. "[A] plaintiff must 'nudge [] [his] claims across the line from conceivable to plausible' in order to survive a motion to dismiss. . . . Thus, the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting Twombly, 127 S. Ct. at 1974).

The Tenth Circuit Court of Appeals has held "that plausibility refers 'to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" Khalik v. United Air Lines, – F.3d –, 2012 WL 364058, at *2 (10th Cir. Feb. 6, 2012). The Circuit court has further "noted that '[t]he nature and specificity of the allegations required to state a plausible claim will vary based on context.'" Id. The court thus "concluded the *Twombly/Iqbal* standard is 'a wide middle ground between heightened fact pleading, which is expressly rejected, and allowing complaints that are no more than labels and conclusions or a formulaic recitation of the elements of a cause of action, which the Court stated will not do.'" Id.

For purposes of a motion to dismiss pursuant to Rule 12(b)(6), the court must accept all well-pled factual allegations in the complaint as true and resolve all reasonable inferences in the plaintiff's favor. Morse v. Regents of the Univ. of Colo.,

154 F.3d 1124, 1126-27 (10th Cir. 1998); Seamons v. Snow, 84 F.3d 1226, 1231-32 (10th Cir. 1996). However, "when legal conclusions are involved in the complaint 'the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to [those] conclusions' . . . ." Khalik, supra at *2 (quoting Iqbal, 129 S. Ct. at 1949)). "Accordingly, in examining a complaint under Rule 12(b)(6), [the court] will disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable." Id.

Since the plaintiff is not an attorney, his pleading and other papers have been construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing Haines v. Kerner, 404 U.S. 519, 520-21 (1972)). Therefore, "if the court can reasonably read the pleadings to state a claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements. . . . At the same time, . . . it is [not] the proper function of the district court to assume the role of advocate for the pro se litigant." Id.

I. Motion by Defendants William Bradstreet Stewart, Institute of Cosmological Economics, Inc., and Sacred Science Institute: (1) to Dismiss for Lack of Personal Jurisdiction; (2) to Dismiss for Failure to State a Claim; (3) to Dismiss for Improper Venue, and (4) for Attorneys' Fees and Sanctions (Docket No. 118)

The Stewart defendants seek dismissal of this action on the following grounds:

(1) pursuant to Rule 12(b)(2) for lack of lack of personal jurisdiction, (2) pursuant to Rule 12(b)(6) because the Complaint fails to state a claim for defamation, false light invasion of privacy, or intentional infliction of emotional distress, fails to allege a conspiracy, and is deficient as against ICE, and (3) pursuant to Rule 12(b)(3) because plaintiff cannot meet his burden to establish venue. In addition, the Stewart defendants seek an award of attorneys' fees pursuant to §§ 13-17-201 and 13-17-102, C.R.S.

The Stewart defendants first assert that the plaintiff has not met his burden of making a prima facie showing of general or claim-specific personal jurisdiction over them. As noted above, the Complaint alleges that Stewart is a California resident, SCI is a California business, and ICE is a Nevada corporation. These defendants thus correctly note that plaintiff acknowledges that none of the Stewart defendants reside in the forum. In addition, they assert that the plaintiff does not allege any direct contacts between the Stewart defendants and Colorado. Instead, plaintiff allegedly merely rests on his vague allegations that they conspired with other defendants to have the e-mail posted and maintained on Wave59's website and that Stewart and SSI sell over the internet books and courses which are thus available for purchase in Colorado. According to the Stewart defendants, these allegations are insufficient to satisfy plaintiff's burden to make a prima facie showing of personal jurisdiction. This court agrees.

Plaintiff's Oklahoma case resulted in a judgment dismissing the action in its entirety for lack of personal jurisdiction over any of the named defendants. The case was heard on appeal by the Tenth Circuit Court of Appeals which published its ruling that contained a very thorough discussion concerning personal jurisdiction, which need

not be repeated in full here and is incorporated by reference. Shrader v. Biddinger, 633 F.3d 1235 (10th Cir. 2011). The Circuit court quickly dismissed the possibility of general jurisdiction over Stewart and his companies based on their commercial web site operations. The court stated that "it bears emphasizing that general jurisdiction over a web site that has no intrinsic connection with a forum state requires commercial activity carried on with forum residents in such a sustained manner that it is tantamount to actual physical presence within the state." Id. at 1246. In the instant case here in Colorado, plaintiff once again has made no showing that the Stewart defendants "actually and deliberately used [their] website to conduct commercial transactions on a sustained basis with a substantial number of residents of the forum." Id. In fact, plaintiff has not alleged any of the Stewart defendants sold anything to anyone in Colorado.

In addition, none of the plaintiff's allegations establish specific jurisdiction over any of the Stewart defendants. Stewart sent the e-mail to Biddinger, who according to the Complaint lives in Michigan. Colorado was not the focal point of the e-mail, either in terms of its audience or its content. Biddinger posted it to an on-line forum, which targeted a trading community with no particular tie to Colorado. As for content, the e-mail was about plaintiff's work which was marketed and sold worldwide through the internet. There has been nothing alleged or shown that inherently links the nature of that work to Colorado. "Given the geographically-neutral content of the message posted by Mr. Biddinger and the inquiry that prompted it (regarding the status of a business selling market-trading materials over the internet), the geographically-neutral nature of the forum where it was posted, and the lack of any facts developed by [plaintiff] to suggest otherwise, there is no basis for concluding that Mr. Biddinger

targeted his post at [Colorado]. On the contrary, every indication is that Mr. Biddinger targeted the post at a nation-wide or world-wide audience of market traders with no inherent interest in or tie to [Colorado]. That is an insufficient basis for exercising personal jurisdiction." Id. at 1245-46.

Once again in this case, like the Oklahoma action, plaintiff alleged that Stewart sent the e-mail to thousands of customers. Plaintiff, however, does not make any specific averments that any of them were sent to anyone in Colorado. While plaintiff alleges a conspiracy among the defendants in this action (and defendant Beann is a Colorado resident), plaintiff's allegations of a conspiracy are conclusory. "[I]n order for personal jurisdiction based on a conspiracy theory to exist, the plaintiff must offer more than 'bare allegations' that a conspiracy existed, and must allege facts that would support a prima facie showing of a conspiracy." Id. at 1242. Plaintiff has not done so here, just as he failed to do in the Oklahoma action with regard to the Wave59 defendants. Id.

In sum, this court finds that the plaintiff has not made a prima facie showing that jurisdiction is proper over any of the Stewart defendants, and it is thus recommended that all claims against the Stewart defendants (Stewart, SSI, and ICE) be dismissed without prejudice. Based upon this finding, and in the interest of judicial economy, the court will not address the additional bases for dismissal raised by the Stewart defendants (although almost all of the additional grounds are essentially addressed below with respect to the Wave59 defendants).

In addition to seeking dismissal of the Complaint, the Stewart defendants seek an award of attorney fees pursuant to §§ 13-17-102 and 13-17-201, C.R.S.

The latter section provides that where any tort action is dismissed on motion of the defendant before trial under Rule 12(b) of the Colorado Rules of Civil Procedure, "such defendant shall have judgment for his reasonable attorney fees in defending the action." § 13-17-201, C.R.S. "The statute has been held equally applicable to a dismissal under Fed. R. Civ. P. 12(b) of a tort claim brought pursuant to Colorado law." Brammer-Hoelter v. Twin Peaks Charter Academy, 81 F. Supp.2d 1090, 1102 (D. Colo. 2000). While "[b]y implication, § 13-17-201 [C.R.S.] allows a plaintiff to escape liability for attorney fees by filing a confession to a motion to dismiss under Rule 12(b) in such a manner that defendant is not required to expend additional efforts beyond the filing of its motion," id., plaintiff here did not file a confession of the motion to dismiss. It is thus recommended that pursuant to § 13-17-201, C.R.S., the Stewart defendants be awarded their reasonable attorney fees and costs associated with defending this action. See id. (awarding reasonable attorney fees and costs following dismissal under Fed. R. Civ. P. 12(b)(1)). The court notes that Judge Blackburn previously directed that co-defendant Biddinger be awarded "his reasonable attorney fees as required by § 13-17-201, C.R.S.," provided that by a date certain he file a motion for attorney fees in form and substance to the requirements of D.C.COLO.LCivR 54.3. (See Docket No. 128 at 3). Based upon this recommendation, the court will not address the request for attorney fees pursuant to § 13-17-102, C.R.S.

II. Motion of Defendants Wave59 Technologies Int'l Inc. and Earik Beann to Dismiss this Matter Pursuant to F.R.C.P. [Sic] 12(b)(6) (Docket No. 98)

The Wave59 defendants seek dismissal pursuant to Fed. R. Civ. P. 12(b)(6) on the following grounds: (1) all of the plaintiff's claims are barred by the Communications Decency Act ("CDA"), (2) the posting is not defamatory, (3) even if the posting is defamatory, it is protected by the "common interest" qualified privilege, and plaintiff's averments do not allege or provide facts to support a finding of malice, (4) plaintiff's claims based on the tort of "false light" are not recognized under Colorado law, (5) plaintiff's allegations of "intentional inflection of emotional distress" are also inadequate under the established law, and (6) plaintiff's claims for "civil conspiracy" are deficient. Finally, these defendants assert they should be awarded sanctions under Fed. R. Civ. P. 11(b)(2) and (c)(3).

A. Communications Decency Act

The Wave59 defendants first assert that all of the plaintiff's claims are barred by the CDA, 47 U.S.C. § 230. Section "230 creates a federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a third party." Ben Ezra, Weinstein, & Co., Inc. v. America Online Inc., 206 F.3d 980, 984-85 (10th Cir. 2000). Specifically, § 230 provides in pertinent part that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," 47 U.S.C. § 230(c)(1), and that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3). The CDA defines an "interactive computer service" ("ICS") as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service

or system that provides access to the Internet . . . ." 47 U.S.C. § 230(f)(2). In addition, "information content provider" ("ICP") as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). ""Taken together, these provisions bar state-law plaintiffs from holding interactive computer service providers legally responsible for information created and developed by third parties." Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 254 (4th Cir. 2009). See Johnson v. Arden, 614 F.3d 785, 791 (8th Cir. 2010) (same). "Congress thus established a general rule that providers of interactive computer services are liable only for speech that is properly attributable to them." Nemet, 591 F.3d at 254. "The majority of federal circuits have interpreted the CDA to establish broad 'federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'" Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 (11th Cir. 2006) (quoting Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)).

As the Tenth Circuit Court of Appeals has noted, "Congress enacted § 230 to promote freedom of speech in the 'new and burgeoning Internet medium' by eliminating the 'threat [of] tort-based lawsuits' against interactive services for injury caused by 'the communications of others.'" BenEzra, 206 F.3d at 985 n.3 (quoting Zeran, 129 F.3d at 330). "The Internet is a unique and wholly new medium of worldwide human communication, which enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world." Id. (quotations omitted). "Congress specifically found that '[t]he Internet and other

interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.'" Id. (quoting 47 U.S.C. § 230(a)(3)). In addition, "Congress further stated, 'It is the policy of the United States, . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State Regulation.'" Id. (quoting 47 U.S.C. § 230(b)(2)).

"The prototypical service qualifying for this statutory immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posted by others." F.T.C. v. Accusearch Inc., 570 F.3d 1187, 1195 (10th Cir. 2009). In this case, we are dealing with just such an online messaging or bulletin board. It is undisputed that neither Beann nor Wave59 originated the posting plaintiff finds objectionable. Rather, Biddinger was the "information content provider." Wave59 was the "interactive computer service." Consequently, this court finds that the CDA provides these defendants with federal immunity against the plaintiff's state tort claims based upon the posting being placed on and kept on the Wave59 website, in other words immunity with respect to "information provided by another information content provider." 47 U.S.C. § 230(c)(1). See Zeran, 129 F.3d at 330-34 ("[L]awsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions–such as deciding whether to publish, withdraw, postpone or alter content–are barred. . . . Liability upon notice [of an allegation that the content was defamatory] would defeat the dual purposes advanced by § 230 of the CDA. . . .") (emphasis added).

Plaintiff has not alleged that the Wave59 defendants were active participants in

the creation or the development of the posting. He has merely alleged that Wave59 provided an electronic bulletin board forum and displayed the posting by Biddinger, which was an e-mail by Stewart. In addition, he complains that the Wave59 defendants did not remove the posting when they were alerted (such as via the Complaint in the Oklahoma action) to plaintiff's assertion that the posting was defamatory. The court agrees with the Wave59 defendants that such conduct as asserted is precisely the type of conduct that is protected by the CDA.

Plaintiff also asserts that Beann contacted third parties, directing them to the posting on the bulletin board. Beann denies this allegation and asserts that even if this claim had factual support, that sort of conduct, in and of itself, is also protected under the CDA. This court agrees that even if Beann "directed" users of the board to Exhibit H, such conduct does not diminish the protections of the CDA's immunity. See Blumenthal v. Drudge, 992 F. Supp. 44, 51-52 (D.D.C. 1998).[2] Even if that were not the case, as discussed below, this court finds that the plaintiff has failed to state a claim upon which relief may be granted.

B. Libel/Defamation, False Light, Intentional Infliction of Emotional Harm Claims

"A federal court in a diversity case applies the choice of law principles of the state

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[2]In Blumenthal v. Drudge, the provider of the interactive computer service (AOL), *inter alia*, affirmatively promoted the material of the information content provider (the person who wrote the alleged defamatory material about the plaintiff). The court noted that "AOL issued a press release making clear the kind of material Drudge would provide to AOL subscribers–gossip and rumor-and urged potential subscribers to sign onto AOL in order to get the benefit of the Drudge Report." Blumenthal, 992 F. Supp. at 51. The court nevertheless found that AOL was immune from suit under the CDA. Id. at 53. The court stated that "Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others." Id. at 52.

in which it sits." Century 21 Real Estate Corp. v. Meraj Intern. Inv. Corp., 315 F.3d 1271, 1281 (10th Cir. 2003). "Under Colorado conflict of law rules, the law to be applied in a libel action is that of the state having the most significant relation with the parties in communication." Zimmerman v. Board of Publs. of Christian Reformed Church, Inc., 598 F. Supp. 1002, 1011 (D. Colo. 1984). In Colorado, courts follow "the most significant relationship to the occurrence and parties test, expressed in the Second Restatement [(Second) of the Conflict of Laws], for multistate tort controversies." AE, Inc. v. Goodyear Tire & Rubber Co., 168 P.3d 507, 509 (Colo. 2007) (citing First Nat'l Bank in Fort Collins v. Rostek, 514 P.2d 314, 316 (1973)). See Lawson v. Western Skyways, Inc., 2010 WL 2943550, at *1 (D. Colo. July 22, 2010); Ledbetter v. Wal-Mart Stores, Inc., 2009 WL 3837878, at *4 (D. Colo. Nov. 13, 2009) ("[I]t is clear that Colorado's choice of law standard is the 'most significant relationship to the occurrence and parties test expressed in Restatement (Second) of the Conflict of Laws § 145, 171 (1971).'") (quotations omitted). While "[i]n defamation cases this is usually the state of the plaintiff's domicile," Zimmerman, 598 F. Supp. at 1011, which in this case would be Oklahoma, here we are dealing with Internet communications involving parties in multiple states.

Under the Restatement, contacts to be taken into account in determining the "most significant relationship to the occurrence and the parties" include the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile, residence, nationality, place of incorporation of business of the parties, and the place where the relationship, if any, between the parties is centered. AE, Inc., 168 P.2d at 510 (citing Restatement (Second) of Conflicts § 145). In addition, those

contacts are to be evaluated according to their relative importance with respect to the particular issue. Id. "Courts are to evaluate the Section 145 contacts and assign a relative degree of importance to each." Lawson, 2010 WL 2943550, at *1.

In this case, with respect to the first factor, the injury allegedly occurred in Oklahoma as plaintiff alleges he was an Oklahoma resident when he filed the Complaint (he is now a Missouri resident). With regard to the second factor, the place where the conduct causing the injury occurred, plaintiff himself avers in his Complaint that "All of the Plaintiff's claims set forth arise in this district and a substantial part of the Defendant's [sic] wrongful acts and omissions complained of occurred in this district." (Docket No. 1 at 3). The conduct complained of against the Wave59 defendants was their allowing the posting to be put on their bulletin board, their failure to remove it, and Beann's sending e-mails to other parties. Plaintiff averred in the Complaint that Wave59 is a Colorado corporation with its place of business in Colorado and Beann is a Colorado resident. Thus, it would follow that the location of the bulletin board and origin of Beann's e-mail, and therefore the place where the conduct causing the injury occurred, is Colorado. Regarding the third factor (domicile, residence, nationality, place of incorporation, and place of business of the parties), as stated above, plaintiff averred in the Complaint that Wave59 is a Colorado corporation with its place of business in Colorado and Beann is a Colorado resident. In addition, plaintiff is now a Missouri resident. Finally, the fourth factor (the place where the relationship, if any, between the parties is centered) would again be Colorado because the primary relationship alleged here centers on the Wave59 website and its bulletin board.

Reviewing the four factors, this court agrees with the Wave59 defendants that

the state with the most significant relationship to the occurrence and parties is Colorado, the forum where plaintiff chose to file this suit. The place of conduct that allegedly caused plaintiff's injury, the location of the Wave59 defendants, and the place where the relationship is centers weigh in favor of the application of Colorado law.

Under Colorado law, there is no cause of action for false light invasion of privacy, "a cause of action arising out of publicity that unreasonably places another person in a false light before the public." Denver Pub. Co. v. Bueno, 54 P.3d 893, 894 (Colo. 2002). "[I]t is highly duplicative of defamation both in interests protected and conduct averted." Id. Therefore, that claim should be dismissed.

In addition, this court further agrees with the defendants that whether under Colorado law (as cited by the Wave59 defendants) or Oklahoma law (as cited by both the Wave59 defendants and the Stewart defendants in their motions to dismiss), the posting by Biddinger is not defamatory,[3] and plaintiff's allegations of intentional infliction

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[3]"In Colorado, the elements of a cause of action for defamation are: (1) a defamatory statement concerning another; (2) published to a third party; (3) with fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special damages or the existence of special damages to the plaintiff caused by the publication." McIntyre v. Jones, 194 P.3d 519, 523-24 (Colo. App. 2008) (quoting Williams v. Dist. Court, 866 P.2d 908, 911 n.4 (Colo. 1993)). See Nagim v. Douglas, 2012 WL 113433, at *2 (D. Colo. Jan. 13, 2012) ("Under Colorado law, '[d]efamation actions may lie for published or publicly spoken statements, in the forms of defamation by libel or defamation by slander, respectively.' . . . . A statement is defamatory if it is false and tends to so harm the reputation of another as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him.") (citation omitted).

In Oklahoma, "[a] plaintiff seeking to recover for defamation must prove 'a false or malicious unprivileged publication by writing, printing, picture, of effigy . . . which exposes [the plaintiff] to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation. . . ." Grogan v. KOKH, LLC, 256 P.3d 1021, 1026-27 (Okla. 2011) (citing 12 O.S.2001 § 1441).

of emotional distress are inadequate because plaintiff has not alleged a behavior that is extreme and outrageous; the conduct alleged is not so outrageous in character as to go beyond all bounds of decency. See Smith v. Colorado Interstate Gas Co., 794 F Supp. 1035, 1042 (D. Colo. 1992) ("Conduct supporting an intentional infliction of emotional harm claim must be 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"'") (quoting Churchey v. Adolph Coors Co., 759 P.2d 1336, 1350 (Colo. 1988)); Durham v. McDonald's Restaurants of Okl., Inc., 256 P.3d 64, 66 (Okla. 2011) ("In order to prove the tort of intentional infliction of emotional distress or outrage, a plaintiff must prove each of the following elements: 1) the alleged tortfeasor acted intentionally or recklessly; 2) the alleged tortfeasor's conduct was extreme and outrageous; 3) the conduct caused the plaintiff emotional distress; and 4) the emotional distress was severe.").

Opinionative, judgmental, or evaluative statements are not factual or actionable. See Sky Fun 1 v. Schuttloffel, 27 P.3d 361, 368 (Colo. 2001); Miskovsky v. Oklahoma Publ. Co., 654 P.2d 587, 594 (Okla. 1982). Whether a statement is one of fact or opinion is a question of law for the court. Lockett v. Garrett, 1 P.3d 206, 210 (Colo. App. 1999) ("Whether allegedly defamatory language is constitutionally privileged is a question of law . . . ."); Seible v. Denver Post Corp., 782 P.2d 805, 809 (Colo. App. 1989); Metcalf v. KFOR-TV, 828 F. Supp. 1515, 1529 (W.D. Okla. 1992). Looking at the nature and full content of the communication at issue, this court finds that the

posting (Exhibit H) is comprised of opinion and other judgmental statements that are constitutionally protected and are not actionable under Colorado or Oklahoma law. In his e-mail, Stewart was discussing his reasoning for the dissolution of his partnership with plaintiff and not being able to back plaintiff's work, including his opinion that the price of the plaintiff's work was not justified and the work was not up to high enough standards because based upon Stewart's analysis of other works, he believed that most of the plaintiff's ideas were already addressed in variations in other published materials.

In sum, plaintiff's claims of libel/defamation, false light invasion of privacy, and intentional infliction of emotional distress do not survive defendants' 12(b)(6) motion.

C. Conspiracy Claims

In Colorado, "[a] claim for civil conspiracy has the following elements: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) an unlawful overt act; and (5) damages as a proximate result thereof." Stauffer v. Stegemann, 165 P.3d 713, 718 (Colo. App. 2006). Here, plaintiff has failed to assert any facts that would show a meeting of the minds between or among any of the defendants. He merely alleges a conspiracy in conclusory fashion which is insufficient to survive a Rule 12(b)(6) motion to dismiss. See Central Masonry Corp. v. Bechtel Nat., Inc., 2010 WL 3730903, at *3 (D. Colo. Sept. 17, 2010). See also Twombly, 550 U.S. at 555 (plaintiff must provide more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action."). Therefore, plaintiff's conspiracy claims should also be dismissed.

D. Sanctions

The Wave59 defendants seek sanctions under Fed. R. Civ. P. 11(b)(2) and

(c)(3). Defendants assert:

> that it is so clear that these Defendants were and are protected under the law cited above, and that they were only passively involved in the alleged wrongful conduct, that the Plaintiff clearly did not investigate the facts of this case or perform any pre-filing review of the law before subjecting these Defendants to the proceedings in Oklahoma and in this Court. Further, once being apprised of the law by counsel for Defendant Biddinger and the undersigned counsel, Plaintiff persisted in pursuing his meritless claims advising "[P]lease file all the motions you want. I'm not going away."
>
> Moving Defendants submit that this conduct by the Plaintiff, even if he believed in his cause, is not reasonable under the circumstances of this case, and that the costs and attorney fees wrongfully incurred by the Moving Defendants should be awarded to them to sanction such conduct.

(Docket No. 98 at 10).

This court finds that it is unnecessary to address Rule 11 sanctions because these defendants are entitled to an award of their reasonable attorney fees and costs in defending the action pursuant to § 13-17-201, C.R.S., should the recommendation herein concerning their motion to dismiss be accepted.

III. Plaintiff's Request to Clerk of Court for Default In Accordance with F.R.C.P. 55 [sic] (Docket No. 154) and Motion of Defendants Wave 59 Technologies Int'l Inc. and Earik Beann to Include Wave 59 Technologies Int'l Inc. Owners and Officers in Motion to Dismiss or, in the Alternative, for Leave to Amend Answer (Docket No. 168)

Plaintiff seeks an entry of default judgment by the Clerk of Court against the Wave59 Technologies Int'l Inc. Owners and Officers. (Docket No. 154). This court's previous Minute Order (Docket No. 159) concerning this motion was vacated by Judge Blackburn in an Order entered on May 18, 2011. (Docket No. 162). Judge Blackburn

noted therein that his

> conclusion does not mean that plaintiff is entitled *ipso facto* to an entry of default against these still unnamed defendants, *i.e.,* Wave 59 Technologies Int'l Inc. Ownder's [sic] and Officers. It is not clear why these defendants remain John and Jane Does at this stage of the litigation, nor whether the alleged service on them was efficacious. Nevertheless, such matters are best addressed in the first instance by the magistrate judge. . . .

(Docket No. 162 at 3).

Plaintiff asserts the following in his motion. The Wave59 OWNERS AND OFFICERS (hereinafter "Owners and Officers") were served on October 25, 2010. Defendants Beann and Wave59 filed an answer on May 2, 2011. In this regard, plaintiff notes this court's Minute Order filed May 2, 2011 (Docket No. 133), in which this court granted the Motion of Defendants Wave 59 Technologies Int'l Inc. And Earik Beann for Order Relieving Them From Filing Their Answer Until After the Court's Action on Their Motion to Dismiss, If required, or, in the Alternative, Allowing Defendants to File Their Answer Immediately (Docket No. 129). Further, this court ordered that the Answer of Defendants Wave 59 Technologies Int'l Inc. And Earik Beann to Complaint (Docket No. 129-1), filed with the court on April 29, 2011, was accepted for filing as of the date of the Minute Order (May 2, 2011). (Docket No. 133). According to plaintiff, that Minute Order clearly shows that the Owners and Officers have been fully knowledgeable of the requirement of Rule 4 to respond to the Complaint but have failed to do so. Plaintiff asserts that "defendants clearly are trying to protect the Wave59 Technologies Int'l Inc. Officers and Owners by failing to answer the Complaint, and mislead the Court and the Plaintiff on the misdirection of the fact that only two of the three entities' that plaintiff has sued from Wave59 Technologies Int'l Inc., have been responding to Plaintiff motions.

And filing Motions and briefs with the court." (Docket No. 154 at 3).

Attached to plaintiff's motion is a Return of Service dated October 25, 2010, by a private process server, Kathleen Albright. That form indicates that service on the Owners and Officers was done by refusal by leaving a copy at 2685 Julliard Street, Boulder, CO 80305. (Docket No. 154). The following remarks are typed on the form:

> Spoke with Defendant, Earik Beann, on his front porch, on 10/25/10 @ 6:26 PM, and explained the specific nature of the District Court Summons and Complaint as well as the reason for providing him with three copies of the documents. A female occupant of the home came outside and spoke with both Earik Beann and myself about the papers. She told Earik to refuse service and I explained that Colorado statutes recognized Refusal of Service as valid service, which Earik Beannn appeared to agree with. She insisted that Earik Beann refuse service and I told them both that I would leave the documents on the porch if the documents were refused. She persuaded Erick [sic] Beann to refuse serviceand [sic] they both went inside and closed the door. Further research showed that the female occupant was Laura Beann, spouse of Earik Bean [sic], and according to her online "Plaxo" profile the "Chief Operating Officer of Wave59 Technologies."

(Docket No. 154 at 5).

The Wave59 defendants, on their own behalf and on behalf of the unnamed Owners and Officers, filed a response (Docket No. 173) to plaintiff's motion. They assert

> that entry of default in this case, where the parties claimed to be in default either do not exist or have not been served with a pleading that gives them "fair notice" of the claims against them, would be improper. There are no "Officers" of Wave59 other than Defendant Beann, and a Motion to Dismiss and Answer already have been filed on his behalf. Therefore, a default under Fed.R.Civ.P. 55 as to the "Officers" of Wave59 would not be proper because Mr. Beann has not "failed to plead or otherwise defend", per Fed.R.Civ.P. 55(a). A default against the two shareholders of Wave59, the only "Owners" of that corporation, would not be proper because they have not been served with a Summons and Complaint that meet the requirement of the federal court rules. Plaintiff's Complaint does not contain any allegations that would allow a reasonable person to

> determine whether the Plaintiff is suing either or both of the known shareholders, or some other persons, as claimed "Owners and Officers", and although nearly 10 months have passed since the Plaintiff filed his Complaint, the Plaintiff has failed to seek an amendment of his pleadings to provide an adequate description of those ostensible parties.
>
> Under these circumstances, Defendants submit that it would be manifestly unfair to default any of the unnamed defendant, and that, on the contrary as requested in Docket #s 98 and 168, the claims against those purported parties should be dismissed. However, if the Court is not included to grant those motions at the present time, at the least, the Plaintiff should be ordered to amend his Complaint to identify the parties against whom he is complaining, to recite sufficient facts to put those parties on notice as to what is being claimed against them, and those parties, once put on such notice, should be allowed the opportunity to file appropriate responses and defend themselves.

(Docket No. 173 at 1-2).

The Wave59 defendants correctly note that in the Complaint (Docket No. 1), plaintiff purports to sue but does not name the "Owners and Officers" of defendant Wave59. He does not describe these "Owners and Officers" and only mentions them in three places, in the caption, in the seventh line of paragraph 1, and in the last line of paragraph 2. Those mentions do not set forth any wrongful acts claimed to have been committed by such defendants other than by reference to acts allegedly committed by the other, named defendants. To date, plaintiff has not moved to amend his pleading to identify the Owners and Officers.

According to the Wave59 defendants, Earik Beann is the only authorized officer of Wave59, and The Earik Beann Living Trust and The Laura Beann Living Trust are the only shareholders of Wave59. (See Docket No. 173-1, ¶¶ 3, 6). The three Returns of Service filed by the plaintiff (Docket Nos. 18, 173-3) are titled "Greg Shrader v. Earik Beann, et. al," "Greg Shrader v. Wave 59 Technologies Int'l Inc., et. al," and "Greg

Shrader v. Wave 59 Technologies Int'l Inc. Owners and Officers, et al." As shown in the remarks quoted above, the process server believed that Laura Beann was the "Chief Operating Officer of Wave59 Technologies." Moreover, the copies of the Summonses left on the Beanns' porch by this process server merely identify the case name as "Greg Shrader v. Dr. Alan Biddinger ETAL," and nowhere else names the defendants. (See Docket No. 173-4).

As a general matter, default judgments are disfavored, Katzson Bros., Inc. v. U.S. E.P.A., 839 F.2d 1396, 1399 (10th Cir. 1988), and entry of a default judgment is committed to the sound, broad discretion of the trial court. Dennis Garberg & Assoc., Inc. v. Pack-Tech Intern. Corp., 115 F.3d 767, 771 (10th Cir. 1997). "The preferred disposition of any case is upon its merits and not by default judgment." Gomes v. Williams, 420 F.2d 1364, 1366 (10th Cir. 1970). "Default may be entered under Rule 55(a) only where a party has "failed to plead or otherwise defend." Lariviere, Grubman & Payne, LLP v. Phillips, 2008 WL 4097466, at *8 (D. Colo. Sept. 4, 2008). "[C]ourts have consistently held that an honest mistake by the Defendant does not represent a willful failure to respond." Zen & Art of Clients Server Computing, Inc. v. Resource Support Assocs., Inc., 2006 WL 1883173, at *2 (D. Colo. July 7, 2006).

This court agrees with the Wave59 defendants that it would be manifestly unfair to default the Owners and Officers under the circumstances presented. A summons issued pursuant to Rule 4 must "be directed to the defendant," Fed. R. Civ. P. 4(a)(1)(B), which was not done here because the summonses were not directed to any specific or described party. "A pro se litigant is still obligated to follow the requirements of Fed. R. Civ. P. 4." DiCesare v. Stuart, 12 F.3d 973, 980 (10th Cir. 1993).

Furthermore, the Complaint is not captioned as against ALL Owners and Officers of Wave59, and plaintiff did not include in his pleading any facts that would necessarily allow a reasonable person to infer that the plaintiff was suing one or more claimed "Owners and Officers" or if he or she is one of the intended defendants. While the plaintiff is permitted to sue unnamed defendants, plaintiff must provide an adequate description of those parties that is sufficient to identify the person involved so process eventually can be served. Roper v. Grayson, 81 F.3d 124, 126 (10th Cir. 1996).

Moreover, the lengthy docket clearly reflects that defendant Beann has not failed to defend this action and, in fact, has vigorously defended this action. See Barker v. Board of County Comm'rs of County of La Plata, Colo., 24 F. Supp.2d 1120, 1131 (D. Colo. 1998) (default judgment inappropriate where, *inter alia*, defendant vigorously defended the action). Therefore, and in view of the confusion here created by the plaintiff's failure to name the Owners and Officers and failure to name any defendants on the Summonses, to enter a default judgment against Beann in his capacity as the Officer of Wave59 would be manifestly unjust. See Lariviere, Grubman & Payne, LLP v. Phillips, 2008 WL 4097466, at *8 (D. Colo. Sept. 4, 2008) (Plaintiff's motion for default was denied. The court "does not endorse 'gotcha!"-style litigation, where parties seek judgment based on technical errors, not the merits of the case.).

In addition, plaintiff has not yet named or served the "Owners" of Wave59, so entry of default and rendering default judgment against them should be denied.

It is also recommended that the Motion of Defendants Wave 59 Technologies Int'l Inc. and Earik Beann to Include Wave 59 Technologies Int'l Inc. Owners and Officers in Motion to Dismiss Or, in the Alternative, for Leave to Amend Answer (Docket

No. 168) be granted.

IV. Plaintiff's Motion of Summary of Judgment Against Wave59 Technologies Int'l Inc, and Earik Beann (Docket No. 245)

Plaintiff moves for summary judgment against defendants Beann and Wave59. (Docket No. 245). He asserts that these defendants "failed to bring all their claims in their original response to plaintiff complaint and are now barred from bringing any other claims for releife [sic] by Fed. R. Civ. 12 (G)(2). And Fed. R. Civ, 12 (h) (1) (a)." (Docket No. 245 at 1-2). Rule 12(g)(2) provides that "[e]xcept as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(g)(2). Furthermore, Rule 12(h)(1) provides that "[a] party waives any defense listed in Rule 12(b)(2)-(5) by: (A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or (B) failing to either: (i) make it by motion under this rule; or (ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course." Fed. R. Civ. P. 12(h)(1).

According to plaintiff, in their answers filed on November 15, 2010 (Docket No. 22), and December 3, 2010 (Docket No. 34), the Wave59 defendants argued that this court lacked personal jurisdiction over them, and then in their third answer (Docket No. 98), they argued five new defenses as grounds for dismissal. Plaintiff objects to this third answer because it adds five new defenses. He claims that Wave59 knew all five of these new defenses when they received a copy of these Complaint, and thus when they filed their first motion (Docket No. 22), they could have consolidated these five

defenses. He argues that Rule 12(g)(2) provides that Wave59 cannot make successive motions with new defenses to dismiss, and that Rule 12(g) and (h) forces them to combine all defenses in their first motion to answer the complaint or in their answer to the complaint and bars them from arguing some of their defenses in the pre-answer motions and then including some of their defenses in their answer. Their failure to include any defenses in their first answer, motion, response, pleading to the Complaint allegedly results in their losing those defenses. Therefore, plaintiff asks the court to find that Wave59 defendants waived any defenses that they omitted from Docket No. 22.

Defendants, however, correctly assert that Rule 12(g)(2) does not bar them from asserting their defenses under Rule 12(b)(6) because the two motions that are the basis for plaintiff's reliance upon Rule 12(g)(2) (Docket Nos. 22 and 34) were not made pursuant to Rule 12. Rather, Docket No. 22 was an Unopposed Motion for Stay of Proceedings, seeking a stay of the proceedings in this matter pending resolution of the plaintiff's two appeals before the Tenth Circuit regarding the dismissal of the plaintiff's Oklahoma action. That motion was denied by this court, and the parties were granted leave to seek administrative closure of this case consistent with D.C.COLO.LCivR 41.2. (Docket No. 27, Minute Order filed November 18, 2010). The Wave59 defendants thus subsequently filed Docket No. 34, which was a Motion by the Wave59 defendants To Close Matter Administratively or, in the Alternative, to Stay Proceedings to Stay or Alternatively to Close Matter. Therefore, this court finds that contrary to plaintiff's assertions, neither motion (Docket Nos. 22 and 34) was brought under Rule 12, and thus Rule 12(g)(2) and 12(h)(1) are inapplicable.

Plaintiff next asserts in his motion that he has shown the court "over 50 pages of

falsehoods with supporting exhibits by Defendant William Bradstreet Stewart, Plaintiff has also shown in briefs submitted to this court falsehoods told to this court by Attorney Jonathan A. Braun, further, Plaintiff has shown this court that Plaintiff has requested on several times for Attorney Jonathan A. Braun to remove his client Earik Beann false statements to the court. None of these request by Plaintiff have been followed by Mr. Braun, which shows he has no horror [sic], Plaintiff has shown in his briefs that Mr. Braun has committed a fraud on the Court, and has no wish to uphold the integrity of the court." (Docket No. 245 at 5-6). Plaintiff then discusses particular statements made and documents filed in this case with which he has an issue. It appears that the plaintiff is using his motion for summary judgment as yet another means of opposing the motion to dismiss discussed above. His second prayer for relief in this motion is that this court "holds [sic] that even if the Wave59 defendant's [sic] hadn't waived their defense under 230 CDA they would be barred from using the immunity of 230 because of their intentional, knowingly, wilfully, guilty knowledge in violating the law. As the Wave59 defendants allowed their web site to be used to facilitate a conspiracy and by doing so they committed an overt act in furtherance of a conspiracy, and by republishing exhibit H the wave 59 [sic] defendants committed libel against the Plaintiff, showing the Plaintiff in a false light, caused the Plaintiff emotional distress, and knowingly joined in a campaign to destroy the plaintiff and his work." (Docket No. 245 at 23). This court has found above that the motions to dismiss should be granted. Consequently, and after a careful review of the plaintiff's rambling, convoluted motion for summary judgment, this court recommends that the plaintiff's motion be denied.

WHEREFORE, for the foregoing reasons, it is hereby

RECOMMENDED that Plaintiff [sic] Request to Clerk of Court for Default In Accordance with F.R.C.P. 55 [sic] (Docket No. 154) be **denied**. It is further

RECOMMENDED that the Motion of Defendants Wave 59 Technologies Int'l Inc. and Earik Beann to Include Wave 59 Technologies Int'l Inc. Owners and Officers in Motion to Dismiss Or, in the Alternative, for Leave to Amend Answer (Docket No. 168) be **granted** to the extent that the court include Wave59 Technology Int'l Inc. Owners and Officers in the Motion of Defendants Wave 59 Technologies Int'l Inc. and Earik Beann to Dismiss this Matter Pursuant to F.R.C.P. [Sic] 12(b)(6) (Docket No. 98). It is further

RECOMMENDED that the Motion of Defendants Wave 59 Technologies Int'l Inc. and Earik Beann to Dismiss this Matter Pursuant to F.R.C.P. [Sic] 12(b)(6) (Docket No. 98) be **granted** and that the Complaint be dismissed as against defendants Wave 59 Technologies Int'l Inc., Earik Beann, and Wave 59 Technologies Int'l Inc. Owners and Officers. It is further recommended that these defendants be awarded their reasonable attorney fees as required by § 13-17-201, C.R.S., provided that by a date certain they file a motion for attorney fees in form and substance to the requirements of D.C.COLO.LCivR 54.3. It is further

RECOMMENDED that the Motion by Defendants William Bradstreet Stewart, Institute of Cosmological Economics, Inc., and Sacred Science Institute: (1) to Dismiss for Lack of Personal Jurisdiction; (2) to Dismiss for Failure to State a Claim; (3) to Dismiss for Improper Venue, and (4) for Attorneys' Fees and Sanctions (Docket No. 118) be **granted** and the claims against William Bradstreet Stewart, Institute of

Cosmological Economics, Inc., and Sacred Science Institute be dismissed without prejudice for lack of personal jurisdiction. It is further recommended that these defendants be awarded their reasonable attorney fees as required by § 13-17-201, C.R.S., provided that by a date certain they file a motion for attorney fees in form and substance to the requirements of D.C.COLO.LCivR 54.3. It is further

RECOMMENDED that the Plaintiff's Motion of Summary of Judgment Against Wave59 Technologies Int'l Inc, and Earik Beann (Docket No. 245) be **denied**.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives *de novo* review of the recommendation by the District Judge, Thomas v. Arn, 474 U.S. 140, 148-53 (1985), and also waives appellate review of both factual and legal questions. Makin v. Colorado Dep't of Corrections, 183 F.3d 1205, 1210 (10th Cir. 1999); Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Date: February 17, 2012
Denver, Colorado

s/ Michael J. Watanabe
MICHAEL J. WATANABE
United States Magistrate Judge