IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

KARL L. DAHLSTROM,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 4:15-CV-384-ALM-CAN
	§	
RICHARD DAWKINS AND THE RICHARD DAWKINS FOUNDATION FOR REASON AND SCIENCE,	§	
	§	
Defendants.	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pending before the Court is Defendants Richard Dawkins and The Richard Dawkins Foundation for Reason and Science's Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to Rule 12(b)(2) [Dkt. 7] and for Failure to State a Claim Pursuant to Rule 12(b)(6) [Dkt. 8]. After reviewing the Motions, and any responsive pleadings, the Court recommends that Defendants' Motions to Dismiss be **GRANTED**.

BACKGROUND

Plaintiff Karl Dahlstrom ("Plaintiff") brought this suit against Defendants Richard Dawkins ("Dawkins") and The Richard Dawkins Foundation for Reason and Science (the "Foundation") (collectively, "Defendants") for the "Tort Action of Outrage" or more specifically, the tort of Intentional Infliction of Emotional Distress ("IIED") [Dkt. 1 at 2]. Plaintiff contends that he "is the only individual on earth in the history of man that has scientifically disproven Evolution" and that he has written and published a book "which offers exclusive scientific proof that Darwinism is a fraud." *Id*. at 5. Plaintiff further claims that at some unspecified time and place Dawkins "publically stated that, 'somebody who claims not to

believe in Evolution is ignorant, stupid, or insane or wicked,'" *Id*. at 2. Plaintiff contends that the Foundation – who provides financial, location and professional support to Dawkins – has conspired and aided Dawkins in reproducing and republishing Dawkins' "outrageous" statement. *Id*. at 2-4. Because Plaintiff is the only individual to have purportedly disproven Evolution, he asserts that Dawkins' statement was obviously and clearly referring to him which has resulted in severe emotional distress, injury to Plaintiff's reputation, millions of persons being prejudiced and biased against Plaintiff which has subjected Plaintiff to hatred, contempt, ridicule and financial injury in the millions of dollars "from persons not exposed to the truth about Darwinian Evolution." *Id*. at 5-6.

Defendant Dawkins is a citizen and resident of the United Kingdom [Dkt. 1 at 1], and the Foundation is a foreign corporation, chartered in Delaware, with its principal office in Washington D.C. [*Id*.; Dkt. 9 at 1]. On July 22, 2015 Defendants filed their Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to Rule 12(b)(2) [Dkt. 7] and also separately their Motion to Dismiss for Failure to State a Claim Pursuant to Rule 12(b)(6) [Dkt. 8]. On September 3, 2015, Plaintiff filed a Motion to Strike the Foundation's Motions [Dkt. 9], to which the Foundation responded on September 7, 2015 [Dkt. 10]. Plaintiff has filed no response to Dawkins' Motions to Dismiss.

LEGAL STANDARD

Defendants move to dismiss based on Federal Rules of Civil Procedure 12(b)(2) for lack of personal jurisdiction and 12(b)(6) for failure to state a claim.

I. Federal Rule of Civil Procedure 12(b)(2)

In determining whether it may exercise personal jurisdiction in a diversity case over a nonresident defendant, a court must consider "both the forum state's long-arm statute and federal

due process." *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 609 (5th Cir. 2008) (citing *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 418 (5th Cir. 1993)). If a state's long-arm statute "extends to the limits of federal due process," as Texas's does, the Court must only perform a due process analysis. *Id.* (citing *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir. 1994)). Due process allows a federal court to exercise personal jurisdiction over a nonresident defendant only if (1) the nonresident defendant has established minimum contacts by "purposely avail[ing] himself of the benefits and protections of the forum state" and (2) "the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice." *Id.* (citing *Wilson*, 20 F.3d at 647).

Minimum contacts may be established through either specific or general jurisdiction. *Lewis v. Fresne*, 252 F.3d 352, 358 (5th Cir. 2001). Specific jurisdiction exists where the plaintiff alleges a cause of action which grows out of or relates to a contact between the defendant and the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). Elements which must exist for the court to exercise specific jurisdiction are: (1) the foreign defendant must purposely direct his activities at residents of the forum and (2) the cause of action must arise from or be connected with such activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73 (1985). *Walk Haydel & Assocs., Inc. v. Coastal Power Prod. Co.*, 517 F.3d 235, 243 (5th Cir. 2008) ("Specific jurisdiction applies when a nonresident defendant has purposefully directed its activities at the forum state and the litigation results from alleged injuries that arise out of or relate to those activities.") (internal quotation marks omitted). Conversely, general jurisdiction occurs when "a [s]tate exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum ...." *Helicopteros*, 466 U.S. at 414 n.9. General jurisdiction exists only when the defendant's

contacts with the state constitute "continuous and systematic" general contacts with the forum. *Id.* at 416. It can hardly be said that a defendant who has continuous and systematic contacts within a given state has not purposefully availed itself of the privileges and benefits of the laws of that state. However, general jurisdiction over a corporation is only appropriate where "the corporation is fairly regarded as "at home" such as in its "place of incorporation[ ] and principal place of business." *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 131 S. Ct. 2846, 2854 (2011).

After a non-resident defendant files a motion to dismiss for lack of personal jurisdiction the burden of establishing the district court's jurisdiction lies with the party seeking to invoke the court's jurisdiction. *Alpine View Co. Ltd. v. Atlas Copco AB,* 205 F.3d 208, 215 (5th Cir. 2000). Where, as here, no evidentiary hearing is conducted, "the party seeking to assert jurisdiction must present sufficient facts as to make out only a prima facie case supporting jurisdiction." *Id.* (citation omitted). When considering the motion to dismiss, the court must accept as true the plaintiff's uncontroverted allegations and conflicts between the facts contained in the parties' affidavits must be resolved in the plaintiff's favor. *Id.* (citations omitted). In considering a motion to dismiss for lack of personal jurisdiction a district court may consider affidavits, interrogatories, depositions, oral testimony or any combination of the recognized methods of discovery. *Revell v. Lidov,* 317 F.3d 467, 469 (5th Cir. 2002)

II. Federal Rule of Civil Procedure 12(b)(6)

A Rule 12(b)(6) motion to dismiss argues that, irrespective of jurisdiction, the complaint fails to assert facts that give rise to legal liability of the defendant. The Federal Rules of Civil Procedure require that each claim in a complaint include "a short and plain statement… showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). The claims must include enough

factual allegations "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

The Court, just as under Rule 12(b)(2), must accept as true all well-pleaded facts contained in Plaintiff's Complaint and view them in the light most favorable to Plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). In deciding a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555; *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009). The Supreme Court has further expounded upon the *Twombly* standard, "explaining that '[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Gonzalez*, 577 F.3d at 603 (quoting *Iqbal*, 556 U.S. at 678). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "It follows, that 'where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not 'shown' - 'that the pleader is entitled to relief.'" *Id.*

In *Iqbal*, the Supreme Court established a two-step approach for assessing the sufficiency of a complaint in the context of a Rule 12(b)(6) motion. First, a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusory allegations are "not entitled to the assumption of truth" and may be disregarded. *Iqbal*, 556 U.S. at 681. Second, the Court "consider[s] the factual allegations in [the complaint] to determine if they plausibly suggest an entitlement to relief." *Id.* "This standard 'simply calls

for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary claims or elements." *Morgan v. Hubert*, 335 F. App'x 466, 470 (5th Cir. 2009). The determination of "whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 678. In determining whether to grant a motion to dismiss, a district court may generally not "go outside the complaint." *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003).

ANALYSIS

In his Complaint, Plaintiff asserts a "Tort Claim of Outrage" otherwise alleged to be a claim for IIED against Defendants [Dkt. 1]. Defendants move to dismiss asserting this Court lacks personal jurisdiction [Dkt. 7] and further that Plaintiff has failed to state a claim upon which relief may be granted [Dkt. 8]. Plaintiff argues the Foundation's Motions should be stricken because it lacks standing to seek dismissal [Dkt. 9].

I. Plaintiff's Motion to Strike [Dkt. 9]

Plaintiff asserts that the Foundation lacks legal standing to file its Motions to Dismiss. *Id*. at 2. Plaintiff's argument appears to be that because the Foundation is a foreign entity not registered with the State of Texas it cannot defend itself against Plaintiff's claim(s). *Id*. at 1-2. Such an argument is contrary to established law. The Foundation is not required to be a registered entity to defend itself against suit (TEX. BUS. ORG. CODE § 9.051(c)(2) (West 2006) ("[t]he failure of a foreign filing entity to register does not…prevent the entity from defending an action, suit, or proceeding in a court in this state"); and, in any event, "it is axiomatic that bringing a lawsuit grants a named defendant standing to challenge the suit." *Cortes v. Republic Mortg. LLC*, No. 2:14-CV-1235-KJD-VCF, 2014 WL 4354141, at *1 (D. Nev. Sept. 3, 2014);

Hoilien v. Bank of America, No. 10-00712 JMS/BMK, 2011 WL 976699, at *14 (D. Haw. Mar. 17, 2011) (finding a claim for lack of standing "makes no sense against a defendant" because "standing is a requirement for a plaintiff in order to proceed in a lawsuit"). Accordingly, the Court finds the Foundation has standing to file its Motions to Dismiss and challenge Plaintiff's claim(s) herein. Plaintiff's Motion to Strike [Dkt. 9] is hereby **DENIED.**

II. Defendants' Motion to Dismiss for Lack of Personal Jurisdiction [Dkt. 7]

Defendants move to dismiss the instant case under Federal Rule of Civil Procedure 12(b)(2) on the basis that this Court lacks sufficient minimum contacts to establish either specific or general jurisdiction. For the reasons set forth below, the Court agrees that Plaintiff has failed to present a prima facie case supporting jurisdiction.

A. Plaintiff's Failure to File a Response

As an initial matter, to date, Plaintiff has failed to file any responsive briefing citing his opposition to Dawkins' Motions to Dismiss and/or the reasons for such opposition. Local Rule CV-7(d) provides as follows:

> **Response and Briefing.** The response and any briefing shall be contained in one document. A party opposing a motion shall file the response, any briefing and supporting documents within the time period prescribed by Subsection (e) of this rule. A response shall be accompanied by a proposed order conforming to the requirements of Subsection (a) of this rule. Briefing shall contain a concise statement of the reasons in opposition to the motion and a citation of authorities upon which the party relies. **In the event a party fails to oppose a motion in the manner prescribed herein, the court will assume that the party has no opposition.** (Emphasis added).

Since Plaintiff has not filed a response to Defendant Dawkins Motions, the Court will assume that Plaintiff is not opposed to the Court's granting Defendant Dawkins' Motions.

B. Specific Jurisdiction

Notwithstanding Plaintiff's lack of opposition, the Court has reviewed the Parties' contentions regarding jurisdiction. Plaintiff contends that Defendants are subject to specific personal jurisdiction[1] in Texas because Dawkins has published books and other publications – some of which may incorporate the statement at issue herein – that are regularly distributed, disseminated and sold in Texas; and further, because Defendants direct electronic activity and media activity[2] into the State of Texas [Dkt. 1 at 1-2, 6-7].

Dawkins is a citizen and resident of the United Kingdom. *Id*. at 1. The Foundation is incorporated in Delaware and has its principal place of business in Washington, D.C. [Dkt. 1 at 1; Dkt. 9 at 1-2]. Per Defendants' Declaration, neither Dawkins, nor the Foundation have provided any services in Texas, manufactured any products or goods in Texas, own property in Texas, and/or maintain any offices, employees or operations in Texas [Dkt. 7 at 14-16]. The Foundation is not licensed and/or registered to conduct business in Texas. *Id.* Defendants do acknowledge having visited Texas in the past for business, but indicate that the most recent visit occurred in 2014. *Id*. None of Dawkins' books, articles, or academic papers have been published in the State of Texas; although some of them are admittedly accessible via the internet. *Id.* Moreover, Defendants declare that Dawkins has never met Plaintiff and was unaware of his existence (much less his residence in Texas) prior to the filing of this lawsuit. *Id.* Plaintiff does not dispute any of the aforementioned facts; and, in fact argues the majority in support of his own Motion to Strike [Dkt. 9].

[1] Plaintiff's Complaint alleges that this Court has specific jurisdiction over Defendants [Dkt. 1 at 1]. There is no express claim that this Court has general jurisdiction. Plaintiff does, however, allege certain facts that if broadly construed could be deemed to assert general jurisdiction. *Id*. at 2-5. Accordingly, and at Defendants' request, the Court analyzes both specific and general herein.

[2] Plaintiff intermittently uses the terms online, electronic activity and/or media activity in reference to Defendants' internet contacts with Texas. The Court will use the general term internet to encompass each of these references.

Examining the evidence before the Court, it is clear that Plaintiff has not satisfied its burden to show specific jurisdiction. Specific jurisdiction can only exist where the defendant has purposefully directed activities toward the forum state and the plaintiff's claims grow out of or relate to those activities. *See, e.g. Walk Haydel & Assocs., Inc.*, 517 F.3d at 243; *Access Telecom, Inc. v. MCI Telecommunications Corp.*, 197 F.3d 694, 718 (5th Cir. 1999). Foreseeability is critical in determining whether the defendant has purposefully directed activities toward the forum state. *Alpine View*, 205 F.3d at 215. "[O]ne cannot purposefully avail oneself of 'some forum someplace'; rather, as the Supreme Court has stated, due process requires that 'the defendant's conduct and connection with the forum state must be such that he should reasonably anticipate being haled into court there.'" *Revell*, 317 F.3d at 475 (quoting *Burger King*, 471 U.S. at 474). Here, there is absolutely no evidence presented that Defendants purposefully directed their activities at residents of Texas. Plaintiff does not dispute that none of Dawkins' books, conferences, interviews, or debates occurred in Texas, nor does Plaintiff contend that any of the same were published and/or were otherwise specifically directed at Texas. Plaintiff, rather, rests upon the contention that one or more of Defendants' publications containing Dawkins "outrageous" statement ultimately reached Texas via the internet or Defendants' international distribution/circulation network. *Id.*

"The internet presents a unique challenge to establishing personal jurisdiction over a non-resident defendant." *Hawbecker v. Hall*, 88 F. Supp. 3d 723, 727 (W.D. Tex. 2015). The Fifth Circuit has adopted the "sliding scale" test first set forth in *Zippo Mfg. Co., v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) to evaluate whether a defendant has sufficient minimum contacts with the forum state to establish personal jurisdiction via the internet. *Mink v. AAAA*

Development LLC, 190 F.3d 333, 336 (5th Cir. 1999).[3] As the Fifth Circuit made clear in *Mink*, the "nature and quality of commercial activity that an entity conducts over the [i]nternet" is paramount. *Id.* The level of activity can be categorized into a spectrum, with one end of the spectrum as a "passive" website that merely allows the owner to post information. *Revell,* 317 F.3d at 472. Merely publishing a statement on a website accessible to users in the forum state does not suffice to establish personal jurisdiction; "a more direct aim is required" to create a nexus between a plaintiff's alleged injury and a defendant's contacts with Texas. *Id.* At the other end of the spectrum are situations where a defendant "engage[s] in repeated online contacts with forum residents over the internet." *Revell,* 317 F.3d at 470.

Application of the *Zippo* test here shows that Defendants lack sufficient minimum contacts with Texas for this Court to exercise specific jurisdiction because Plaintiff has presented no evidence that any Texas resident purchased and/or was distributed Dawkins' books/publications based on a directed, purposeful act by Defendants. *See, e.g., Dymatize Enter., Inc. v. Reflex Nutrition Ltd.,* 2008 WL 161021 (N.D. Tex. 2008); *Healix Infusion Therapy, Inc. v. Helix Health,* LLC, 2008 WL 1883546 (S.D. Tex. 2008). Plaintiff maintains that Dawkins' publications are available or accessible on the internet to a "national, if not international audience," which includes "citizens of this State of Texas" [Dkt. 1 at 6]. Defendants' internet contacts, as alleged, are directed at the entire world, not Texas specifically or uniquely. The mere possibility of a Texas audience does not establish purposeful availment by Defendants of the benefits and protections of Texas, which is necessary to satisfy due process. *Revell,* 317 F.3d at 470. Plaintiff must establish Defendants' intent to target or focus on Texas readers/internet users as distinguished from readers/users in other states. *Id.* at 474-75 (citing

[3] The sliding scale test articulated in *Zippo* is rooted in the effects doctrine articulated in *Calder v. Jones*, 465 U.S. 783 (1984) (holding that minimum contacts exist where a nonresident defendant expressly aims intentionally tortious activity into the forum state).

Young v. New Haven Advocate, 315 F.3d 256, 258 (4th Cir. 2002)). Indeed, as courts have explained, asserting specific jurisdiction based on internet activity requires proof that the out-of-state defendant's internet activity is expressly directed at or directed to the forum state," and "more than simply making ... news articles accessible to [the forum state] ... [is] needed for assertion of jurisdiction." *Id*. at 475 (quoting *Young*, 315 F.3d at 262)). Plaintiff has failed to adduce any such proof.

Similarly, the fact that Defendants have allegedly sold or otherwise disseminated an unspecified number of Dawkins' books and publications in Texas through a distribution network does not evidence an effort by Defendants to direct activities toward or focus on Texas users. Plaintiff has not shown Defendants directed sales, or any other act, specifically or intentionally toward Texas or its residents. Again, Plaintiff has presented no evidence that any Texas resident, including himself, purchased or was distributed Dawkins' books and/or publications based on a directed or purposeful act by Defendants to reach out to Texas residents and/or Plaintiff.

C. General Jurisdiction

Turning now to general jurisdiction, in order to make a prima facie case establishing general jurisdiction Plaintiff must produce evidence that affirmatively shows Defendants' contacts with Texas unrelated to the litigation are sufficient to satisfy due process requirements. *Revell,* 317 F.3d at 471. Such unrelated contacts must be substantial, continuous and systematic. *Id*. This is a difficult test to meet because it requires evidence of extensive contacts between Defendants and the forum state. *Johnston,* 523 F.3d at 609 (5th Cir. 2008)

Here, the evidence establishes, at best, that Defendants traveled to Texas once in the past several years for business [Dkt. 7 at 15]. Defendants have no other direct contacts with Texas and cannot fairly be said to be "at home" in Texas. *See Goodyear Dunlop Tires Operations,*

131 S. Ct. at 2854. As stated above, Dawkins is a resident of the United Kingdom and the Foundation is a foreign entity registered in Delaware with its principal place of business in Washington D.C [Dkt. 1 at 1; Dkt. 9 at 1]. The Foundation has no offices, employees, management or operations in Texas [*see* Dkt. 14-16]. It is not licensed or registered to do business in Texas. Plaintiff does not dispute these facts. Plaintiff simply has not submitted enough proof to establish general jurisdiction.

This result is not changed by Plaintiff's reference to *Keeton v. Hustler Magazine, Inc.* 465 U.CS. 770 (1984) [Dkt. 1 at 6]. In *Keeton*, the plaintiff brought a libel suit alleging personal jurisdiction existed based on Hustler's regular circulation of magazines in the forum state; between 10,000 to 15,000 copies of the magazine were distributed to the forum state per month. *Id*. at 772 The Court found that "[t]he general course of conduct in circulating magazines throughout the state was purposefully directed at [the forum state], and inevitably affected persons in the state…[and that] [s]uch regular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous." *Id*. at 774. *Keeton* jurisdiction demands substantial circulation which is not alleged by Plaintiff, and thus is lacking in the instant case. *See, e.g., Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005).

Therefore, the Court finds no basis to assert either general or specific jurisdiction over Defendants; and, accordingly, recommends that Plaintiff's Complaint be dismissed, under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction.

III. Defendants' Motion to Dismiss for Failure to State a Claim [Dkt. 8]

Defendants also contend that Plaintiff's claim(s) against them for the tort of outrage (or IIED) and defamation[4] should be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) [Dkt. 8]. Assuming *arguendo* that the Court does have jurisdiction, the Court agrees. The Court's review of Defendants' Motions illustrates that Plaintiff has no plausible claims against Defendants.[5]

At the first step of the Rule 12(b)(6) analysis, the Court identifies conclusory allegations and proceeds to disregard them, for they are "not entitled to the assumption of the truth." *Iqbal*, 556 U.S. at 681. Plaintiff alleges, by way of this suit, that Dawkins at some unidentified time and place made a public statement about evolution which was, in actual fact, directed specifically at Plaintiff and has caused Plaintiff emotional distress [Dkt. 1 at 2, 6]. Plaintiff surmises he is the target of Dawkins' statement because it was directed to "'somebody' that did not believe in evolution" and being that "he is the only individual on earth in the history of man that has scientifically disproven Evolution" Plaintiff is obviously and clearly "the number one candidate for [such] attack". *Id*. at 3, 5. Plaintiff offers nothing more than his own far-fetched rhetoric that Dawkins' statement refers to and was intended to personally harm him. Plaintiff does not dispute, and in fact admits, that Dawkins has repeatedly made this same general statement in his books, at conferences, in interviews and debates, and that on its face, the statement does not attack any particular individual, but merely references "somebody". *Id.* at 2, 7. Because

[4] Plaintiff's Complaint does not specifically state a defamation claim; however, Defendants contend that certain factual allegations presented therein may be pertinent to and/or intended to assert such a claim [Dkt. 8 at 6n.6]. Accordingly, Defendants move to dismiss Plaintiff's IIED claim and also any defamation claim, to the extent such a claim is alleged. *Id.* This Court's analysis encompasses both claims (to the extent alleged by Plaintiff).

[5] The Court notes again that, generally, in considering a motion to dismiss under Rule 12(b)(6), it 'must limit itself to the contents of the [plaintiff's] pleadings, including the attachments thereto." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496 (5th Cir. 2000). For such reason, the Court has excluded from its consideration of Defendants' Motion to Dismiss for Failure to State a Claim any attachments and/or exhibits to Defendants' Motion to Dismiss for Lack of Personal Jurisdiction and Plaintiffs' Motion to Strike. In connection with the 12(b)(6) Motion, the Court has properly limited its consideration to the contents of Plaintiff's pleadings.

Plaintiff's allegations – that Defendant Dawkins' statement about evolution referred to and was intended to harm Plaintiff – amount to nothing more than unsubstantiated conclusions, they are not entitled to assumption of the truth.

Next, the Court further "consider[s] the factual allegations in [the Complaint] to determine if they plausibly suggest an entitlement to relief." *Gonzalez*, 577 F.3d at 603. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Twombly,* 550 U.S. at 556. A sheer possibility does not exist here. Plaintiff's Complaint does not contain sufficient factual allegations that, even if taken as true, would satisfy each of the elements for a claim of IIED or defamation in Texas; thus, there are no allegations that plausibly suggest an entitlement to relief.[6] As evidenced by the Court's earlier discussion, Plaintiff has not made factual allegations sufficient to establish that Dawkins' statement was intended to cause harm, constituted reckless conduct and/or that the statement at issue referred to Plaintiff.[7] *See, e.g. Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62 (Tex. 1998) (discussing facts sufficient to establish intent/reckless conduct); *Harvest House Publishers v. Local Church,* 190 S.W.3d 204 (Tex. App. 2006) (discussing facts sufficient to establish referring to). Each of which are necessary elements to Plaintiff's claims in this suit. *Kroger Texas Ltd. P'ship v. Suberu*, 216 S.W.3d 788 (Tex. 2006) (among the elements necessary to support a claim for IIED are that the defendant acted intentionally or recklessly); *Huckabee v. Time Warner Entertainment Co., LP,* 19 S.W.3d 419

[6] Based on its recommendation of dismissal for lack of personal jurisdiction and Plaintiff's failure to allege any facts that would make his claims plausible, the Court will not address Defendants remaining argument that Plaintiff's IIED claim is barred by First Amendment privilege [Dkt. 8 at 13-15].

[7] To prevail on an IIED claim, Plaintiff must establish that: (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe. *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 445 (Tex. 2004). To prevail on a defamation claim, Plaintiff must establish that a defendant: (1) published a statement; (2) that defamed the plaintiff; (3) while acting with actual malice (if the plaintiff is a public official/figure) or negligence (if the plaintiff is a private individual) regarding the truth of the statement. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998).

(Tex. 2000) (to prove defamation must establish statement referred to plaintiff). Thus, Plaintiff's claims do not raise a right to relief above the speculative level, and do not have facial plausibility "that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Gonzalez*, 577 F.3d at 603. Accordingly, assuming *arguendo* that the Court has personal jurisdiction over Defendants, the case should nonetheless be dismissed for failure to state a claim pursuant to Rule 12(b)(6).

CONCLUSION AND RECOMMENDATION

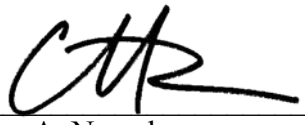
Based on the foregoing, the Court finds that The Richard Dawkins Foundation for Reason and Science has standing to challenge this litigation. Accordingly, it is therefore **ORDERED** that Plaintiff's Motion to Strike [Dkt. 9] is **DENIED.**

Moreover, the Court **RECOMMENDS** that Defendants Richard Dawkins and The Richard Dawkins Foundation for Reason and Science's Motion to Dismiss for Lack of Personal Jurisdiction Under Rule 12(b)(2) [Dkt. 7] and for Failure to State a Claim Under Rule 12(b)(6) [Dkt. 8] be **GRANTED** and Plaintiff's claim(s) against Defendants be **DISMISSED** in their entirety with prejudice.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 20th day of November, 2015.



Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE