



his motion to dismiss (Docket No. 26) in which he requests that the court dismiss his action in its entirety without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2).

Given Palmer's request to have his action dismissed in its entirety I deem his motion to dismiss all but Count V as **MOOT**. I recommend that the Court **DENY** Palmer's request to have his action dismissed in its entirety. Because I conclude that Palmer's complaint fails to state a claim as to any of his counts including Count V, I recommend that the Court **GRANT** Wells's motion to dismiss the complaint with prejudice as to all counts.

### *Pleadings*

Both parties to this dispute have played a part in obfuscating the issues that are relevant to the resolution of these motions to dismiss. Apropos Wells's motion, both parties have submitted exhibits that are not properly considered when a court sets out to weigh the sufficiency of a plaintiff's complaint under Federal Rules of Civil Procedure 8 and 12.<sup>1</sup> Contrary to Wells's belief, at this stage of this action Palmer does not have to generate evidence in support of his allegations; Palmer must set forth sufficient factual allegations in support of his claims. It is also important to keep in mind that the present action is filed against a single defendant, Nancy Wells, and, counter to Palmer's apparent expectations, this court does not permit a plaintiff to conduct a rolling casting call in the hopes of selecting additional defendants down the road.<sup>2</sup> It is also important to note that

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<sup>1</sup> Wells is arguing that she has insufficient contacts with the State of Maine to warrant the assertion of personal jurisdiction over her. If it were necessary for this court to delve into such an analysis then it would be necessary to flesh out the necessary facts vis-à-vis her contacts with the state. I do note that Palmer's contention concerning Wells's recent initiative in setting up her practice as a limited liability corporation seems entirely irrelevant to the question of minimal contacts.

<sup>2</sup> In his objection to Wells's motion to dismiss, Palmer imagines that the United States Department of Veteran's Affairs may be required to participate as Wells has admitted that she issued a subpoena to the

this is Palmer's second case against Wells in this court. He filed an action against her, Robert Murphy, and Donald Gardner on December 9, 2003 (Civ. No. 03-282- P-H), and Palmer unilaterally dismissed that action prior to answer by notice on January 8, 2004, stating that only Wells will be shown in a Maine state court to be the primary actor and initiator of the violations alleged. Rather than filing his second action in state court he returned to this court.

***Palmer's Counts and Allegations***

The following is the extent of Palmer's complaint with respect to the setting forth of his counts and the clarifications he offers in his objection to Wells's motion to dismiss:

- COUNT I: *Deprivation of Constitutional Rights:* 42 U.S.C. § 1983  
Clarification: Wells interfered with Palmer's pauperis status in the state courts when she communicated with court officers concerning Palmer's filings in the domestic case asking that his pauperis status be traversed. This deprived Palmer of his constitutional rights to "equal access to the state court, equal protection under the law, religious freedoms as they relate to parental responsibilities under the Christian faith, pursuit of happiness as well as his rights to privacy and protections under the Americans with Disabilities Act." This is the only court that Palmer can get declaratory relief with respect to his denial of access to court.
- COUNT II: *Conspiracy to Interfere with Civil Rights:* 42 U.S.C. § 1985  
Clarification: Wells initiated the traversal of Palmer's pauper status in the state domestic proceedings. She contacted the clerk of court's legal counsel, Don Gardner and conspired to revoke Palmer's pauperis status. Two separate orders of traversal entered. Palmer is a disabled veteran who is dependent on public housing and food stamps. Wells plainly stated to Palmer that she had this contact with Gardner. Wells's conduct was "so egregious on [its] face [that it] violate[d] the spirit of the Louisiana attorney oath, [the] U.S. Constitution, Code of Professional Ethics, Code of Judicial Conduct, and the laws of the United States, Maine[,] and Louisiana."
- COUNT III: *Interference with Equal Rights Under the Law* 42 U.S.C. § 1981
- COUNT IV: *Action for Neglect to Prevent* 42 U.S.C. § 1986
- COUNT V: *Conspiracy Against Rights* 18 U.S.C. § 241
- COUNT VI: *Deprivation of Rights Under Color of State Law* 18 U.S.C. § 242

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agency. He states that he has contacted the U.S. Attorney's office in Maine about the matter. He states that, therefore, counter to Well's assertion, 18 U.S.C. § 1391(e)(3) is applicable as the United States will likely be a party (plaintiff) in this case. While there are cases in which a plaintiff's ability to complete his cast of defendants must await discovery, Palmer's case does not fall within this category.

COUNT VII: *Loss of Enjoyment of Live*

Maine state tort

Clarification: Palmer previously enjoyed a close father-son relationship with his only child, RJR, since RJR's birth on January 9, 1994 through January 21, 2000. On February 1, 2000, Palmer filed a complaint with the City of Harahan Police Department, Harahan, Louisiana and the Louisiana Department of Child Protective Services, against RJR's maternal grandparents alleging that they were nude in front of the minor. From February 2000 to present no actions were taken by either agency. Instead, Wells and others took immediate action to deny Palmer of his constitutional rights and to sever Palmer's ties with RJR. Wells also denied Palmer access to the state court by alleging that Palmer had filed frivolous pleadings. Meanwhile, Wells and others have initiated no less than eight hearings over that last four years, while there have been only three initiated by Palmer. Nothing has been resolved by the state court other than Wells's continued efforts to prevent Palmer from filing pleadings and reestablishing and maintaining a normal parent-child relationship with his son.

COUNT VIII: *Negligent infliction of emotional distress*

Maine state tort

COUNT IX: *Intentional infliction of emotional distress*

Maine state tort

Clarification: Wells contacted Palmer by U.S. certified mail with a request that Palmer surrender his parental rights in exchange for immediate relief from his child support obligations and the need to pay for the court ordered evaluations. Palmer rejected Wells's "outrageous offer."<sup>3</sup>

Palmer states that after Wells's response he will present evidence to substantiate all of the allegations and counts made herein. In his request for relief he asks the court to enjoin Wells from attempting to "unlawfully or improperly obtain or request federal agency records, either through surreptitious means or using legitimate legal processes in an unlawful manner, without first filing actions [in] a federal court which has exclusive jurisdiction over federal agencies, employees and records." Palmer makes it clear that he does not want his federal suit commingled with the proceedings of the Louisiana state court civil case<sup>4</sup> and that he does not want his ex-spouse to be pulled into this action.<sup>5</sup>

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<sup>3</sup> In his clarification Palmer references 42.U.S.C § 1985, but this is clearly a Maine State tort claim.

<sup>4</sup> Palmer states that the state court is acting as if this federal action was never filed and asserts that the Louisiana judges and court officials are indignant with him for filing this federal civil suit and may retaliate against him for filing complaints with the United States Department of Justice Office of Public Integrity.

<sup>5</sup> In her motion to dismiss, Wells argues that Palmer's ex-wife should be joined as an indispensable party.

### ***Wells's Pre-Answer Motion to Dismiss***

In her "Pre-answer Motion to Dismiss Action,"<sup>6</sup> Wells states that her only interaction with Palmer has been in her role as an attorney for Palmer's ex-spouse in a civil domestic child visitation matter before the 24th Judicial District Court, Parish of Jefferson, Louisiana. Seeking information about Palmer's health status as it pertains to the visitation question, Wells has issued a single subpoena duces tecum to the Veteran's Administration Medical Center in Togus, Maine,<sup>7</sup> to which she has not received a response. Wells contends that this court does not have personal jurisdiction over her due to a want of minimal contacts<sup>8</sup> and Maine is not the proper venue as neither party resides in Maine.<sup>9</sup> What is more, she contends, Palmer does not state a federal cause of action under the statutes cited in his complaint and asks the court to dismiss the action because Palmer's complaint is overly vague and does not identify allegations upon which relief can be granted. All else failing, Wells argues that abstention under Younger v. Harris, 401 U.S. 37 (1971) is warranted because Palmer's claims can be presented in the ongoing child visitation proceedings in Louisiana.

### ***Palmer's Objection to Wells's Pre-Answer Motion to Dismiss***

Palmer has filed an objection to Wells's motion to dismiss. Therein he provides additional factual details and formally clarifies a few of his claims as indicated above. He described Wells as "a vexatious individual who has engaged in criminal and tortuous (sic) activities against the Plaintiff using a state court proceeding in Louisiana as an

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<sup>6</sup> This is also styled as an objection to Palmer's motion for preliminary discovery.

<sup>7</sup> Palmer asserts that Wells has also communicated with Palmer's landlord in Rumford, Maine and his former attorney who resides in Maine.

<sup>8</sup> Palmer's rejoinder to this is that Wells has directed all but one of her communications over the last two and a half years to him through addresses, telephones, and facsimiles in Maine.

<sup>9</sup> Palmer states in response to Wells's venue argument that he believes that the United States may become a plaintiff in this case due to Wells's issuance of a subpoena against the Department of Veteran's Affairs and that the U.S. Attorney Office in Maine would represent the United States in this action.

excuse for her tortuous (sic) activities." He relays that Wells has filed a complaint with the Louisiana Child Protective Services regarding the safety of Palmer's son, "RJR". He asserts that an August 2001 letter from Wells to Palmer is a "threatening communication" within the meaning of 18 U.S.C. 876, in that it in effect is a veiled ultimatum for him to surrender his parental rights. The letter, attached by Palmer, reads with the underline emphasis added by Palmer:

I have been retained by [your ex-spouse] for the limited purpose of contacting you about surrendering parental rights of your son. As you are aware, the judgment of April 2000 awarded [your ex-spouse], with your consent, sole custody with restricted, supervised visitation to you. If you agree to surrender your parental rights, [your ex-spouse] will terminate your child support obligation immediately upon your written surrender. Your surrender will, of course, relieve you of your obligation to undergo a psychological evaluation and pay the evaluation cost. At one time, you were interested in surrendering your parental rights as evidenced by a letter written by your attorney, Sarah Glynn to H. Craig Cabral on May 10, 2000.

When you initially contacted [your ex-spouse] about surrendering your parental rights, she did not respond because she was advised by her attorney, H. Craig Carbal, that it was premature. She is now in a position to go forward with an intrafamily adoption. Please find enclosed an act of surrender. If you wish to discuss this with me, please feel free to call.

If I do not hear from you, please make immediate arrangements to start the evaluation process as the July 2001 judgment requires you to do.

Sincerely,

Nancy K Durant

With respect to the attempt to subpoena his medical records, Palmer clarifies that the question of federal law is: "Can a Louisiana state court judge order a litigant in a state civil suit to waive his /her federal privacy act rights [5 U.S.C. § 552a] and ignore AF Form 2587 'Security Termination Statement?'" Palmer contends that Wells can be enjoined from pursuing federal agency records without following proper procedure. He

also complains that Wells has interfered with his pauper status in the Louisiana courts in an effort to fix the case. He asserts that Wells conspired with court officials to initiate a process to reverse his pauper status. While his access to the courts has now been restored due to Palmer's lodging of a complaint with the United States Department of Justice's Office of Public Integrity, Palmer insists that Wells has continued to use the legitimate discovery processes in the state proceedings to intimidate and harass Palmer. He claims that Wells is a de facto state actor in that she has used, under color of law, the state courts and its officers to violate Palmer's rights. He further believes that the Supremacy Clause of the United States Constitution requires the Louisiana state courts and attorneys who practice in those courts to comply with federal laws and the rulings of federal courts when there is a conflict between the state and federal laws or rulings.<sup>10</sup>

***Palmer's Reply to Wells's Response to Palmer's Voluntary Motion to Dismiss***

In his reply to Wells's response to his voluntary motion to dismiss (Docket No. 26), Palmer now requests that his entire case be dismissed without prejudice because this is his only recourse; he fears that a dismissal with prejudice would be catastrophic to his ability to protect his rights. Palmer anticipates that the United States might want to be heard in his case and Palmer is concerned it might be barred by such a dismissal from bringing an action against Wells for issuing a subpoena to a federal agency. Palmer contends that under Federal Rule of Civil Procedure 41(a)(2) his action should be dismissed "if for no other reason than to provide relief for the Plaintiff against currently

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<sup>10</sup> Palmer sees Wells's conduct as tied in with what he describes as the Louisiana state court's reputation for corruption, conspiracy, malfeasance and misconduct by attorneys, state court judges, local police officers, and parish clerks of courts. Palmer expresses his belief that the Louisiana state court system is infested with corruption as evidenced by the ongoing federal investigations of it and the entire bench of the United States District Court for the Eastern District of Louisiana. He states that judicial corruption is not "a problem" in Louisiana, it is a way of life. He contends that Wells wants to avoid the United States District Court of Maine because she would be unable to influence the outcome of the instant case by exchanging favors or through ex parte communications with presiding officials.

unnamed Defendants." Palmer states that there is an ongoing federal investigation by the U.S. Department of Justice and reveals that he is concerned that the adjudication of the federal law violations in this case will interfere with this ongoing investigation. Wells has not filed anything in response to Palmer's request for an in toto dismissal.

### *Discussion*

#### *Palmer's Request to Have his Action Dismissed Without Prejudice*

Civil Rule of Procedure 41(a) governs voluntary dismissals and the effect thereof.

It provides:

**(1) By Plaintiff; by Stipulation.** Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

**(2) By Order of Court.** Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Fed. R. Civ. P. 42(a) (emphasis added).

Palmer has expressly asked that this court consider his motion to dismiss the entire suit under subsection (2). Palmer seeks to have all his claims dismissed without prejudice, even though he is in a position in this action to file a notice of dismissal pursuant to subsection (1), as he did in his first action. Perhaps Palmer is seeking to

circumvent a "with prejudice" dismissal determination upon filing of his third action due to the final clause of subsection (a). See Commercial Space Mgmt. Co., Inc. v. Boeing Co., Inc., 193 F.3d 1074, 1076-79 (9th Cir. 1999) (plaintiff has absolute right to voluntarily dismiss an action prior to the service of an answer or a motion for summary judgment and once a notice of voluntary dismissal is filed the district court has no discretion with respect to the terms and conditions of the dismissal); see also Me. R. Civ. P. 41(a). I could locate no authority for the proposition that a plaintiff must proceed under subsection (a) if eligible, although most of the cases treating a subsection (b) dismissal involve suits well in process and vis-à-vis which the defendant has invested more time, energy, and expense than has Wells in this action.

To proceed with a dismissal without prejudice subsection (b) determination on Palmer's current motion without some testing of the validity of such a disposition would be to circumvent the purpose of the Rule 41(a) two dismissal rule. ASX Inv. Corp. v. Newton, 183 F.3d 1265, 1268 (11th Cir. 1999) (indicating that the primary purpose of the two dismissal rule is to prevent an unreasonable use of the plaintiff's unilateral right to dismiss an action in a manner that is abusive or harassing towards the defendant). Accordingly, it is necessary to analyze whether dismissing this action at this juncture would be an abuse of procedure. See id. 1268 -69 ("Even though we conclude a dismissal by motion and court order does not implicate the Rule 41(a)(1) two dismissal rule, we do not mean to suggest that there is no limit to Rule 41(a)(2) or analogous state dismissals.... Abuse of the procedure can be sanctioned. A court granting a Rule 41(a)(2) or analogous state dismissal may do so 'upon such terms and conditions as the court deems proper.'"). "Dismissal without prejudice should be permitted under the rule unless the court finds

that the defendant will suffer legal prejudice. Neither the prospect of a second suit nor a technical advantage to the plaintiff should bar the dismissal." Puerto Rico Maritime Shipping Authority v. Leith, 668 F.2d 46, 50 (1st Cir. 1981).

Vis-à-vis the Rule 41(a)(2) standard the First Circuit has explained:

Rule 41(a)(2) provides that "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.... Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice." Its purpose is to permit the plaintiff, with approval of the court, see Grover v. Eli Lilly & Co., 33 F.3d 716, 718 (6th Cir.1994) (noting that judicial approval is required "to protect the nonmovant from unfair treatment"), voluntarily to dismiss an action as long as "no other party will be prejudiced," Puerto Rico Maritime Shipping Auth. v. Leith, 668 F.2d 46, 50 (1st Cir.1981) (internal quotation marks and citation omitted). The district court is responsible under the rule for exercising its discretion to ensure that such prejudice will not occur. See Alamance Indus., Inc. v. Filene's, 291 F.2d 142, 146 (1st Cir.1961).

In deciding whether to grant a Rule 41(a)(2) motion, courts typically look to "the defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and the fact that a motion for summary judgment has been filed by the defendant." Pace v. Southern Express Co., 409 F.2d 331, 334 (7th Cir.1969); accord Grover, 33 F.3d at 718. But, courts need not analyze each factor or limit their consideration to these factors. See Tyco Labs., Inc. v. Koppers Co., 627 F.2d 54, 56 (7th Cir.1980) ("The enumeration of the factors to be considered in Pace is not equivalent to a mandate that each and every such factor be resolved in favor of the moving party before dismissal is appropriate. It is rather simply a guide for the trial judge, in whom the discretion ultimately rests."); see also Kern v. TXO Prod. Corp., 738 F.2d 968, 971 (8th Cir.1984) ("The very concept of discretion presupposes a zone of choice within which the trial courts may go either way [in granting or denying the motion].").

Doe v. Urohealth Systems, Inc., 216 F.3d 157, 160 (1st Cir. 2000). Given the fact that this action is still at the pre-answer/pre-summary judgment phase the Pace/Doe framework is not a perfect fit but it does set forth a template for identifying relevant factors.

In my view it is not possible to separate out the prospect for and the implications of a subsection (1) two dismissal rule from the analysis of Palmer's entitlement to a subsection (2) dismissal without prejudice. While the prospect of another lawsuit is not sufficient to warrant denying Palmer's request, there is a measurable prejudice to Wells in allowing such a dismissal given that she would lose the advantage of defending a third action by asserting the two dismissal rule available under both the federal and Maine rules. This does not seem to me to be a mere "technical advantage" lost. This is the second time Palmer has filed an action against Wells in the District of Maine, and it is clear the subsection (1) two dismissal rule is aimed at preventing these repeat filings, even though a defendant never had to go to the expense and effort of filing an answer or motion for summary judgment. See ASX Inv. Corp., 183 F.3d at 1268 ("While there is no precise digital answer, the mere repetition of such occurrence may, in and of itself, become so oppressively prejudicial as to require the sound conclusion that even once more is too much. This along with countless elements, traditionally called upon to underpin our concepts of reasonableness and fairness, goes into the process of sound discretion of the trial court."); Smith, Kline and French Labs. v. A. H. Robins Co., 61 F.R.D. 24, 29 -31 (E.D.Pa.1973) ("Multiple suits against the same defendant, withdrawn by the unilateral act of the plaintiff, without court intervention, could in some situations provide an opportunity for harassment. Engelhardt v. Bell & Howell Company, 299 F.2d 480 (8th Cir. 1962). But the injury to the defendant is caused by the institution of the action, not by the necessity of responding to any particular claim in an action already instituted. Once an action is filed, the defendant must suffer the inconvenience and expense of retaining counsel and responding to the complaint.").<sup>11</sup>

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<sup>11</sup> In this case Wells is representing herself but, as a practicing attorney, in doing so she is sacrificing

I also find it relevant that in this action Wells has prepared and filed a motion to dismiss citing numerous grounds for dismissal. As discussed below, at least one of the grounds has enough merit in my opinion to entitle her to that relief. For his part, Palmer states that he wants to bring the same action in the Maine state courts because he has found the federal system hard to navigate. However, Palmer filed this suit having already had experience with the federal system vis-à-vis his first action. He also knew at the time of that dismissal that he could file in the Maine system yet he returned here with what he now portrays as an incomplete list of defendants.

### ***Wells's Motion to Dismiss***

While Wells asserts various grounds for dismissal and identifies numerous infirmities in Palmer's complaint the simplest and perhaps most rudimentary analysis is that of whether or not any of his counts state a claim for which relief can be granted. The First Circuit has recently made it clear (after some confusion over whether certain § 1983 claims carried a heightened pleading standard) that, in the wake Swierkiewicz v. Sorema N. A., 534 U.S. 506 (2002),

courts faced with the task of adjudicating motions to dismiss under Rule 12(b)(6) must apply the notice pleading requirements of Rule 8(a)(2). Under that rule, a complaint need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." This statement must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). State of mind, including motive and intent, may be averred generally. Cf. Fed.R.Civ.P. 9(b) (reiterating the usual rule that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally"). In civil rights actions, as in the mine-run of other cases for which no statute or Federal Rule of Civil Procedure provides for different treatment, a court confronted with a Rule 12(b)(6) motion "may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

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time that could be spent representing clients.

Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61, 66 (1st Cir. 2004).

Palmer has set forth the factual allegations concerning Wells's conduct upon which he premises his legal claims, if in a bit of a jumbled form. Id. at 68 ("[I]n a civil rights action as in any other action subject to notice pleading standards, the complaint should at least set forth minimal facts as to who did what to whom, when, where, and why-- although why, when why means the actor's state of mind, can be averred generally. As we have said in a non-civil-rights context, the requirements of Rule 8(a)(2) are minimal-- but 'minimal requirements are not tantamount to nonexistent requirements.')(quoting Gooley v. Mobil Oil Corp., 851 F.2d 513, 514 (1st Cir.1988)). However, the First Circuit has made it clear that even under the plaintiff generous review of notice pleading, "in considering motions to dismiss courts should continue to eschew any reliance on bald assertions, unsupportable conclusions, and opprobrious epithets. Id. at 68 (internal quotation and citations omitted); id. ("As such, we have applied this language equally in all types of cases. We will continue to do so in the future.").

### ***Federal Claims***

First I note that there is no factual predicate for a determination that Wells is a state actor within the meaning of 42 U.S.C. § 1983. Palmer alleges that Wells is a private attorney hired by his ex-spouse.<sup>12</sup>

With respect to any claim under 18 U.S.C. § 241 or § 242, there is no private right of action under these criminal statutes. The First Circuit has spoken on this issue:

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<sup>12</sup> As Wells points out, it was the Louisiana court that issued the orders concerning Palmer's pauperis status and it is for the court to determine whether it will require Palmer to waive his federal privacy rights vis-à-vis the visitation proceedings. As framed by Palmer the question is a hypothetical question as there has been no such ruling by the court. As Wells states, she is not in a position to order Palmer to waive his privacy rights. Furthermore, for this Court to enter this fray in this context would certainly implicate the Rooker/Feldman doctrine. See Rosenfeld v. Egy, 346 F.3d 11, 18-19 (1st Cir. 2003).

[The plaintiff] has alleged that the appellees committed perjury, extortion, criminal conspiracy and racketeering. Generally, a private citizen has no authority to initiate a federal criminal prosecution. Keenan v. McGrath, 328 F.2d 610, 611 (1st Cir.1964). Only the United States as prosecutor can bring a complaint under 18 U.S.C. §§ 241-242 (the criminal analogue of 42 U.S.C. § 1983), Dugar v. Coughlin, 613 F.Supp. 849 (S.D.N.Y. 1985); Fiorino v. Turner, 476 F.Supp. 962 (D.Ma.1979.... These statutes do not give rise to a civil action for damages.

Cok v. Cosentino, 876 F.2d 1, 2 (1st Cir. 1989).

Vis-à-vis Palmer's 42 U.S.C. § 1985 claim that Wells conspired with court personnel to block his access to the court by traversing his pauperis status, he has not come near meeting the pleading standard for such a claim. With respect to this standard the First Circuit has explained:

An actionable section 1985(3) claim must allege that (i) the alleged conspirators possessed "some racial, or perhaps otherwise class-based, invidiously discriminatory animus," Griffin v. Breckenridge, 403 U.S. 88, 102 (1971), and (ii) their alleged conspiracy was "aimed at interfering with rights ... protected against private, as well as official, encroachment." United Bhd. of Carpenters & Joiners of America v. Scott, 463 U.S. 825, 833 (1983). See also Libertad v. Welch, 53 F.3d 428, 446 (1st Cir.1995) (citing Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 267-68 (1993)). The conspiracy allegation must identify an overt act. See Griffin, 403 U.S. at 93; Libertad, 53 F.3d at 450 n.18. If no racial animus is charged, a discriminatory class-based animus must be alleged. See Harrison v. Brooks, 519 F.2d 1358, 1359 (1st Cir.1975) (citing Griffin, 403 U.S. at 102, 91 S.Ct. at 1798). "The requirement that the discrimination be 'class-based' is not satisfied by an allegation that there was a conspiracy which affected the interests of a class of persons similarly situated with the plaintiffs. Rather, the complaint must allege facts showing that the defendants conspired against the plaintiffs because of their membership in a class and that the criteria defining the class were invidious." Id. at 1359-60.

Romero-Barcelo v. Hernandez-Agosto, 75 F.3d 23, 34 (1st Cir. 1996). There is no allegation that Wells (or the court) took action based on Palmer's race, nor is there an allegation of facts that show that Wells conspired against Palmer because of his

membership in a class.<sup>13</sup> Therefore, recognizing that Palmer has no heightened pleading burden vis-à-vis discrimination, he has failed to even provide notice of upon what basis he believes Wells discriminated against him. Because Palmer's § 1985 count does not state a claim, his § 1986 claim must also fail as the latter statute requires as a predicate a § 1985 type discriminatory animus and the commitment of a wrong on the part of a third party.<sup>14</sup>

For related reasons Palmer has not stated a claim that his rights under 42 U.S.C. § 1981 were violated. That provision provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981. While such an action can be brought against a private entity, see, e.g., Chapman v. Higbee Co., 319 F.3d 825, 829 -30 (6th Cir. 2003), Palmer has provided no factual allegation pertaining to this claim. As with his § 1985 claim, he has not even

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<sup>13</sup> The fact that Palmer filed for pauperis status certainly does not carry the day under this standard.

<sup>14</sup> Section 1986 of title 42 provides:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding \$5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

42 U.S.C. § 1986

alleged what characteristic of his – e.g., race, creed, national origin – is the basis for the discrimination claim.

### ***Maine Tort Claims***

Finally, I address and assess the Maine state court claim. In explaining his intentional infliction of emotional distress claim Palmer points only to the letter from Wells to him inquiring about his willingness to surrender his parental rights in exchange for a dissolution of his child support payment obligations and suggesting that he could avoid paying for court ordered evaluation. While Palmer describes the contents of letter as "outrageous" there is simply no doubt in my mind that it does not form a factual predicate for an intentional infliction of emotional distress claim under Maine Law. For, "[i]n order to recover for his claims of intentional infliction of emotional distress," Palmer must establish that Wells "intentionally or recklessly inflicted severe emotional distress," that her "conduct was so extreme and outrageous as to exceed 'all possible bounds of decency' such as would be regarded as 'atrocious and utterly intolerable in a civilized community,'" that Wells's "actions caused his emotional distress and that the distress is so severe that 'no reasonable man could be expected to endure it.'" See Vicnire v. Ford Motor Credit Corp., 401 A.2d 148, 154 (Me.1979) (quoting Restatement (Second) of Torts § 46 (1995)).

Palmer's complaint fares no better on his count for negligent infliction of emotional distress. On this standard the Maine Law Court has said, in comparing negligent infliction of emotional distress to most negligent torts:

Part of the confusion regarding claims of negligent infliction arises from the fact that the elements of a claim of negligent infliction of emotional distress are similar to most negligence torts: a plaintiff must set forth facts from which it could be concluded that (1) the defendant owed a

duty to the plaintiff; (2) the defendant breached that duty; (3) the plaintiff was harmed; and (4) the breach caused the plaintiff's harm. Devine v. Roche Biomed. Labs., Inc., 637 A.2d 441, 447 (Me.1994). Plaintiffs claiming negligent infliction, however, face a significant hurdle in establishing the requisite duty, in great part because the determination of duty in these circumstances is not generated by traditional concepts of foreseeability. Although each person has a duty to act reasonably to avoid causing physical harm to others, there is no analogous general duty to avoid negligently causing emotional harm to others. See Bryan R., 1999 ME 144, ¶ 30, 738 A.2d at 848; Devine, 637 A.2d at 447; see also Michaud v. Great N. Nekoosa Corp., 1998 ME 213, ¶ 20, 715 A.2d 955, 960 (declining to expand NIED recovery to rescuers).

Nevertheless, we have recognized a duty to act reasonably to avoid emotional harm to others in very limited circumstances: first, in claims commonly referred to as bystander liability actions; and second, in circumstances in which a special relationship exists between the actor and the person emotionally harmed. We have also held that a claim for negligent infliction of emotional distress may lie when the wrongdoer has committed another tort.

Curtis v. Porter, Me 2001 18 ¶¶ 18-19, 784 A.2d 18, 25 -26 (footnotes omitted). There is no bystander liability in Palmer's factual equation. The factual allegations supplied by Palmer concerning Wells's efforts with respect to her representation of Palmer's ex-wife fall far short of demonstrating a duty running from Wells to Palmer. The August 2001 letter and her initiation of hearing in the visitation proceedings were taken on behalf of her client who she had a duty to represent and who was on opposite sides of the visitation controversy. And Palmer has failed to state a claim as to any other tort upon which this claim could piggy back.

As for Palmer's "Loss of Enjoyment of Life" count, this is not an independent tort but an element of a damage claim. See Zillman, Simmons & Gregory, Maine Tort Law § 19.02 at 19-10 & n.45 (1994).

### ***Conclusion***

I conclude that Palmer's motion to dismiss all but Count V of his complaint (Docket No. 23) is **MOOT** in view of his subsequent request that this court dismiss his action in its entirety. However, for the reasons stated above, I also recommend that the Court **DENY** Palmer's request to dismiss this action without prejudice (Docket No. 26) pursuant to Federal Rule of Civil Procedure 41(a)(2). I do recommend that the Court **GRANT** Wells's motion to dismiss (Docket No. 13) for the reason that Palmer has failed to state a claim for which relief can be granted as to a single one of his federal or state counts.

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk  
U.S. Magistrate Judge

Dated August 11, 2004

PALMER v. WELLS

Assigned to: JUDGE D. BROCK HORNBLY

Referred to:

Demand: \$

Lead Docket: None

Related Cases: 2:03-cv-00282-DBH

Case in other court: None

Cause: 42:1983 Civil Rights Act

Date Filed: 01/15/04

Jury Demand: Plaintiff

Nature of Suit: 440 Civil Rights:

Other

Jurisdiction: Federal Question

**Plaintiff**

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