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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KHALID ELHASSAN,

Plaintiff(s),

v.

PORTER GOSS, ET AL,

Defendant(s).

HON. JOSEPH A. GREENAWAY, JR

Civil Action No. 06-1000

DEFENDANTS' REPLY BRIEF IN FURTHER
SUPPORT OF MOTION TO DISMISS

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PRELIMINARY STATEMENT

Defendants Porter Goss¹ and the Central Intelligence Agency (“CIA”) have moved to dismiss the twenty count complaint which alleges causes of action for tort, civil rights, and mandamus. Plaintiff’s reply brief largely responds by combining the causes of action and providing general responses to all of them. Plaintiff’s reply in large part, fails to respond to the law set forth in support of defendants’ motion. As will be shown below, plaintiff’s response fails to overcome the legal deficiencies of his complaint and the motion to dismiss must be granted.

APPLICABLE STANDARDS

Plaintiff asserts that this Court must accept each and every allegation of the complaint as true and deny defendant's motion to dismiss if there is any possibility that plaintiff can prevail. (Plaintiff’s Brief, p. 10-11) Plaintiff asserts that the standards are the same for all motions under Rule 12(b), F.R.Civ.P.. Plaintiff’s assertions are simplistic and not an entirely accurate statement of the law.²

The Third Circuit has held, and this Court has agreed, that the standards differ depending on whether the motion is one under Rule 12(b)(1) or 12(b)(6)

¹To the extent that Director Goss is sued in his official capacity, the new Director of the CIA, General Michael Hayden, should be substituted pursuant to Rule 25(d)(1), F.R.Civ.P..

²Plaintiff relies on *Scheuer v. Rhodes*, 416 U.S. 232 (1974) but fails to note that the case was reversed on other grounds by *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982); *Davis v. Scheuer*, 468 U.S. 183, 104 S.Ct. 3012 (1984).

and if under 12(b)(1), whether the motion is a facial or factual attack on the court's subject matter jurisdiction. If the motion is a factual attack under Rule 12(b)(1), "the court may consider and weigh evidence outside the pleadings to determine if it has jurisdiction. *Gould v. United States*, 220 F.3d 169, 178 (3d Cir. 2000) citing to *Mortensen v. First Federal Savings and Loan Association*, 549 F.2d 884, 891 (3d Cir. 1977). When a dispute exists as to certain jurisdictional facts alleged by plaintiff, "the Court is free to weigh the evidence and satisfy itself whether it has power to hear the case." *Carpet Group Int'l v. Oriental Rug Importers Assoc*, 227 F.3d 62, 69 (3d Cir. 2000). "[N]o presumptive truthfulness attaches to plaintiff's allegations and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of the jurisdictional claims". *Id.*. *Danvers Motor company v. Ford Motor Company*, 186 F. Supp.2d 530, 534 ((D.N.J. 2002)(JAG); *Continental Insurance Co v. United States*, 335 F.Supp. 2d 532 (D.N.J. 2004).

Moreover, "district courts should presume that they lack jurisdiction unless the contrary appears affirmatively on the record." *Id.* citing to *Renee v. Geary*, 501 U.S. 312, 316, 111 S.Ct. 2331 (1991). It is well established that it is plaintiff's burden to prove the existence of the Court's jurisdiction. *Danvers Motor Company v. Ford Motor Company*, 186 F. Supp. 2d at 534, n.5.

However, even under Rule 12(b)(6), "courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint" and "legal conclusions draped in the guise of factual allegations may not benefit from the

presumption of truthfulness." *In re Rockefeller Center Properties v. David Rockefeller*, 311 F.3d 198, 216 (3d Cir. 2002). A court "will not accept unsupported conclusions, unwarranted inferences or sweeping legal conclusions cast in the form of factual allegations". *Haesler v. Novartis Consumer Health Inc.*, 426 F. Supp. 2d 227, 229 (D.N.J. 2006)(JAG) citing to *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 475, 119 S.Ct. 2139 (1999).

ARGUMENT

I

THE COURT LACKS JURISDICTION OVER CLAIMS OF CONSTITUTIONAL VIOLATIONS

Defendants Goss and the CIA have moved to dismiss plaintiff's claims under 42 U.S.C. §§1981, 1982, 1983, 1985, 1986 and the fourth and fifth amendment pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)³ because neither is a proper party defendant and because the statute of limitations to bring such a claim has passed. Plaintiff's response confuses all of

³It is without dispute that 42 U.S.C §1983 does not apply to federal officials as it requires action under color of state law. It is well-established that section 1983 is not cognizable against the United States or Federal officers acting under color of Federal law. *District of Columbia v. Carter*, 409 U.S. 418, *reh'g denied*, 410 U.S. 959 (1973); *Black v. Black v. Indian Area School District*, 985 F.2d 707 (3d Cir. 1993). A person acts under color of State law only when exercising power possessed by virtue of State law and made possible only because the wrongdoer is clothed with authority of State law. *West v. Atkins*, 487 U.S. 42 (1988); *Dale-Murphy v. Winston*, 837 F.2d 348 (9th Cir. 1987); *Motes v. Meyer*, 810 F.2d 1055 (11th Cir. 1987), *reh'g denied*, 837 F.2d 1095 (11th Cir. 1987); *Calvert v. Sharp*, 748 F.2d 861 (4th Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985).

his causes of action and his defenses are not targeted against the specific arguments made by defendants. However, to the best plaintiff's arguments can be discerned, they fail to overcome the defects of the complaint.

A. NEITHER THE CIA NOR DIRECTOR GOSS IN HIS OFFICIAL CAPACITY ARE PROPER DEFENDANTS

The defendants argued that only individuals sued in their individual capacity are proper party defendants. Plaintiff does not argue that the agency is a proper defendant only that a suit against the agency is a suit against the United States (Plaintiff's Brief, p.12) It is difficult to understand how that helps him since the United States is not a proper defendant in a civil rights suit. Thus, the CIA is not a proper defendant and must be dismissed.

As to Director Goss, plaintiff asserts for the first time, that he has been named in both his official and individual capacity and states that this is evident by Count IV of the complaint which makes a general allegation that the defendants knew of the conspiracy against him. The fact remains that there is not one factual allegation of the complaint which specifically asserts that Director Goss did or did not do anything. Moreover, as discussed in footnote 6 of defendants' initial brief, knowing of a constitutional violation is not sufficient for liability under *Bivens*. A federal official must have actually participated to be liable.

The problem of plaintiff's failure to make any specific claim against Director Goss is highlighted by the fact that Goss was only the Director of the CIA from September 24, 2004 until May 5, 2006. Thus, Director Goss did not even work at

the CIA during the bulk of the time when plaintiff asserts these violations occurred.

Finally, plaintiff admits that he has only served Director Goss in his official capacity. The Court therefore lacks jurisdiction over the Director in his individual capacity and therefore lacks jurisdiction over the *Bivens* claims against him.

Plaintiff quite confusingly now argues that his *Bivens* claims can survive under the Federal Tort Claims Act (“FTCA”).(Plaintiff’s Brief, p.12) It is hard to imagine how a statute which allows suit against the United States for negligence would give this Court personal jurisdiction over these defendants to be personally liable for constitutional violations. ⁴ It does not. *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. Ct. 471, 114 S.Ct. 996 (1994). Defendants CIA and Director Goss must therefore be dismissed from Counts 1-7 of the complaint.

B. PLAINTIFF’S CONSTITUTIONAL CLAIMS ARE TIME BARRED

As discussed in defendants’ initial brief, the statute of limitations for bringing a suit alleging constitutional violations in Virginia is two years. Plaintiff asserts for the first time and not in his complaint, that some of the violations occurred in

⁴Moreover, as asserted in Argument II, plaintiff has failed to meet conditions precedent to the jurisdiction of the court under the FTCA as well.

New Jersey⁵. However, even if this were true, it does not help plaintiff for the same two year statute of limitations applies in New Jersey. *Cito v. Bridgewater Township Police Department*, 892 F.2d 23, 25 (3d Cir. 1989) (§1983 action governed by N.J.S.A. 2A:14-2's two-year limitations statute); *Napier v. Thirty or More Unidentified Federal Agents*, 855 F.2d 1080, 1087-88 (3d Cir. 1988) (state limitations period for tortuous personal injury claims also applicable to *Bivens* cases).

1. Equitable Tolling

It next appears that plaintiff argues that the statute of limitations should be tolled where a plaintiff “in some extraordinary way has been prevented from asserting his or her rights.” (Plaintiff’s Brief, p.14, citations omitted) Plaintiff does not assert that he did not know of the accrual of his cause of action. Indeed, such a position would be difficult to assert in light of the fact that he submitted an administrative tort claim in or about January 2003 in which he asserted a cause of action pursuant to *Bivens*. (Patterson Dec. Exhibit 1, Complaint p.22). Indeed, in his letter of that date, plaintiff asserts that he will file the attached complaint as soon as permissible and plaintiff did in fact file the complaint against the CIA in Virginia in 2003. (Defendant’s initial brief, note 2) Thus, plaintiff was quite capable of going to court, and did in fact do just that.

⁵Plaintiff cites to ¶¶109-110 as evidence that some of his claims occurred in New Jersey. Those paragraphs make no mention of New Jersey.

It appears rather that plaintiff claims that virtually everything that has allegedly happened to him in the last several years has been caused by the CIA and because of this, the CIA has prevented him from timely filing suit. Plaintiff is wrong.

Plaintiff asserts that he is entitled to equitable tolling because “Defendants took deliberate steps to both actively mislead Plaintiff with respect to his cause of action, as well as to create extraordinary circumstances to prevent him from asserting his claims.” (Plaintiff’s Brief, p. 15)

“Equitable tolling is an extraordinary remedy which should be extended only sparingly.” *Hedges v. United States*, 404 F.3d 744, 751 (3d Cir. 2005). It is not a defense that relieves plaintiff of his obligations. Rather, a plaintiff must exercise due diligence in preserving his claim. *Id.*, citing to *Irwin v. Dept of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453 (1990)

Initially it bears repeating that there are absolutely no allegations in the complaint as to Director Goss. Therefore, there is no basis on which to say that this defendant interfered in any way with plaintiff’s ability to file suit. To the extent plaintiff has now said that the Director was involved, it was only that he knew of the conspiracy being perpetrated by others. That certainly can not be called an interference with plaintiff’s ability to file a complaint. Additionally, Director Goss did not even work at the CIA for much of the relevant time period. Moreover, plaintiff believes that members of the CIA were responsible for numerous events in his life, including impersonating legal counsel, and

dissuading him from bringing a claim. But since the CIA is not a proper defendant, the agency's alleged actions are irrelevant. There are no allegations that Director Goss tricked or induced plaintiff into missing the filing deadline. Certainly, plaintiff as an attorney who has filed previous suits, was aware of the importance of time deadlines.

Additionally, this Court is not required to accept every outlandish accusation plaintiff makes. The Court need not accept bald assertions, factual inferences or legal conclusions, no matter how often plaintiff asserts them. Not one of plaintiff's assertions that the CIA impersonated legal counsel, intercepted "correspondence", subjected him to intensive pressures, falsely imprisoned him, seized his computer and threatened his life and livelihood, have a scintilla of evidence suggesting in any manner whatsoever, that any of these events occurred. What plaintiff submits by way of support, are merely his bald assertions that these events occurred and that the CIA was involved. Where independent evidence is provided, it does not support plaintiff's conclusions. For instance, plaintiff asserts that the CIA broke into his home. However, the police report (Plaintiff's Brief, p. 16, affidavit Exhibit 2) makes no mention of the CIA and points to the fact that plaintiff admitted leaving his window open and that a dresser drawer was also open. Plaintiff does not claim that anything was taken and nothing in the report refers to the CIA or indicates that his filing cabinet was "ransacked"⁶.

⁶Similarly, plaintiff asserts that the CIA has interfered in his being admitted to the New Jersey bar. However, Exhibit 3 to his affidavit says that a hearing is

Additionally, plaintiff provides no details about any of these claims such as how “Defendants” intercepted his email and correspondence, how and when lawyers were impersonated, in what way and why he was dissuaded from pursuing his claim, threatening him, etc. Most importantly, plaintiff has provided not one shred of evidence that even if these events had occurred, that they were done at the behest of anyone at the CIA. Because there is absolutely no evidence that any of the defendants, except for Director Goss, has ever worked for the CIA, plaintiff’s allegations are nothing but bald assertions and legal conclusions warranting no credence and are certainly not sufficient to warrant the wholesale voiding of the important doctrine of the statute of limitations.

Thus, there is no evidence that Director Goss in any way interfered with plaintiff’s ability to file a complaint in Court asserting constitutional violations.

2. Continuing Violation

Lastly, plaintiff asserts that he should be excused from the mandates of the statute of limitations because of the continuing violation theory. Plaintiff relies on *Cowell v. Palmer Township*, 263 F.3d 286 (3d Cir. 2001). The continuing violation theory has most often been applied in employment discrimination cases, and the Third Circuit has declined to apply it in a previous substantive due process case and in *Cowell*. *Cowell*, 263 F.3d at 293 citing to

needed because of his numerous arrests, his bankruptcy petition, his defaulted student loan and a whistleblower incident.

287 Corporate Center v. Township of Bridgewater, 101 F.3d 320, 324 (3d Cir. 1996).

To establish the doctrine, a plaintiff must establish “that the defendant’s conduct is more than the occurrence of isolated or sporadic acts.” *Cowell*, 263 F.3d at 292. Plaintiff must establish *at least* three factors: 1) whether the violations constitute the same type of discrimination 2) whether the acts are recurring rather than sporadic and 3) whether the act had a degree of permanence which should trigger the plaintiff’s awareness of and duty to assert his rights and whether the consequences would continue even in the absence of a continuing intent to discriminate. The degree of permanence is the most important factor. *Cowell*, 263 F.3d at 292 (citations omitted). The Court must focus “on the particular acts of the defendant and not a general interference with property rights.” *Cowell*, 263 F.3d at 294. The last act evidencing the continuing practice must fall within the limitation period. *Cowell*, 263 F.3d at 292. Plaintiff can not meet any of these requirements.

Most importantly, the only defendant relevant to this discussion is Porter Goss in his official capacity. Since neither Goss nor the CIA is a proper defendant to plaintiff’s *Bivens* claims, this defense is irrelevant. Moreover, to the extent the Court disagrees, there are no allegations or evidence that Porter Goss was involved in anyway with the claimed events or that he even worked at the CIA at the time the events are alleged to have occurred. To the extent plaintiff’s allegation

is that Director Goss knew of some undescribed conspiracy, that certainly does not establish that he had any participation in a continuing violation.

As to the specific elements of *Cowell*, contrary to plaintiff's legal conclusions, his claimed events are not the same. First, not all of his assertions, readily translate to a constitutional violation.⁷ Such actions as impersonating attorneys, following plaintiff, hypnosis, etc. do not constitute constitutional claims.

Second, as to frequency, plaintiff's allegations span approximately four years. Without specific dates being provided by plaintiff, and specifics as to which defendants did what, he can not establish that any one of the defendants was involved in frequent constitutional violations, much less that Director Goss did.

Thirdly, the degree of permanence, the most important factor, is the factor which destroys plaintiff's argument. For by his own argument, he claims that each and every one of the events which allegedly happened to him was egregious and violated his constitutional rights. (Plaintiff's Brief, p.20). Plaintiff's claims that each of these acts constitute constitutional violations, establish that each gave rise to an independent cause of action which required him to pursue each timely,

⁷Plaintiff for the first time mentions quid pro quo sexual harassment and racial discrimination. It should be noted that the complaint makes no allegations of discrimination and there are absolutely no causes of action alleging discrimination. Moreover, even if there were such claims, they would fail as plaintiff failed to exhaust administrative remedies required under Title VII. 29 C.F.R. §1614.105(a).

rather than sit back and attempt to abuse the important safeguards of the statute of limitations. *Cowell*, 263 F.3d at 294-95.⁸

Finally, plaintiff can not establish that the last violative act, falls within the statute of limitations. Since plaintiff filed his complaint in March 2006, only those acts occurring after March 2004 are examined to determine whether they meet the *Cowell* requirement. The only assertions which meet this time limit are that his computer was taken by unidentified defendants (Complaint ¶108), that unidentified defendants allegedly intercepted his correspondence and a woman attempted to seduce him. (Complaint ¶109) As previously discussed, these are bald factual and legal conclusions that don't immediately satisfy the requirements of a constitutional violation and don't involve Director Goss.

It must not be forgotten that statutes of limitations are important limitations long recognized by Congress and the Courts to protect defendants and the Courts from stale claims and the loss of evidence impeding the search for truth. *United States v. Kubrick*, 444 U.S. 111, 117, 100 S.Ct. 352, 357 (1979). Plaintiff has provided nothing more than his own imagination to obliterate one of the most important doctrines in law. Much more is required for plaintiff to succeed.

Thus, because plaintiff's complaint was not timely filed, it must be dismissed.

⁸Plaintiff claims that he attempted to assert his rights, but was "impeded at every turn by the Defendants." (Plaintiff's Brief p.21) Once again plaintiff asserts bald factual and legal conclusions to try to evade his responsibilities to the defendants to file his claims in court timely. He certainly managed to find his way to court and file a complaint at least once.

II

THE COURT LACKS JURISDICTION OVER
PLAINTIFF'S CLAIMS SOUNDING IN TORT

Defendants CIA and Director Goss moved to dismiss plaintiff's claims sounding in tort because plaintiff failed to timely institute suit, failed to name a proper party defendant, and because there is no waiver of sovereign immunity for intentional torts. Plaintiff's reply to these defenses is hard to decipher as once again, he has failed to distinguish what he is claiming for each of defendant's defenses. Like his complaint, his brief lacks a great deal of specificity. Defendants will therefore assume that everything in plaintiff's brief is being claimed against defendants' tort defenses.

A. PLAINTIFF FAILED TO TIMELY INSTITUTE SUIT

As established in defendants' initial brief, plaintiff was obligated to file suit within six months of the denial of his tort claim. (Defendants' Brief, p. 7) Plaintiff's administrative claim was denied in May 20, 2003 and informed him that he must file suit within six months, or by November 2003. (Patterson Dec. Exhibit 2) Therefore, rather than interfere with plaintiff's ability to file a complaint in court, the agency informed plaintiff of the statutory deadlines and plaintiff certainly did not engage in due diligence in preserving his claim. Plaintiff's complaint is almost two and one half years late.

1. Equitable Tolling

Plaintiff apparently believes that this time limit should be equitably tolled and therefore defendants are barred from raising time limits at all. However, as an initial matter, equitable tolling when applied, does not give a defendant a free ride forever. Time limits are only tolled to the extent the equitable defense applies. There are no allegations of plaintiff's complaint which specifically address the time period of May 2003 -November 2003, at all, much less against these defendants. Indeed, in one of the rare times when plaintiff has stated a date, he asserts that the interception of his correspondence and impersonation occurred in the summer of 2004, and the interference with his livelihood occurred in October 2005, long after he should have filed his case in court. (Plaintiff's brief, p. 15).⁹

The only cases in this circuit under the FTCA that have been located where equitable tolling has been applied, involve the issue of when the cause of action accrued and appear limited to the area of medical malpractice. *Hughes v. United States*, 263 F.3d 272 (3d Cir. 2001); *Green v. United States*, 2006 WL 839054 (3d Cir. 2006)(non precedential).

Moreover, equitable tolling applies 1)where plaintiff has been actively misled the plaintiff as to his cause of action 2)where extraordinary circumstances have

⁹Additionally, Director Goss did not begin working for the CIA until September 2004, (Complaint ¶107)long after plaintiff should have filed this law suit. Thus, Goss perpetuated no actions what so ever during the time that plaintiff should have filed his complaint in court.

prevented plaintiff from asserting his rights or 3) where plaintiff timely asserted his rights in the wrong court. *Robinson v. Dalton*, 107 F.3d 1018, 1022 (3d Cir. 1997). Equitable tolling is an “extraordinary remedy” that should be applied “sparingly” and a plaintiff must “exercise due diligence in preserving his claim.” *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453 (1990). In determining whether equitable tolling applies, the equities must be balanced. *Hedges v. United States*, 404 F.3d 744, 751 (3d Cir. 2005)

Plaintiff did file a premature complaint on his tort allegations in District Court in Virginia in January 2003 (Civil Action No 03-0063LMB) which case was pending until June 17, 2003 when it was dismissed without prejudice by Judge Brinkema. The filing and pendency of that matter at that time totally undercuts plaintiff's argument that he was prevented from timely filing a complaint.

Additionally, defendant's arguments stated above in response to plaintiff's tolling argument relative to his *Bivens* claims, also apply to his tort claims.

2. Continuing Violation

It is also assumed that plaintiff is attempting to argue that the theory of continuing violations should be applied to the tort arena. Defendants have found no cases in which application was permitted and indeed, the requirements of the theory would militate against it. Continuing violation is an equitable remedy, which, like tolling, should only be applied in extraordinary circumstances. The Court may not apply the theory where the acts have a degree of permanence which should trigger plaintiff's duty to assert his rights. Indeed, negligence claims are

specific acts, each one of which must stand on its own to meet the legal requirements of negligence. The FTCA requires that an administrative claim be filed for each and every alleged tort committed by a federal employee. 28 U.S.C. § 2675(a); *McNeil v. United States*, 508 U.S. 106, 111, 113 S.Ct. 1980, 1983 (1993); *Roma v. United States*, 344 F.3d 352, 362 (3d Cir. 2003), *cert. denied*, 543 U.S. 874 (2004).

Therefore, the Court lacks jurisdiction over each alleged tort not contained in plaintiff's administrative claim i.e. those occurring after December 2002. Plaintiff can not obviate his requirement to file a tort claim by seeking to apply the continuing violation theory. The filing of an administrative claim is mandatory. Thus, continuing violation does not apply to tort actions.

Defendants' discussion on continuing violation in the *Bivens* context, also applies to plaintiff's tort claims.

B. PLAINTIFF HAS FAILED TO NAME A PROPER PARTY DEFENDANT

Plaintiff apparently does not disagree that the United States is the only proper defendant in a suit under the FTCA. Plaintiff's sole response to defendants' argument that they are not proper party defendants, is to argue that a suit against these defendants is a suit against the United States. The FTCA requires otherwise and mandates that the United States is the only proper defendant. 28 U.S.C. § 2679(b) ("the remedy against the United States ...is exclusive of any other civil action or proceeding ...). As discussed in defendants' initial brief, the cases

are extensive that the FTCA is a limited waiver of sovereign immunity and as such must be strictly construed.

Moreover, the cases plaintiff relies on do not support him. The court in *Fort Worth National Corp v. Federal Savings & Loan Corp*, 469 F.2d 47, 54 (5th Cir. 1972) stated that an action against a federal agency is a suit against the United States only to support its finding that sovereign immunity applies, even when a suit is against only an agency. However, in both *Fort Worth* and *Blackmar v. Guerre*, 342 U.S. 512 (1952), the Court found that it lacked jurisdiction when the plaintiff named the agency. Under the FTCA, only the United States is a proper party defendant. Having failed to name the United States, the Court lacks jurisdiction over the tort claims.

C. THE UNITED STATES HAS NOT WAIVED SOVEREIGN IMMUNITY FOR INTENTIONAL TORTS

Defendants' are not liable for intentional torts because the FTCA does not waive sovereign immunity unless such torts are committed by law enforcement. As discussed in defendants' initial brief, the FTCA is a limited waiver of sovereign immunity and as such it must be strictly construed. (Defendants' initial brief, p. 10)

Plaintiff totally ignores footnote 7 of defendants' brief which makes clear that the employees of the CIA are not law enforcement and thus there is no waiver of sovereign immunity. Plaintiff's response is that he has not limited his complaint to acts committed by law enforcement personnel. (Plaintiff's Brief, p. 22) This

does not help plaintiff's position. If the federal employees on which the claims of intentional tort rest are not law enforcement, 28 U.S.C. § 2680(h) precludes jurisdiction under the FTCA. Only when intentional torts have been committed by law enforcement is sovereign immunity waived. Plaintiff has named no personnel who committed alleged acts of intentional torts who are law enforcement personnel.

The Court therefore lacks jurisdiction over the claims for intentional torts.¹⁰

III

PLAINTIFF IS NOT ENTITLED TO A WRIT OF MANDAMUS

In responding to defendants' argument concerning the legal requirements which doom plaintiff's request for mandamus, plaintiff explains why he believes

¹⁰Plaintiff appears to believe that the fact that he has named John and Jane Does saves his complaint. But since he identifies those defendants as employees or agents of the CIA, they similarly would not be considered law enforcement. Additionally, federal courts have consistently rejected pleadings that name unknown persons as defendants because of failures to properly identify the defendants with a reasonable degree of specificity, insufficiency of allegations concerning their specific involvement and the inability to perfect service.

See, Glaros v. Perse, 628 F.2d 679, 685 (1st Cir. 1980); *Fifty Associates v. Prudential Insurance Co.*, 446 F.2d 1187, 1191 (9th Cir. 1970); and *Dykes v. Camp*, 333 F. Supp. 923, 927 (E.D. Mo. 1971); *Garter-Bare Company v. Musingwear, Inc.*, 622 F.2d 416, 423 (9th Cir. 1980); and *Wiltsie v. California Department of Corrections*, 406 F.2d 515, 518 (9th Cir. 1968); *Black v. United States*, 534 F.2d 524, 528 (2d Cir. 1976); and *Wood v. Woracheck*, 437 F. Supp. 107 (E.D. Wis. 1977) Thus, the courts have consistently found that the these defects deprive the Federal courts of personal jurisdiction over the unnamed defendants. *Glaros*, 628 F.2d 679; and *Garter-Bare Co.*, 622 F.2d at 416.

that the information he seeks is important. (Plaintiff's Brief, 22-25) Such is irrelevant.

Plaintiff argues that he lacks an adequate remedy because he has not succeeded in obtaining the desired documents pursuant to his Freedom of Information Act request. (FOIA) If plaintiff is not satisfied with the response he received to his FOIA request, he must pursue the remedial scheme established in the FOIA statute through an administrative review and appeal to the district court of the denial. The fact that his request does not qualify under FOIA only points up the impropriety of his mandamus request, rather that justify his desire to do an end run around FOIA. Without any support what so ever, plaintiff asserts that he should be allowed to ignore both FOIA and the Federal Rules of Civil Procedure. Plaintiff once again has forgotten that a suit against the sovereign must be strictly construed. Just because he believes it is warranted to stray from Congress' mandate, does not make it so.

Plaintiff next argues that defendant owes him the duty to provide the documents and that he has a clear entitlement to the documents because the defendants are tortfeasors who owe their victim the duty of remedial conduct to abate harm. The FTCA has only waived sovereign immunity to provide plaintiffs with monetary damages. It has not provided plaintiff's with the rights plaintiff claims.

Plaintiff has failed to provide a specific citation which establishes that plaintiff has both a right to the documents sought and that defendant has any duty what

so ever to provide the documents he seeks. Given the extraordinary nature of the relief sought, plaintiff's failure to satisfy the stringent requirements for mandamus require that his cause of action for mandamus be dismissed.

CONCLUSION

As established in defendants' initial brief and this reply, the Court lacks jurisdiction over the complaint and plaintiff has set forth no facts which could state a claim on which relief may be granted. The complaint must therefore be dismissed.

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