IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-07-4060

Adam Key, *Plaintiff*,

v.

M.G. "Pat" Robertson and Regent University, *Defendants*.

DEFENDANT REGENT UNIVERSITY'S MOTION TO DISMISS UNDER RULE 12(B)(6) AND 12(B)(3); OR, IN THE ALTERNATIVE, MOTION TO TRANSFER VENUE UNDER 28 U.S.C. § 1404(a)

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ADAM KEY, Plaintiff,	§ § §	
v.	§	CIVIL ACTION NO. H-07-4060
	§	
M.G. "PAT" ROBERTSON and REGENT UNIVERSITY, Defendants.	§ § §	

DEFENDANT REGENT UNIVERSITY'S MOTION TO DISMISS UNDER RULE 12(B)(6) AND 12(B)(3); OR, IN THE ALTERNATIVE, MOTION TO TRANSFER VENUE UNDER 28 U.S.C. § 1404(a)

TO JUDGE SAMUEL B. KENT:

Defendant Regent University ("Regent"), files this Motion to Dismiss under FED. R. CIV. P. 12(b)(6) and 12(b)(3); or, in the alternative, Motion to Transfer Venue under 28 U.S.C. § 1404(a), seeking (i) dismissal of the First Amended Original Complaint of Plaintiff Adam Key ("Key") (Doc. # 5), or, in the alternative, (ii) a directive transferring Key's lawsuit to a court of proper jurisdiction and venue in the U.S. District Courts of Virginia. For the reasons discussed below, Key has no viable cause of action against Regent, venue is improper in Texas, and this Court should grant this Motion to Dismiss or, in the alternative, Motion to Transfer Venue.

I. SUMMARY OF MOTION.

Key has alleged that Regent's and Robertson's conduct constitutes violations of the United States and Texas Constitutions and violations of the Higher Education Act, and various state claims, including breach of contract, fraudulent inducement and intentional infliction of emotional distress. (Doc. # 5.) Key's frivolous claims should be dismissed, as a matter of law, for the following reasons: (1) under Rule 12(b)(6), Key has failed to state an actionable claim under the United States and Texas Constitutions because although freedom of speech is

protected, it is not absolute in that private actors, i.e., Regent and Robertson, are fundamentally immune from these constitutional guarantees; (2) under Rule 12(b)(6), Key's claims under the Higher Education Act ("HEA") are not actionable because there is no express or implied private right of action to enforce the HEA; (3) under Rule 12(b)(6), Key's remaining state claims, i.e., breach of contract, fraudulent inducement, and intentional infliction of emotional distress, are barred by applicable Texas law and are fatally deficient of supporting factual allegations; and (4) under Rule 12(b)(3), venue is improper in Texas because substantially all of the events allegedly giving rise to Key's claims occurred in Virginia. In the alternative, under 28 U.S.C. § 1404(a), Key's lawsuit should be transferred because Texas is not connected to the events giving rise to this action, whereas the Eastern District of Virginia is an adequate and available forum, and the private and public interest factors in regard to the convenience of the parties and witnesses weigh heavily in favor of venue in the Eastern District of Virginia.

II. SUMMARY OF FACTS.

Key's pleading contains harassing and irrelevant allegations[1] to create an inaccurate factual bias against Regent and Robertson, just as he has done in provoking media attention on his misleading statements of "facts." Accordingly, Regent has provided a more accurate and supported factual background, in Section IV(C)(1) on page 17 below, in its Motion, in the

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[1] For example, Key alleges that "Pat Robertson has made many statements--some completely ridiculous--including advocating murder and predicting widespread death and destruction ...," thereafter, quoting multiple statements of Robertson made between 1987 through 2005. (Doc. # 5, at pp. 7-8, ¶ 20.) Key's use of these irrelevant statements in his pleading is objectionable, blatantly harassing and highly prejudicial in that none of the statements has any relevance to the claims or allegations made the basis of this action. All the statements, in fact, referenced by Key were made prior to Key being a student at Regent.

Curiously, Key's accusations have changed in regard to these statements. Key's Original Complaint claims that "[n]one of the above religious and political views reflected in the above statements were told to Adam Key." (Doc. # 1, at p. 7, ¶ 19.) However, now in his First Amended Original Complaint, Key claims that these statements induced him to attend Regent by "indicat[ing] to Adam that he, like Regent President Pat Robertson, would enjoy Freedom of Speech and Expression ... while at Pat Robertson's college." (Doc. # 5, at p. 8, ¶ 21.)

alternative, to Transfer Venue to the Eastern District of Virginia. Nevertheless, and for purposes of the Motion to Dismiss, Regent provides the following limited and relevant facts.

A. Regent is a Private Academic Institution in Virginia.

Regent is a private academic institution[2] established in 1978 and located in Virginia Beach, Virginia. Robertson is the president and chancellor of Regent, and one of the members of the Board of Trustees of Regent.

Regent's mission statement is "to provide an exemplary education from a global, biblical perspective leading to bachelors, masters, and doctoral degrees to aspiring servant leaders in pivotal professions and to be a leading center of Christian thought and action." Regent sought to extend this aspiration to all students of Regent, including Key. In doing so, Regent took every reasonable and measured step to provide its students a safe, professional, and positive learning environment.

B. Key was a Student of Regent.

Key was admitted to Regent and began law classes in August 2006. On November 6, 2007, Regent suspended Key for one year for certain conduct in violation of Regent's Student Handbook, including violations of the Weapons Policy and the Standard of Conduct. Before doing so, Regent provided Key every reasonable opportunity to be heard regarding the suspected violations through scheduled administrative hearings, some of which he attended, whereas others he did not. Ultimately, Regent provided Key the appropriate avenue to appeal the decision to suspend Key for multiple violations of university policies. Key failed to exhaust his

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[2] Some Regent students receive federally backed student loans and grants. However, the Supreme Court held, in *Randell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764 (1982), that a privately operated school's receipt of public funds does not make it a state actor. 102 S.Ct. at 2721. Furthermore, Key does not dispute that Regent is a private academic institution. (Doc. # 1, at p. 3, ¶ 10; Doc. # 5, at p. 4, ¶ 12)) ("Defendant Regent University is a private college in Virginia Beach, Virginia").

administrative remedies at Regent by not appealing any of Regent's findings or decisions but, instead, filed this lawsuit.

III. STANDARD OF REVIEW

A. Authority to Challenging the Pleadings Under Rule 12(b)(6).

FEDERAL RULE OF CIVIL PROCEDURE 12(b) states in part, "the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). Dismissal of a claim under Rule 12(b)(6) is proper when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99 (1957). In reviewing a 12(b)(6) motion, the Court must accept the facts set forth in the complaint as true, so long as they are well pled. *See Southland Securities Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004). That said, a court does not "strain to find inferences favorable to the plaintiffs," *see id.* at 361, nor does a Court "accept conclusory allegations, unwarranted deductions, or legal conclusions." *See id.*; *see also Jones v. Enterprise Rent A Car Co. of Texas*, 187 F. Supp.2d 670, 674 (S.D. Tex. 2002) (Kent, J.). Thus, the plaintiff must provide either direct or inferential allegations respecting all the material elements of his claim to avoid dismissal under Rule 12(b)(6). *See Rockbit Industries U.S.A., Inc. v. Baker Hughes, Inc.*, 802 F. Supp. 1544, 1547 (S.D. Tex. 1991). More importantly, faced with mere suspicions or insufficient allegations, "the court is not required to 'conjure up unpled allegations or construe elaborately arcane scripts to' save a complaint." *See Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) (*quoting Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir. 1988)).

B. Authority to Challenging Venue Under Rule 12(b)(3).

Under the general venue statute, venue is proper in "a judicial district where any defendant resides, if all defendants reside in the same State," 28 U.S.C. § 1391(a)(1), or "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(a)(2). If venue is not proper, the district court may, in its discretion, choose to dismiss or transfer the case. FED R. CIV. P. 12(b)(3); 28 U.S.C. § 1406(a) ("The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought").

C. Statutory Authority to Transfer Venue Under 28 U.S.C. § 1404(a).

The statutory authority to transfer venue to another federal district is set forth in 28 U.S.C. § 1404(a), which provides as follows:

> [f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1404(a); *Keller v. Millice*, 838 F. Supp. 1163, 1168 (S.D. Tex. 1993). In *Stewart Organization, Inc. v. Ricoh Corporation*, the Supreme Court recognized the district court has discretion in adjudicating motions to transfer on an "individualized, case-by-case consideration of convenience and fairness." 487 U.S. 22, 29, 108 S.Ct. 2239, 2244 (1988). The district court is required to undergo a two-step inquiry: (1) whether the action "might have been brought" in the federal courts of Virginia, and (2) whether a change of venue will facilitate (a) the private convenience interest of the litigants, and (b) the public interests in the fair and efficient administration of justice. *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004).

IV. ANALYSIS AND AUTHORITY

A. Key's Complaint Should be Dismissed Under Rule 12(b)(6) Because He Has Failed to State a Claim Upon Which Relief Can be Granted.

First, it should be noted that Key has failed to bring any specific or direct allegations against Robertson in connection to various causes of action other than one count based on alleged defamation.[3] Instead, Key arguably uses an unpled claim of vicarious liability by means of an improper "group" pleading, i.e., making blanket and vague allegations against "Defendants," to bring Robertson into this lawsuit.[4] This is insufficient to satisfy the pleading requirements under the FED. R. CIV. P., and Key's complaint should be dismissed based on this alone. However, even if the Court finds that Key's complaint satisfies applicable pleading requirements, his causes of action fail as a matter of law.

1. Key's Claims for Violation of Freedom of Speech, Assembly and Religion are Misleading and Not Viable as a Matter of Law.

In his complaint, Key erroneously asserts that Regent, a private institution, and Robertson, an individual, violated his First Amendment right to freedom of speech and expression, assembly, and religion. (Doc. # 5, at pp. 11-12, ¶¶ 29-31.) Specifically, Key alleges his Constitutional rights were violated by suspending his attendance at the University after he depicted Regent's President, Robertson, in a false light using a school sponsored forum.[5] First,

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[3] "Allegations of constitutional violations must be pleaded with 'factual detail and particularity,' not mere conclusory allegations." *Jackson v. Widnall*, 99 F.3d 710, 715-716 (5th Cir. 1996) (affirming trial court's dismissal of plaintiff's constitutional claims because allegations were too vague and conclusory).

[4] Key only brings one specific claim, defamation, against Robertson which will be addressed in a separate motion to dismiss filed on behalf of Robertson, and which motion incorporates by reference the same arguments made herein as to the remaining causes of action based on the "group" pleading.

[5] Curiously, Key stated to the media that "I realize that Regent is not a state actor and I never tried to imply that it was. My First Amendment argument rests on ABA Standard of Accreditation 211(c), which states that religious law schools are permitted to enact policies 'only to the extent that these policies are protected by the U.S. Constitution' and that they must be 'administered as though the First Amendment of the United States Constitution governs its application." (http://www.abovethelaw.com/2007/10/regentgate_atls_exclusive_inte.php). Key's complaint is

even if Key's suspension was based on this depiction, "it is well settled that private action is not subject to the restrictions of the United States and Texas Constitutions." *Stevenson v. Panhandle Eastern Pipe Line Co.*, 680 F. Supp. 859, 860 (S.D. Tex. 1987). More specifically, the First Amendment "applies to and restrict[s] only the Federal Government and not private persons." *Public Utilities Commission of District of Columbia v. Pollak*, 343 U.S. 451, 461, 72 S.Ct. 813 (1952). As such, Regent and Robertson are not subject to the restrictions set forth in either the United States or Texas Constitutions because neither is a governmental entity capable of governmental action, but rather are a private institution and a private citizen, respectively, only capable of private action. *See Stevenson*, 680 F. Supp. at 860. *Cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511-14, 89 S.Ct. 733 (1969) (explaining that "state-operated schools" may not censor non-disruptive student expression because "[t]he Constitution says that Congress (and the States) may not abridge the right to free speech").

Second, Key's suspension was not premised on his depiction of Robertson in the manipulated television clip posted on various internet sites. Rather, it was based on his violations of Regent's Standard of Conduct and its Weapons Policy, and other unprofessional and potentially threatening behavior, as discussed in Section IV(C)(1) on page 17 below.

2. Similarly, Key's Claims for Violation of Procedural and Substantive Due Process Wholly Fail as a Matter of Law.

Key also claims that he was denied substantive and procedural due process as prescribed in the Fifth and Fourteenth Amendments. (Doc. # 5, at pp. 12-13, ¶¶ 32-35.) However, it is clearly established law that the due process clauses of the Fifth and Fourteenth Amendments do

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noticeably silent on this ABA Standard as it relates to his causes of action based on any alleged constitutional violation. (Doc. # 5, at pp. 11-13, ¶¶ 29-36.) Moreover, there is no private right of action created by the ABA's Council of the Section of Legal Education or under the ABA Standards, Rules or Interpretations adopted by this Council. Key simply has no standing or viable cause of action based on his foregoing constitutional argument.

not apply to private conduct, unless governmental action can be found. *See Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 349 (1974); *Stevenson*, 680 F. Supp. at 860 (S.D. Tex. 1987). As stated above, both Regent and Robertson are private actors rather than public, governmental entities, and are thus not subject to the restrictions of the Due Process Clause. The basis of a procedural due process claim is that the government, before depriving the plaintiff of a recognized property or liberty interest, failed to afford the plaintiff required procedures for challenging the government's action. *Wheeler v. Miller*, 168 F.3d 241, 249 (5th Cir. 1999).

Moreover, Key fails to state a factual basis to support a substantive due process claim. Specifically, Key describes substantive due process as "requir[ing] at a minimum notice and an opportunity to be heard." (Doc. # 5, at p. 13, ¶ 34.) As this Court, and all other courts for that matter, is aware, substantive due process does not entail the right to be heard, but rather acts as a prohibition on the "government from engaging in conduct that 'shocks the conscience' or interferes with rights implicit in the 'concept of ordered liberty.'" *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095 (1987) (citations omitted). Procedural due process, on the other hand, encompasses the right to be heard. *Wheeler*, 168 F.3d at 249 (5th Cir. 1999) (stating that "[t]he basis of a procedural due process claim is that the government, before depriving the plaintiff of a recognized property or liberty interest, failed to afford the plaintiff procedures for challenging the government's action").[6] Regardless of Key's misinterpretations regarding due

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[6] Even if Key had sufficiently pled facts to raise an issue regarding substantive due process, these claims are still without merit because, as explained in Section IV(C)(1), Regent had a rational basis for suspending Key. *See Brewer by Dreyfus v. Austin Independent School Dist.*, 779 F.2d 260, 264 (5th Cir. 1985) (holding that "[r]eview and revision of a school suspension on substantive due process grounds would only be available in a rare case where there was no 'rational relationship between the punishment and the offense'").

Other cases have rejected due process arguments from students against private colleges and universities. *See Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 625 (10th Cir. 1975) (rejecting an expelled Ph.D. student's procedural due process argument where the student was given notice of charges to be raised at the disciplinary hearing and was given the opportunity to fully participate in the hearing); *Napolitano v. Trustees of Princeton Univ.*,

process, neither substantive due process nor procedural due process applies to Regent or Robertson because they are private actors, not extensions of the State or Federal Government.

3. There is No Private Right of Action for Violations of the Texas Constitution and, Therefore, Key's Claims Under the Texas Bill of Rights Are Not Actionable.

Key has no actionable claim against Regent or Robertson under the Texas Constitution for allegedly violating his rights to freedom of speech guaranteed by the Texas Constitution. (Doc. # 5, at pp. 14-15, ¶¶ 40-45.) However, Key's claim is fatally flawed because the Texas Supreme Court has held that there is no implied private right of action for damages for violations of the Texas Constitution. *Favero v. Huntsville I.S.D.*, 939 F. Supp. 1281, 1295 (S.D. Tex. 1996) (citing *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148-49 (Tex. 1995)); *see also Vincent v. West Texas State Univ.*, 895 S.W.2d 469, 475 (Tex.App.–Amarillo 1995, no writ) (no private right of action exists for violations of the Texas Constitution); *Cote v. Rivera*, 894 S.W.2d 536, 542 (Tex.App.–Austin 1995, no writ); *City of Alamo v. Montes*, 904 S.W.2d 727, 731-32 (Tex.App.–Corpus Christi 1995, no writ); and *Jones v. City of Stephenville*, 896 S.W.2d 574, 577 (Tex.App.–Eastland 1995, no writ). Consequently, Key's claims under the Texas Constitution are not viable and should be dismissed.

4. Key is Not Entitled to Relief Under the Higher Education Act.

Key also asserts that he is entitled to relief under the Higher Education Act ("HEA"), 20 U.S.C. § 1011 (a) (2007). Specifically, Key quotes the Act but merely makes the conclusory statement that "Key's freedom of speech and expression rights, freedom of association, and right to free exercise of religion and right to due process were clearly violated by defendants." (Doc.

186 N.J. Super. 548, 453 A.2d 263, 273 (App. Div. 1982) (noting that courts are virtually unanimous in rejecting students' claims for due process where academic suspensions or dismissals are involved).

5, at p. 14, ¶ 38.) However, the HEA "does not establish a private right of action to enforce any of its provisions." *Brown v. Louisiana Office of Student Financial Assistance*, C.A. No. 3:06-CV-0950-R, 2007 WL 2325514 at *2 (N.D. Tex. Aug. 14, 2007) (citing *Sibley v. Diversified Collection Services, Inc.*, C.A. No. 3:96-CV-0816, 1998 WL 355492 at *4, n. 2 (N.D. Tex. June 30, 1998), and *L'Ggrke v. Benkula*, 966 F.2d 1346, 1348 (10th Cir. 1992)). The HEA only provides for a suit brought by or against the Secretary of Education. *Id.* "Nearly every court to consider the issue in the last twenty-five years has held that there is no express or implied private right of action to enforce any of the HEA's provisions." *Id.* (citing *McCulloch v. PNC Bank Inc.*, 298 F.3d 1217, 1221 (11th Cir. 2002) (per curiam), and cases cited). Accordingly, Key's claim under the HEA is without merit.

5. Key Has Failed to Bring His Breach of Contract Claim on a Valid Contract.

Key's state law claim for breach of contract fails for three reasons: (i) it is based on claims in which Key does not have a private right of action; (ii) the Court lacks federal question jurisdiction because "if a federal law does not provide a private right of action, a state law cause of action based on its violation does not raise a federal question," *Brown*, 2007 WL 2296543 at *2 (citing *Merrell Dow Pharms.*, 478 U.S. 804, 814, 106 S.Ct. 3229 (1986)), and (iii) there is no valid and enforceable contract between Key and Regent. Key's breach of contract claim is based on a purported contract with Regent to "respect religious liberty and First Amendment rights including freedom of religion, speech and assembly." (Doc. # 5, at p. 10, ¶¶ 25-26.) In other words, Key's claim arises from alleged constitutional and HEA violations. This claim is without legal merit or a sufficient factual bases.

As discussed above, Key's alleged violations of the United States and Texas Constitutions and the HEA are not actionable as a matter of law in that there is no private right of action.

Because Key has no private right of action based on these alleged violations, he cannot bring a state law breach of contract claim arising from the same non-viable allegations. Moreover, the Court lacks federal question jurisdiction over Key's state law claims because "if a federal law does not provide a private right of action, a state law cause of action based on its violation does not raise a federal question," *Brown*, 2007 WL 2296543 at *2.

Lastly, the elements of a breach of contract claim in Texas[7] are: (i) the existence of a valid contract, (ii) performance or tendered performance by the plaintiff, (iii) breach of the contract by the defendant, and (iv) damages to the plaintiff resulting from the breach. *Palmer v. Espey Huston & Assocs.*, 84 S.W.3d 345, 353 (Tex.App.–Corpus Christi 2002, review denied). An essential element in Key's contract claim is the existence of a valid contract. A valid contract requires: (1) an offer, (2) an acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *See Copeland v. Alsobrook*, 3 S.W.3d 598, 604 (Tex.App.–San Antonio 1999, pet. denied). This determination is based on the objective standard of what the parties said and did, not on their subjective states of mind. *Id.*

First and foremost, it is unknown from Key's breach of contract claim the specific "letters and other communications" that he is purporting to be a contract between Regent and himself. (Doc. # 5, at p. 10, ¶ 25.) Key also does not allege that Regent failed to provide him an education, but merely claims Regent did not "respect" his constitutional rights. (Doc. # 5, at pp. 10, ¶¶ 25-26.) On this notion alone, he seemingly attempts to argue that some unknown letters

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[7] Regent does not concede or waive any argument in regard to choice of law, i.e., whether Virginia law or Texas law applies to Key's state claims. Regent addresses the dismissal of Key's claim under Texas law, regardless of any choice of law issue, because Key has purportedly asserted Texas causes of action. If necessary, Regent will fully brief the choice of law issues for the Court.

or communications from Regent are valid contracts between Key and Regent. (Id.) This argument fails.

Also, nowhere in the letters that are attached to Key's Original Complaint (Doc. # 1) but not to his live pleading are there promises, offers, or any meeting of the minds, that would contractually permit Key to engage in unprofessional, profane, or potentially dangerous behavior - violating Regent student policies - in acting upon his alleged constitutional liberties. (Id., at Ex. 2 & 3.)[8] Instead, the letters simply summarize to the prospective student Regent's mission, which is to provide "an exemplary education from a global, biblical perspective leading to bachelors, masters, and doctoral degrees to aspiring servant leaders in pivotal professions and to be a leading center of Christian thought and action." (Id.) These Regent letters, if the purported contract made the bases of Key's claim, express only a general statement of Regent's goals for its students. (Id.)[9]

Under Texas law, a contract must be sufficiently definite in its terms so that a court can understand what the promisor undertook. *See Searcy v. DDA, Inc.*, 201 S.W.3d 319, 322 (Tex.App.–Dallas 2006, r'hrg overruled)). If the agreement upon which the plaintiff relies is so indefinite as to make it impossible for the court to determine the legal obligations and liabilities of the parties, it is not an enforceable contract. *Id.* In other words, the indefinite and informational language in Regent's recruiting letters does not create a valid and enforceable

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[8] For instance, the December 15, 2005 Regent letter states: "[t]hrough ACLJ [American Center for Law and Justice] clerkships and moot court presentations, Regent law students are engaged in actual religious and civil liberties cases that are taking place in our courts today and acquiring hands-on experience in constitutional law from leading attorneys like Jay Sekulow." (Doc. # 1, at Ex. 2.) Again, the December 15 letter is not a contract. More importantly, the statement is an unspecific invitation to participate in activities at Regent pertaining to religious and civil liberties; however, it does not provide Key a contractual right to violate Regent's Standard of Conduct.

[9] In addition, Key has admitted that the reason he attended Regent was "because, at the time [he] applied to law school in late 2005, it was the only ABA accredited Christian law school," not because of any alleged contract created by an informational or recruiting letter of Regent.

contract in Texas. Accordingly, no valid contract exists between Key and Regent, so his cause of action fails as a matter of law.

In an auxiliary argument, Key alleges there was a contract with Regent that it would "not discipline Adam if he took down the Facebook profile picture of" Robertson. (Doc. # 5, at p. 10, ¶ 26.) Regent did not enter into any contract of this nature. In addition, even if such agreement existed, Key was disciplined based on his violations of Regent's Standard of Conduct and its Weapons Policy, and other unprofessional and potentially threatening behavior -- not because he did or did not remove the manipulated television clip as requested, as discussed in Section IV(C)(1) on page 17 below. Key has no factual support on the existence or breach of this alleged contract. Tellingly, Key again has not specifically identified this purported contract or the language contained therein.

6. Because Key's Breach of Contract Claim Fails, So To Does His Fraudulent Inducement Claim.

Key's state claim for fraudulent inducement is without merit as well. Under Texas law, elements of fraudulent inducement are the same as those for fraud, namely: (i) a material misrepresentation, (ii) that is false, (iii) made with knowledge of its falsity or recklessness as to its truth, (iv) made with the intention that it should be acted upon by another party, (v) relied upon by the other party, and (vi) causing injury. *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001). A fraudulent inducement claim, however, requires the existence of a contract. *Id.* ("Without a binding agreement, there is no detrimental reliance, and thus no fraudulent inducement claim"). Moreover, as discussed above, a state law claim cannot survive based on a federal law claim that is not actionable. There is no viable contract claim so, consequently, Key's fraudulent inducement claim fails.

7. Key Has No Viable Claim Under His Alleged Conspiracy to Deprive Constitutional and Contract Claims.

Key has no viable intentional tort in which to base his conspiracy claim. Key alleges that Regent and Robertson were allegedly engaged in a "conspiracy to deprive [him of] constitutional and contract rights." (Doc. # 5, at p. 13, ¶ 36.) In order to recover for conspiracy, Key must prove by a preponderance of the evidence that two or more persons: (i) have an object to be accomplished, (ii) that there was a meeting of the minds on the subject or course of action, (iii) that there was one or more unlawful acts, and (iv) that plaintiffs were damaged as a proximate result. First, a conspiracy to breach a contract is not actionable under Texas law. *Grizzle v. Texas Comm. Bank*, 38 S.W.3d 265, 285 (Tex.App.–Dallas 2001), *rev'd on other grounds*, 96 S.W.3d 240. This is because Key must plead and prove a substantive tort upon which to base a civil conspiracy claim, and breach of contract is not a tort. *Id.* Therefore, Key's conspiracy claim based on breach of contract fails as a matter of law.

Second, if an act by one person cannot give rise to a cause of action, then the same act cannot give rise to a cause of action if done pursuant to an agreement between several persons. *Murry v. Earle*, 405 F.3d 278, 295 (5th Cir. 2005). As discussed above, Key has no viable constitutional claims against Regent or Robertson,[10] thereby precluding Key's conspiracy claim based on these same underlying claims. Accordingly, Key's conspiracy claim fails as a matter of law and should be dismissed.

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[10] In addition, Robertson, as an officer and director of Regent, could not have conspired with Regent. *Bradford v. Vento*, 48 S.W.3d 749, 761 (Tex. 2001).

8. Key Failed to Plead Any Facts That Rise to the Level Required for Recovery Under Intentional Infliction of Emotional Distress.

Key's state claim for intention infliction of emotional distress lacks sufficient factual support. (Doc. # 5, at pp. 15-16, ¶ 46.) Texas follows the RESTATEMENT (SECOND) OF TORTS § 46 approach to infliction of emotional distress. A defendant is liable if: (i) he acted intentionally or recklessly; (ii) his conduct was extreme and outrageous, (iii) his actions caused the plaintiff emotional distress, and (iv) plaintiff's emotional distress was severe. *Brewerton v. Dalrymple*, 997 S.W.2d 212, 215 (Tex. 1999); *Stewart v. Houston Lighting & Power Co.*, 998 F. Supp. 746, 757 (S.D. Tex. 1998) (Kent, J.). To be actionably extreme and outrageous, conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and be atrocious and utterly intolerable in a civilized community. *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 611 (Tex. 1999); *Gray v. Sears, Roebuck & Co., Inc.*, 131 F. Supp.2d 895, 904-905 (S.D. Tex. 2001). Mere insensitive, insulting, threatening, annoying, oppressive or even rude behavior, however, does not constitute extreme and outrageous conduct. *Goins v. Hitchcock I.S.D.*, 191 F. Supp.2d 860, 871-872 (S.D. Tex. 2002) (Kent, J.) (*citing Brewerton v. Dalrymple*, 997 S.W.2d 212, 216 (Tex. 1999)).

Key fails to provide sufficient factual support regarding his claims for intentional infliction of emotional distress. (Doc. # 5, at pp. 15-16, ¶ 46.) More specifically, Key has failed to allege any specific conduct of Regent and Robertson or injury that he sustained from such conduct. Moreover, the vague and conclusory allegations in the "Fact" section (id., at pp. 4-10) simply do not rise to the level necessary to support recovery under intentional infliction of emotional distress. Key's cause of action for intentional infliction of emotional distress, consequently, fails and should be dismissed.

9. Key is Not Entitled to Declaratory or Injunctive Relief Because He Has Failed to Present Any Viable Claim.

Key also brought suit seeking declaratory and injunctive relief for alleged violations of his constitutional and contractual rights. (Doc. # 5, at p. 16, ¶¶ 49-50.) These requests for declaratory and injunctive relief, however, are based on the same non-viable claims against Regent and Robertson, as discussed above. For this reason, Key is not entitled to any declaratory or injunctive relief based on these "untenable legal theories and as such, require dismissal" of the same. *Marathon Oil Co. v. Texas City Terminal Ry.*, 172 F. Supp. 897, 900 (S.D. Tex. 2001) (Kent, J.).

B. Key's Complaint Should be Dismissed Under Rule 12(b)(3) Because the Southern District of Texas Is Not a Proper Venue.

Key has filed his complaint in the wrong venue. In this action, both defendants – Regent and Robertson – reside in Virginia, not Texas. This is not disputed by Key. (Doc. # 5, at pp. 3-4, ¶¶ 11-12) ("Defendant Pat Robertson is an individual and a resident of Virginia" and "Defendant Regent University is a private college in Virginia Beach, Virginia"). Further, Key has failed in his complaint to demonstrate that any events or omissions occurred in Texas, and none, in fact, has.[11] To the contrary, substantially all of the events allegedly giving rise to Key's claims occurred in Virginia, as further discussed in Section IV(C)(1) on page 17 below. Key cannot dispute this because his claims all arise from Regent's acts in suspending Key based on his violations of Regent's Standard of Conduct and its Weapons Policy, and other unprofessional and potentially threatening behavior on the campus of Regent. (Doc. # 5.)

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[11] Key attempts to plead venue under 28 U.S.C. § 1391(b)(2), as follows: "because events relating to the incident at issue took place in Harris County, Texas." (Doc. # 5, at p. 3, ¶ 9.) However, § 1391(b)(2) states "a judicial district in which a ***substantial*** part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b)(2) (emphasis added). Key has failed to plead or provide sufficient factual allegations to demonstrate that "a substantial part of the events" took place in Texas.

Because none of the alleged actions or inactions at issue in this case occurred in Texas, venue is not proper in the Southern District of Texas, and this Court must either dismiss the action or transfer it to Virginia.

C. Motion to Transfer Venue under 28 U.S.C. § 1404(a) Because of Private and Public Convenience Factors.

Regent moves, in the alternative, to transfer venue to the U.S. Eastern District of Virginia, the venue where all private and public convenience factors weigh heavily in its favor, and no factors weigh in favor of Texas.

At this time, and for purposes of Regent's motion, in the alternative, to transfer venue, it is proper and necessary to provide a more accurate factual backdrop to the Court. Accordingly, Regent provides the Court the following detailed recitation of the facts with evidentiary support where appropriate.

1. Factual Background.[12]

Key was admitted to Regent and began classes in August 2006. Key's contentious behavior surfaced during his first year, but in the fall of 2007, his behavior became more

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[12] This factual background and the documents attached in support consist in part of documents from Key's student file at Regent. Key has waived his right of non-disclosure or protection of these documents under the Family Educational Rights and Privacy Act ("FERPA"), as evidenced by the following findings of the U.S. Department of Education:

"In the preamble to the Department's final rule amending FERPA on November 21, 1996, we stated:

...the Department interprets FERPA to allow an educational agency or institution to infer the ... student's implied waiver of the right to consent to the disclosure of information from the student's education records if the ... student has sued the institution.

61 Fed. Reg. 59,292, 59,294 (November 21, 1996).

As the preamble states, we have determined that an educational institution may infer a student's implied waiver of the right to consent to the release of information from his or her education records when the student has sued the institution. We believe that if a student sues a school, the school must be allowed to redisclose information to the extent necessary to defend itself." FERPA, 61 Fed. Reg. 59291-298 (Nov. 21, 1996). Nevertheless, and until the Court determines otherwise, all exhibits attached hereto will be filed under seal for the protection of other third-parties that are involved or mentioned in the annexed exhibits.

concerning and threatening. As one example, with more to follow, in the summer of 2007, Key had a large visible tattoo of Osama Bin Laden placed on his left arm. (Ex. A.) Key's Bin Laden tattoo is next to his other tattoos of Robertson, Martin Luther, Sir Thomas More and former Justice Oliver Wendell Holmes, Jr. (Id.)

a. Although Key's Behavior was Contentious During His First Year, He Was Not Subject to Any Disciplinary Action Taken by Regent.

During his first year at Regent, Key's behavior was antagonistic. For example, Key complained to Regent administration regarding an alleged unfair registration process for Regent's study abroad program. Key complained that certain students were missing class in order to get priority on the registration list for the program, and he felt these students should be punished. Then, in March 2007, Key filed a complaint with Regent administration regarding an alleged unfair grading policy of a Regent professor. (Ex. B.) Dean Douglas B. Cook and Dean Jeffrey Brauch administratively addressed Key's grievance. (Ex. C.) Thereafter, Key requested a letter of good standing to transfer schools. (Ex. D.)

b. In April 2007, Key's Behavior Turns More Confrontational But He Still Was Not Disciplined By Regent.

In April 2007, Key complained again to Regent administration, this time regarding alleged slanderous statements about Key by another student. Stephen L. McPherson, Associate Dean of Students at the time, and Dean Brauch administratively handled Key's grievance. Key, however, openly criticized and questioned Regent's handling of his complaint against the student on Regent's "The Branch," a public e-mail list on Regent's LISTSERV which is used as an

informal community for Regent staff, faculty, and students.[13] (Ex. E.) Again, Key requested a letter of good standing, and for it to be sent to the University of Houston, Law Center. (Ex. F.)

c. In August 2007, Key's Behavior Became More Bizarre.

Key engaged in a written and verbal assault on the teachings of Joel Osteen by: (a) engaging in a verbal assault on the steps of Lakewood Church, in Houston, Texas, (b) posting footage of such assault on "YouTube.com," a video sharing website,[14] (c) posting a sign outside Lakewood Church stating, "Joel is LYING to you," and (d) writing a book entitled, "Your Best Lie Now: The Gospel According to Joel Osteen." Key's book allegedly "takes a stand against the sugar coated sewage flowing from the pulpit of Lakewood Church."[15] And, his book cover is substantially similar to that of Pastor Osteen's book, however, Key drew horns and a mustache on Pastor Osteen's face. (Id.)

d. Then, in September and October 2007, Key's Behavior Deteriorated, Thereby Leading to the Disciplinary Proceedings and Ultimately His Suspension.

Key's behavior, in September and October 2007, was disrespectful, unprofessional, and potentially dangerous to Regent, Robertson and the Regent community. It was this behavior that led to disciplinary proceedings and ultimately to his suspension. First, Key posted a manipulated picture of Robertson on "Facebook.com," a social networking website. The manipulated picture is taken from a segment of *The 700 Club* television program posting wherein Robertson

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[13] All communications transmitted via "The Branch" are governed by Regent Policy, specifically the Acceptable Use Policy. The Acceptable Use Policy provides, in part, that: "[u]sers of the university's information systems [i.e., "The Branch"] have no personal privacy rights with respect to content created, stored, received or sent," and "should not be used in a way which may constitute intimidating, hostile or offensive material ...." (www.regent.edu/it/infosec/policies/aup.pdf).

[14] *See* (www.youtube.com/watch?v=Nu9k60-GgVk).

[15] *See* (www.lulu.com/content/1005423).

scratched his head with his middle finger. The television clip was edited to manipulate the context of Robertson's action during the program and was posted on "YouTube.com."[16] The manipulated clip portrays Robertson allegedly using a gesture which represents profane or vulgar language. (Id.) The meaning of this gesture, a raised middle finger, is normally an obscene sign of disrespect. Robertson clearly intended no such thing, and was simply scratching his head.

On September 24, Dean Natt Gantt requested a meeting with Key to discuss his offensive student conduct, and they did in fact meet on September 25. (Ex. G.) At that meeting Dean Gantt requested that Key remove the manipulated picture from "Facebook.com." Later that day, Key posted a diatribe on "The Branch" openly discussing his meeting with Dean Gantt. (Ex. H.) In Key's rant, he, yet again, attached, "the offending picture of Dr. Robertson making what some would call an obscene/profane gesture," the same picture which had caused Dean Gantt to request the initial meeting with Key. (Id.) Key signed this post as the "Born Again, Hookah Smoking,[17] Token Liberal, Resident Polemic." (Id.) Thereafter, Key posted another tirade on "The Branch" stating that "[t]he value the picture serves is to show that Pat Robertson is a very bad man" and that he posted the picture in order "to push people away from Pat Robertson." (Ex. I.) This is followed by another post from Key stating that Robertson is "a very bad person." (Ex. J.) Key's rants do not stop there and, unfortunately, only get more harassing and contentious.

On September 27, Key posted a note on "The Branch" in response to many student messages in opposition of Key's behavior, stating that "Pat shot the bird on national TV and got caught, and it was spun to say he was scratching his head. Good job both believing the lie and spreading to others." (Ex. K.) Again, Regent administration through reasonable and measured

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[16] *See* (www.youtube.com/watch?v=d1bluMXnp9A).

[17] A "hookah" is a single or multi-stemmed water bong, originating from India, that is used for smoking.

actions addressed Key's unprofessional and inappropriate handling of the pending circumstances through an administrative hearing held by Dean Brauch and Dean Gantt on September 27. Following this hearing on Key's conduct, Dean Brauch wrote to Key with remedial options regarding the situation. Dean Brauch stated, in part:

> I first want to emphasize that neither Dean Gantt nor I question your right to disagree with provisions in the University Standard of Personal Conduct or with particular positions taken by Dr. Robertson. However, Dean Gantt and I believe that the way in which you attempted to express such disagreement was highly inappropriate. And, regardless of whether you disagree with the Standard of Conduct, as a student of Regent University you are expected to comply with the standard and may be disciplined if you do not. You are, of course, free to lobby for a change in the Standard of Conduct, but as a student and as a potential professional, you are expected to do so civilly, honestly and with respect.

(Ex. L.) Then, Dean Brauch provided Key the following options to avoid discipline: (1) post an apology for implying that Robertson intended to make an obscene gesture and his unprofessional behavior on Regent's "The Branch," or (2) submit a brief outlining arguments and legal authority supporting Key's contention that Regent's disciplinary action against him violates the American Bar Association Standards as applied to Regent. (Id.) Key refused to apologize and chose option two and submitted his brief on October 1. (Ex. M.)[18] And, in the process, Key made the following remarks to Dean Brauch:

> "I invoke my right to a trial by the Honor Council under RUSL Honor System, Council and Code Article II Section 2.01(c)."
>
> "I will instruct my attorney to begin preparation to file suit against the university."

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[18] Key later admitted that he "heavily benefited" from certain Amicus briefs filed in *Morse v. Frederick*, 127 S.Ct. 2618 (2007). However, the Supreme Court, in *Morse*, held that public schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regards as encouraging unlawful behavior, and that the rights of students "must be 'applied in light of the special characteristics of the school environment.'" 127 S.Ct. at 2622.

> "I will further prepare and submit a formal complaint against Regent to the American Bar Association, asking for immediate intervention and subsequent revocation of Regent's accreditation."
>
> "I will prepare and send out a press release detailing Regent's wrongdoing to every major media source in the nation."

(Id.) Dean Brauch, not persuaded by Key's brief, concluded that Key's "actions raise issues both under the Law School Honor Code and the University Standard of Conduct," thereby referring the pending issues to Dean Gantt for another administrative hearing. In response, Key issued a media press release. (Ex. N.)

e. <u>Key's Behavior Became Potentially Dangerous and Frightening to Regent Administration, Faculty and Students, and Eventually Lead to Key's Suspension.</u>

Regent administration intended to pursue an administrative hearing under the Honor Code, but beginning on October 4, events occurred regarding Key that required the administration to take other responses. First, on October 4, Key sent an email to Dean Brauch challenging the suspected violations of Regent's Honor Code and Standard of Conduct. (Ex. O.) Key also addressed in the email a confrontation involving him which occurred at Regent's Public Relations Department, wherein he stated:

> [w]hen the press hear about the racist application of policies here, it falls onto [the PR] department ... [and t]he fact that three armed security guards and their captain were called ... is demonstrative of the racial bias that goes on at Regent.[19]

(Id.) Second, beginning on October 4, several students at Regent came forward to express serious concern for their safety and security to the administration in connection with Key. Following the wake of the Virginia Tech massacre, at least one student told Regent that that student and others had planned escaped routes from class should an altercation involving Key

[19] A review of Key's "Application for J.D. Admissions" to Regent indicates that Key stated his ethnicity is "White."

occur. Students also expressed concern about Key's emotional state. Furthermore, they reported that Key said he had possession of an actual gun on campus, and then it was confirmed by Key himself that he had possession of a stun-gun weapon on campus, as discussed below. Regent was obligated to take reasonable and measured steps to investigate these safety and security concerns.

In response to these concerns, Dean Gantt sent Key an October 12 letter reiterating the underlying basis for disciplinary proceedings and raising these additional issues that had been brought to the attention of Regent administration, i.e., Key's emotional well-being and students' concerns for their personal safety. (Ex. P.) Dean Gantt explained that Regent will not pursue any disciplinary proceedings at this time, but he stated that, due to these serious concerns raised by fellow students, Key would not be allowed to attend classes until Key was evaluated by a mental health provider and "until the University receives and approves the report from the mental health provider and until you complete successfully any treatment plan deemed appropriate by that provider." (Id.)

Key did not see the mental health provider as requested. Rather, Key's contentious behavior did not stop, and on October 15, Key filed another complaint with Regent administration against university employees for alleged violations of FERPA and stating that "[w]hile [he is] planning to file suit against Regent for several issues, this one could definitely be mediated without litigation." (Ex. Q.)

On October 19, Dean Brauch, still concerned about Key's mental and emotional well-being and the safety of Regent students, sent an email to Key addressing reports that Key was in possession of a stun gun on campus. (Ex. R.) Regent's Standard of Personal Conduct prohibits students "from using or possessing ... firearms, or other dangerous weapons ... on University

property." (Ex. S.) Key responded by challenging Regent's weapon policy and admitting that he did have a stun gun on campus and he was entitled to do so. (Ex. T.)[20] Dean Brauch set up an administrative hearing on October 23 with Key to discuss the suspected violations of Regent's Weapon Policy. (Ex. U.) Key did not appear for the October 23 hearing. (Ex. V.) Dean Brauch set up another hearing for October 26, and again Key failed to appear. (Id.) Key's only response was an October 25 letter to Dean Brauch stating that he had "retained [an] attorney" and, thereafter, submitting numerous grievances filed against Dean Brauch, Dean Gantt, and several Regent employees and students. (Ex. W.)

After Key's failure to attend either of the two hearings, Dean Brauch sent Key a letter on November 6 in response to Key's October 25 letter. (Ex. X.) Dean Brauch rejected Key's grievances and suspended Key for one year for his conduct in violation of Regent's policies. (Id.) In doing so, Dean Brauch stated:

> I am ... rejecting your grievance. ***You have the right to appeal this decision*** pursuant to the process set forth in the Student Handbook under the Procedure for Student Grievance and Other Appeals.
>
> ...
>
> You have violated the Regent University Weapons Policy by bringing a stun gun to campus ... [y]ou have violated the Regent University Standard of Conduct by posting a profane picture on the

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[20] Key argued that a stun gun was not a "dangerous weapon" as defined under Regent's weapon policy. (Ex. T.)

As the Court of Appeals in Missouri explained: "In today's climate of students being taken hostage, shot at and killed, possessing any item on a school property that resembles a firearm, and pointing that object at a student ... creates an extremely dangerous situation. School security, law enforcement or other persons in the vicinity could easily misinterpret the situation and conclude that some immediate response was necessary." *Moore v. Appleton City R-II School District*, 232 S.W.3d 642, 647 (Mo. App. S.D. 2007)) (finding plastic toy gun a "dangerous instrument" as defined and prohibited under the student handbook and policies).

Moreover, according to certain studies, stun guns have been the cause of hundreds of deaths in America over the past few years. These ever increasing statistics, arguably, are why stun guns are now illegal in at least 7 states and 13 countries. *See* D.C. CODE ANN. § 6-2303; HAW. REV. STAT. § 134-1; MASS. ANN. LAWS ch. 140, § 131J; MICH. PEN. CODE ch. 750.224a; N.J. STAT. ANN. § 39-1; N.Y. PENAL § 265.00; R.I. GEN .LAWS § 11-47-42; WIS. STAT. ANN. § 939.22.

> Branch listserve ... [y]ou have engaged in misrepresentation in your Branch postings .... ***You have the right to appeal this decision*** pursuant to the process set forth in the Student Handbook under the Procedure for Student Grievances and Other Appeals.

(Id.) Key failed to exhaust his administrative remedies at Regent by not appealing any of Dean Brauch's findings. Instead, Key sought more media attention and filed this lawsuit on November 29.[21]

2. Eastern District of Virginia is the Proper Judicial District.

The initial determination to be made by this Court is whether the judicial district to which transfer is sought would have been a district where the claim might have been filed. *In re Horseshoe Entertainment*, 337 F.3d 429, 433 (5th Cir. 2003). The Eastern District of Virginia is a proper district in which this lawsuit might have been filed. In this lawsuit, Key alleges actions which are based in large part on actions that took place on the campus of Regent, located in Virginia Beach, Virginia.

3. The District Court Will First Consider the Private Convenience of the Parties and Witnesses.

Upon determining that the Eastern District of Virginia is an adequate and available forum, this Court is to weigh private and public interest factors in regard to the convenience of the parties and witnesses. The specific criteria considered when determining the private convenience interests are:

(1) the convenience of the parties;

(2) the convenience of the witnesses;

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[21] Key is no stranger to litigation against educational institutions. For example, in 2005, Key sued the Student Government Association at his undergraduate alma mater, Stephen F. Austin State University, and two students, for alleged violations of due process, libel and slander. (Ex. Y.) Key sought damages exceeding $85,000 (id., at p. 5), only to have his claims (after being severed) dismissed, in part, for want of prosecution, and on summary judgment. (Ex. Z.)

(3) the relative ease of access to sources of proof;

(4) the availability of process to compel attendance of unwilling witnesses;

(5) the cost of obtaining willing witnesses;

(6) the practical problems associated with trying the case most expeditiously and inexpensively; and

(7) the interest of justice.

Walter Fuller Aircraft Sales v. Republic of Philippines, 965 F.2d 1375, 1389 (5th Cir. 1992) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 843 (1947)).

a. Key's Choice of Forum in Texas is Inconvenient as Compared to Virginia.

Even though this Court may give deference to Key's choice of forum, Key should not, by choice of an inconvenient forum, vex, harass, or oppress Robertson or Regent by inflicting upon them expense or trouble not necessary to their own right to pursue their remedy. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508; 67 S.Ct. 839, 843 (1947); *see also, Lemery v. Ford Motor Co.*, 244 F. Supp.2d 720, 730 (S.D. Tex. 2002) (citing *Continental Airlines, Inc. v. American Airlines, Inc.*, 805 F. Supp. 1392, 1395-96 (S.D. Tex. 1992)); *In re Triton*, 70 F. Supp.2d 678, 688 (E.D. Tex. 1999) (quoting *Texas Instruments, Inc. v. Microm Semiconductor*, 815 F. Supp. 994, 996 (E.D. Tex. 1993)).

Key's choice of forum, Texas, is not supported by a strong public policy in Texas. Essential witnesses who will be called upon to testify in this lawsuit are located in Virginia and more importantly, nearly all the witnesses are located outside of Texas. So too, despite Key's contention to the contrary, a substantial part of the alleged events giving rise to Key's claims did not occur in Texas.[22]

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[22] Key contends venue is proper in Texas under 28 U.S.C. § 1391(b)(2), by alleging the "events relating to the incident at issue took place in Harris County, Texas." (Doc. # 5, at p. 3, ¶ 9.) This contention is in complete

b. The Cost of Obtaining Attendance of Witnesses in the Texas Forum Will be Burdensome.

The convenience of witnesses is another important factor this court is to consider. *See Brown v. Petroleum Helicopters, Inc.*, 347 F. Supp.2d 370, 373 (S.D. Tex. 2004) (movant must identify key witnesses and provide a brief outline of their likely testimony); *Holmes v. Energy Catering Services, LLC,* 270 F. Supp.2d 882, 887 (S.D. Tex. 2003) (Kent, J.) (stating that the convenience of key witnesses is arguably the most important factor in a venue motion); *LeBouef v. Gulf Operators, Inc.*, 20 F. Supp.2d 1057, 1060 (S.D. Tex. 1998) (the availability and convenience of key witnesses is arguably the most important of the factors listed); *Gundle Lining Construction Corp. v. Fireman's Fund Ins. Co.*, 844 F. Supp. 1163, 1166 (S.D. Tex. 1994). The party seeking transfer is to identify the key witnesses to be called and make a general statement of what their testimony will cover. *Z-Tel Communications, Inc. v. SBC Communications, Inc.*, 331 F. Supp.2d 567, 574 (E.D. Tex. 2004) (citing *Fletcher v. Southern Pacific Transp. Co.*, 648 F. Supp. 1400, 1402 (E.D. Tex. 1986)) (the defendant demonstrated to the court the content and relevance of the testimony to be presented by the listed witnesses). "The convenience of one key witness may outweigh the convenience of numerous less important witnesses." *Brown*, 347 F. Supp.2d at 373.

Robertson and Regent anticipate testimony from key witnesses of the Regent community, including administrators, faculty, staff, and students, in regard to the bizarre, and potentially threatening behavior of Key. Specifically, the nature of this litigation will necessitate testimony from the following witnesses located in or near Virginia:

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disregard of the pertinent facts of this lawsuit. Upon review of Key's pleading there is seemingly only one connection to Texas -- Key "was born in Spring, Harris County, Texas." (Id., at p. 3, ¶ 13.) Otherwise, a substantial part of the events took place in Virginia.

(a) Jeffrey Brauch, Dean, Regent School of Law.

Dean Brauch, as Dean, Regent School of Law, is anticipated to testify in regard to the administrative actions and proceedings of Regent in regard to Key's violations of Regent's Standard of Conduct and Weapons Policy, and other unprofessional and potentially threatening behavior of Key, as discussed above.

(b) Douglas H. Cook, Associate Dean for Academic Affairs, Regent School of Law.

Associate Dean Cook, as Associate Dean for Academic Affairs, Regent School of Law, is anticipated to testify in regard to the administrative actions and proceedings of Regent in regard to Key's grievances and complaints filed against certain Regent faculty and students, as discussed above.

(c) L.O. Natt Gantt, II, Associate Dean for Student Affairs, Regent School of Law.

Associate Dean Gantt, as Associate Dean for Student Affairs, Regent School of Law, is anticipated to testify in regard to the administrative actions and proceedings of Regent in regard to Key's violations of Regent's Standard of Conduct and Weapons Policy, and other unprofessional and potentially threatening behavior of Key, as discussed above.

(d) Darius Davenport, Director of Career & Alumni Services, Regent School of Law.

Mr. Davenport, as Director of Career & Alumni Services, Regent School of Law, is anticipated to testify in regard to the personal safety concerns of certain Regent students as they relate to Key.

(e) Nikitia Powell, Supervisor of Access Services, Regent School of Law Library.

Ms. Powell, as Supervisor of Access Services, Regent School of Law Library, is anticipated to testify in regard to the personal safety concerns of certain Regent students as they relate to Key.

(f) One or more of the Regent students who expressed concern for their safety in light of Key's conduct.[23]

It is reasonable to conclude that the relative financial burdens of litigating the present lawsuit do not favor Texas, as the overwhelming majority of relevant liability and damage witnesses, along with the pertinent evidence, is located outside of Texas.

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[23] Due to federal privacy concerns, these students names will not be disclosed at this time.

c. <u>The Accessibility and Location of Sources of Proof Makes Virginia the Proper Forum.</u>

When documents may be easily copied and shipped to the pending district, this court should not consider the documents' present location as "an important factor in the transfer analysis." *Z-Tel Comm.*, 331 F. Supp.2d at 576 (citing *In re Triton*, 70 F. Supp. at 690); *Gundle*, 844 F.Supp. at 1166 (considering significance of document location in determining transfer motion because movant and non-party's documents are located in transferee forum). However, the cost of locating and producing relevant discovery is totally independent from the cost of transporting such documents after the production has occurred. *Z-Tel Comm.*, 331 F. Supp.2d at 577. The marginal costs of document transportation, rather than fixed costs of document production, is the focus of this court' s analysis. *Id.*

The location of pertinent documents and records is noteworthy in the case at hand, as this lawsuit is expected to be determined, in part, on the interpretation of such documentation. As the discovery process has not yet begun, only estimates may be made on the extent of document production that may take place. Key was involved in a number of communications and administrative proceedings at Regent and with its administration. Evidence in regard to these communications and administrative proceedings is essential—and located in Virginia Beach, Virginia. The burden in transporting the evidence is not merely shifted because the documents originated and are maintained in Virginia. The sources of proof are located and accessible in Virginia, thus clearly favoring venue in Virginia.

d. <u>The Interest of Justice Favors Venue in Virginia as There is No Possibility of Delay and Prejudice if Granted.</u>

Lastly, in regard to private interest, this Court should consider whether the evidence offered establishes that any party would suffer delay or prejudice should the transfer be granted.

Liaw Su Teng v. Skaarup Shipping Corp., 743 F.2d 1140, 1149 (5th Cir. 1984) (stating the court's duty is to ignore the gamesmanship of the litigants and to seek the most just result permitted by applicable law); *Speed v. Omega Protein, Inc.*, 246 F. Supp.2d 668, 675 (S.D. Tex. 2003) (noting the possibility of delay to be insignificant because the case had not yet been set for trial). Whether this lawsuit is in federal court in Texas or Virginia will not cause a delay in concluding discovery or obtaining a final adjudication. Furthermore, the parties scheduling conference report has not been filed. With no trial date currently set, transferring this lawsuit to Virginia will not cause a delay or prejudice on any parties involved, and would be in the best interest of justice.

4. Public Interests in the Fair an Efficient Administration of Justice Dictate Transfer to Virginia.

After weighing the private convenience of the parties and witnesses, this Court should include in its analysis public interest factors, such as those listed below:

(1) the relative backlog and/or congestion, and other administrative difficulties in the two jurisdictions;

(2) the fairness of placing the burdens of jury duty on the citizens of the state with the greater interest in the dispute;

(3) the local interest in adjudicating local disputes at home; and

(4) the appropriateness of having the case in a jurisdiction whose law will govern the dispute in order to avoid difficult problems in conflicts of law.

Gulf Oil, 67 S.Ct. at 839; *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252 (1981); *In re Volkswagen AG*, 371 F.3d 201, 206 (5th Cir. 2004) (reiterating the Supreme Court's recognition that jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation); *Syndicate 420 at Lloyd's London v. Early American Insurance Co.*, 796 F.2d 821, 832 (5th Cir. 1986) (concluding pending action was of little local interest in

that the overwhelming majority of affected persons from outcome of case had no link to the forum state).

Virginia has a strong public interest in the outcome of this lawsuit. As discussed, all disputes arising out of this lawsuit relate to acts taking place on the campus of Regent located in Virginia Beach, Virginia. To put the burden on a Virginia jury which has a greater interest in the outcome of the dispute is more reasonable than forcing a Texas jury to determine the same. Allowing a Texas jury to determine the outcome of this lawsuit would put the power of control in their hands over interests in Virginia to adjudicate local lawsuits. It is undoubtedly prejudicial to give jurors living outside of the State of Virginia such control and power over local interest of Virginia.

In comparing the relative backlog and/or congestion between the Southern District of Texas and the Eastern District of Virginia, the favored forum is still Virginia. Statistical data obtained from the U.S. District Court's web site (www.uscourts.gov/caseload2007), in regard to judicial caseload profiles, suggests Texas had almost twice as many civil filings in 2006-2007[24] than Virginia.[25] However, the important statistic to compare between the two districts is the median length of time it takes each court to take civil actions from filing to disposition. In 2006-2007, on average, it took courts in the U.S. Southern District of Texas 7.6 months for a civil action to go from filing to disposition, and 20.6 months if the case goes to trial. On the other hand, in the Eastern District of Virginia, the courts took on average 5.8 months to reach disposition of a civil action, and 10.0 months if the case goes to trial. The statistics represent a

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[24] Data is from the 12-month period ending March 1, 2007.

[25] The U.S. Southern District of Texas had 6,437 civil filing in 2006-2007, compared to the U.S. Eastern District of Virginia which had 3,485 civil filings.

significant distinction in the median times for disposition of civil actions, and such statistics strongly favor Virginia.

V. CONCLUSION AND RELIEF REQUESTED

Defendant, Regent University, requests this Court grant its Motion to Dismiss under FED. R. CIV. P. 12(b)(6) and 12(b)(3) and, in the alternative, Motion to Transfer Venue under 28 U.S.C. § 1404(a), thereby (i) dismissing with prejudice the First Amended Original Complaint of Plaintiff Adam Key ("Key") (Doc. # 5), or (ii) transferring Key's Complaint to a court of proper jurisdiction in the U.S. Eastern District of Virginia, and that this Court grant all other relief to which Defendant, Regent University, may be justly entitled.

Respectfully submitted,

By: /s/ William L. Maynard

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of ***Defendant Regent's Motion to Dismiss and, in the alternative, Motion to Transfer Venue*** was sent to the following attorneys by certified mail, return receipt requested, and electronic notice on this 11th day of January, 2008.

Randall Lee Kallinen
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Houston, Texas 77006

Via CM/ECF Notice and Certified Mail, RRR

By: /s/ David A. Walton
David A. Walton