IN THE UNITED STATS COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANZ A. WAKEFIELD, Plaintiff - Appellant, vs. APPLE INC., STEVE JOBS, and SARAH JESSICA PARKER, Defendants - Appellees.	Case No. 10-16550 D.C. No. 5:09-cv-05420-JW U.S. District Court for Northern California, San Jose

JOINT REPLY OF DEFENDANTS APPLE INC., STEVE JOBS AND SARAH JESSICA PARKER TO APPELLANT'S RESPONSE TO THE COURT'S AUGUST 5, 2010 ORDER TO SHOW CAUSE

I. INTRODUCTION

This appeal arises out of the dismissal of an *in forma pauperis* complaint filed by Appellant Franz A. Wakefield ("Appellant" or "Wakefield") against Apple Inc. ("Apple"), Apple's Chief Executive Officer, Steve Jobs ("Jobs"), and the famous television, film and theatre actress Sarah Jessica Parker ("Parker") (collectively, "Appellees"). In his complaint, Wakefield claims he invented the iPod, iTunes and iPhone products and their marketing campaigns in 1989 (when he was 15 years old) – over ten (10) years before the initial iPod was released in 2001 and nearly twenty (20) years before the release of the iPhone. Wakefield claims that in 1999 he made a secret contract with Parker whereby she was to reach out to Apple to commercialize these products and negotiate a contract for him to receive two percent (2%) of the revenues associated with these products in perpetuity.

Wakefield further alleges that the FBI seized all of his notes, documents and other work product related to his iPod trade secrets to preserve and protect the national security of the United States, making it impossible for him to come forward with evidence to support his claims. Based on these allegations, Wakefield attempted to assert a claim against Parker for breach of an oral contract, and claims against Parker, Apple and Jobs for trade secret misappropriation and violation of the RICO Act. Apple, Jobs and Parker moved to dismiss the complaint on numerous grounds, including frivolousness under 28 U.S.C. section 1915(e).

The district court found the *in forma pauperis* complaint frivolous and was therefore required to dismiss the complaint pursuant to 28 U.S.C. section 1915(e) which mandates the dismissal an *in forma pauperis* complaint any time the court determines it is "frivolous, malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). Wakefield's Response to this Court's August 5, 2010 Order to Show Cause why the judgment should not be summarily affirmed ("Response") generally reargues the points Wakefield made to the district court while glossing over the thrust of the district court's order (*i.e.,* that Wakefield's complaint is frivolous). The district court's order will be reviewed for abuse of discretion and Wakefield's Response does not present any argument from which one might reasonably conclude that the district court abused its discretion in concluding that Wakefield's claims are delusional and frivolous. Accordingly, there is no substantial question involved in this appeal that would preclude summary affirmation of the judgment and Appellees Apple, Jobs and Parker

hereby respectfully request that the Court summarily affirm the judgment pursuant to Circuit Rule 3-6(b).

II. STANDARD OF REVIEW

The district court's decision to dismiss a complaint under 28 U.S.C. section 1915(e) will be reviewed for abuse of discretion. *Denton v. Hernandez*, 504 U.S. 25, 31-33 (1992). "A district court abuses its discretion if its decision is based on an erroneous conclusion of law or if the record contains no evidence on which it rationally could have based its decision." *Fischel v. Equitable Life Assurance Soc'y*, 307 F.3d 997, 1005 (9th Cir. 2002) (*quoting Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 270 (9th Cir. 1989).

Here, the district court's order does not disclose any erroneous conclusions of law and the order and the record provide ample basis for the district court's conclusion, including an extended discussion of the frivolous and delusional quality of Wakefield's claims.

III. SUMMARY OF THE DISTRICT COURT'S DECISION

Apple, Jobs and Parker filed with the district court motions requesting (1) dismissal of the case under 28 U.S.C. section 1915(e), (2) dismissal of the case under Federal Rule of Civil Procedure 12(b)(6), and (3) entry of an order declaring Wakefield a vexatious litigant in this district and enjoining him from filing further *pro se* cases without prior judicial authorization. As part of the briefing, they provided the district court with over 750 pages of excerpts from Wakefield's earlier *pro se* cases in the Central District of California and in Florida (where Wakefield already has been declared a vexatious litigant). The district court granted the motions under 28 U.S.C. section 1915(e) and further noted in footnote

number 7 that Wakefield's claims also would be barred by the applicable statute of limitations (and, in the case of Wakefield's contract claim against Parker, by the applicable statute of frauds). The district court also found Wakefield to be a vexatious litigant and barred him from filing actions in the Northern District of California without prior judicial approval. In making that decision, the district court noted Wakefield had filed numerous frivolous actions in several district courts, appealing all cases to the point of seeking writs of certiorari, and that he has a history of suing individuals he randomly comes into contact with or sees on television or on film, claiming harm to himself or his companies in the millions or billions of dollars. (Order at 9.)

The district court's order includes a meaningful review of the allegations in Wakefield's Complaint, including that between 1989 (when Wakefield was 15 years old) and 1991 he established a relationship with Parker and that he created the entire line of iPods and iPhones, including their respective marketing campaigns. (Order at 5:23-25.) The district court found these allegations frivolous and delusional. The district court also found it "unbelievable that the FBI, after being contacted by Plaintiff, confiscated his trade secrets for national security purposes." (Order at 6:1-2.) Even granting Wakefield a liberal construction of his allegations (see Order at 5:22-23), the district reasonably concluded that these claims "rise to the level of the irrational and wholly unbelievable." (Order at 5:22-23.) Accordingly, the district court was required to dismiss the complaint pursuant to 28 U.S.C. section 1915(e).

Moreover, as explained more fully in the district court's order, Wakefield's oppositions to the motions below did not present a rational story to explain his

claims. Rather, Wakefield made more completely incredible allegations. For example, Wakefield claimed that "in 1992 he created a computer game that could track terrorists and that he warned the FBI of a plan to attack the United States using commercial airliners." (Order at 6:8-10.) Wakefield's opposition papers also included representations that he had "a secret deal with the FBI based on his creation of the algorithm behind Google's web search." (Order at 6:11-12.)

Wakefield does not dispute that these are his allegations, nor does he dispute that these are the things he said in his opposition papers. As was the case below, Wakefield makes no effort to deny or explain his history of vexatious litigation and, notwithstanding that his allegations are patently unbelievable, he demands that this action go forward so that he can subpoena and take discovery from the FBI and the U.S. Department of Justice. Wakefield cannot possibly show that the district court abused its discretion in concluding that his allegations are frivolous and delusional; his demand to take discovery from the FBI to prove that his claims are not frivolous only further underscores the delusional nature of his claims.

IV. WAKEFIELD'S HISTORY OF VEXATIOUS LITIGATION AND BIZARRE CLAIMS

Wakefield has a long and well-documented history of filing and pursuing frivolous lawsuits. His behavior before the courts of his home state of Florida was so abusive that he was sanctioned and formally declared a vexatious litigant after the court made findings that his claims were "delusional" and "clearly non-meritorious." (Order at 8:19-20). Once declared vexatious in Florida, Wakefield moved his lawsuits to California. He went first to the Central District and then to the Northern District of California. Wakefield's litigation history shows that he has repeatedly abused the *pro se* rules to pursue absurd and unsubstantiated

appeals against all manner of defendants. Any chance or brief encounter with him is fertile ground for a frivolous lawsuit, and because he has no assets to lose (and therefore nothing to fear from a sanctions award), he has demonstrated a willingness to pursue his irrational musings all the way to the U.S. Supreme Court. Wakefield has not prevailed in any of his cases. (Order at 9.)

In the course of not only this case, but myriad other state and federal litigations, Wakefield claims to have created a whole host of famous inventions and entertainment properties including, among other things, the Nintendo Wii, the NASA Mars Rovers, YouTube, the *Harry Potter* books, the television shows *Sex and the City*, *Survivor*, *Ugly Betty*, and *Big Brother*, a Disney video game called "Kingdom of Hearts," another famous video game called "Dragon Ball-Z", over 100 songs, including *Standing Ovation*, the rapper persona "Young Jeezy" (a stage name belonging to rapper Jay Jenkins) and the color-coded threat level system implemented by the Department of Homeland Security (*i.e.*, the red, orange, yellow, etc. warnings commonly used to identify threat levels at U.S. airports). Wakefield also claims to have created Google's search algorithm (and says that the FBI guaranteed him that he would own three percent (3%) of all of Google's shares). (See Order at 6:5-12, Wakefield Decl. filed April 19, 2010 at 8-10 and Apple's Reply Brief filed April 26, 2010 at 3-4.)

It is a simple matter of common sense that it took dozens, if not hundreds, of individuals, years of effort and, in some cases, lifetimes of accumulated skill and knowledge to create these inventions. Yet, Wakefield claims to have developed them all by the time he was 15. Wakefield's creation of any one of them would be highly improbable; his claim of having created them all is utterly nonsensical and

obviously delusional. There is no basis to conclude that the district court abused its discretion in reaching this common sense and obvious conclusion. Thus, there is no substantial question which requires the attention of the Court of Appeal and summary affirmation under Ninth Circuit Rule 3-6 is appropriate.

V. WAKEFIELD RAISES NO SUBSTANTIAL QUESTIONS REGARDING THE DISTRICT COURT'S EXERCISE OF DISCRETION IN DISMISSING HIS COMPLAINT

Wakefield's Response is nothing more than a rehash of the irrational musings the district court rejected. Wakefield cites no relevant legal authority and makes no factual showing that his appeal would raise a substantial question that in any way would justify further proceedings before this Court.

A. The Dismissal Was Based Upon 28 U.S.C. Section 1915(e); Wakefield Is Not Entitled to Discovery Under Rule 56.

In his Response, Wakefield first argues Rule 56 of the Federal Rules of Civil Procedure entitles him to take discovery from the FBI and the Department of Justice to see if those entities have evidence showing that Wakefield created Apple's products while he was in high school. Putting aside the fact that this theory is rooted in Wakefield's delusions, this argument is legally unsound because this matter was not decided on a motion for summary judgment under Rule 56. Thus, Rule 56 does not apply and Wakefield's arguments in this regard are misplaced and raise no substantial question for appeal.

B. Wakefield's Complaint Is Entirely Frivolous; He Can Raise No Substantial Question On Appeal To Change That Fact

Wakefield next argues that no matter how delusional his claims may appear to be, he has a right to pursue them in court. This too is wrong as a matter of law and presents no substantial question for appeal.

The district court has the discretion and the obligation to dismiss frivolous or delusional claims. *See* 28 U.S.C. § 1915(e)(2)(B) and *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). A finding of factual frivolousness is appropriate when "the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them." *Denton*, *supra*, at 33; *see also Riches v. Timberlake*, 2007 U.S. Dist. LEXIS 81811 (N.D. Cal. Oct. 24, 2007)(dismissing case as frivolous under §1915(e) where the plaintiff alleged that he caught the baseball hit by Barry Bonds for his 756th home run; that the musician Justin Timberlake was sitting next to him and assaulted him, while actress Jessica Biel took the ball from him; and that defendants then used members of the Russian mafia to steal his audio recordings, which recordings Justin Timberlake then put on his latest album). When reviewing a complaint for frivolity, a trial court may "pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Where the material facts alleged by a plaintiff are frivolous, fanciful or delusional, as is the case here, the complaint does not state a plausible claim for relief under *Iqbal*. *See Jagar v. Jagar*, 2009 U.S. Dist. LEXIS 109131 (N.D. Cal. 2009); *Basulto v. GMAC Mortg.*, 2009 U.S. Dist. LEXIS 50116 (N.D. Cal. June 12, 2009). Thus, Wakefield's contention that his claims must be allowed to proceed although they appear delusional is simply wrong as a matter of law. In fact, delusional claims made by *in forma pauperis* litigants are not permitted to proceed to discovery, but must be dismissed pursuant to 28 U.S.C. section 1915(e).

Given the nature of Wakefield's claims, the district court was entirely correct to find that Wakefield's claims are frivolous, unbelievable and entirely irrational. Dismissal under 28 U.S.C. section 1915(e) was, therefore, plainly warranted. (Order at 6.) Wakefield's Response presents no argument or evidence to demonstrate that Wakefield can raise any substantial question on appeal that would convince this Court that the district court abused its discretion in coming to this conclusion.

C. Wakefield's Complaint Was Properly Dismissed With Prejudice

Courts may dismiss a complaint without leave to amend if the plaintiff is unable to cure the defect by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000). Here, not only were Wakefield's claims frivolous, but they were obviously barred by the statute of limitations (and, in the case of Wakefield's contract claim against Parker, by the applicable statute of frauds). (See Order at 6:25-27 (footnote 7).) Wakefield did not request leave to amend his complaint and did not suggest any allegations he could add to the complaint to cure its many defects. Indeed, Wakefield's claims are so fundamentally frivolous and so obviously barred that there is no plausible way for Wakefield to cure the defects in his claims. Thus, the district court properly dismissed the complaint with prejudice. Even if Wakefield had been granted leave to try to amend his complaint to remove the judicial admissions that bar his claims, the underlying factual allegations would still be frivolous. Thus, amendment was futile and the district court properly dismissed the complaint with prejudice.

VI. CONCLUSION

The district court properly dismissed Wakefield's complaint on the grounds that the allegations and claims therein are frivolous, irrational and wholly unbelievable. The district court's order is thorough and well-reasoned and leaves no substantial questions for appeal. Wakefield has failed to raise any questions that would suggest any abuse of discretion by the district court. Therefore, further proceedings before this Court are not justified and would be a waste of the Court's valuable resources. Accordingly, Appellees respectfully request that the Court summarily affirm the judgment pursuant to Ninth Circuit Rule 3-6(b).

ATTESTATION OF FILING ON BEHALF OF MS. PARKER

I, Emily L. Maxwell, attest that this document is filed on behalf of my clients, Apple Inc. and Steve Jobs, and that it also is filed on behalf of Sarah Jessica Parker with the consent and concurrence of her counsel, Ron Arena, of Arena Hoffman LLP.

Dated: September 7, 2010 HOWREY LLP

By: */s/Emily L. Maxwell*

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 7, 2010.

Participants who are registered with CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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