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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ROBERT FIRTH, FAN ACTION, INC.,	)
BLUE AND GOLD.COM,	)
Plaintiffs,	)
	)
vs.	) CAUSE NO. 3:10-CV -075
	)
YAHOO! INC. dba: RIVALS.COM,	)
TIM PRISTER, JACK FREEMAN,	)
PETE SAMPSON, SHANNON TERRY,	)
BOBBY BURTON,	)
Defendants.	)

PLAINTIFFS' OPPOSITION TO DEFENDANTS YAHOO! INC., dba RIVALS.COM, TIM PRISTER, JACK FREEMAN, PETE SAMPSON, SHANNON TERRY and BOBBY BURTON'S MOTIONS TO DISMISS

Preliminary Statement

Plaintiffs Firth, Fan Action, Inc., and Blue and Gold.com submit this memorandum of law in opposition to the motions to dismiss filed by Yahoo!Inc. Dba:Rivals.com, Tim Prister, Jack Freeman, Pete Sampson, Shannon Terry, and Bobby Burton.

In footnote 1 of Defendants Prister, Freeman and Sampson's motion to dismiss they respectfully adopt in support of their Motion the arguments presented by Yahoo! And they note: "Plaintiffs *presumably* contend that Indiana law governs their causes of action..."(Italics added)

In footnote 1 of Defendants Terry and Burton's motion to dismiss they respectfully adopt in support of their motion the arguments presented by Yahoo! in support of its own motion to dismiss. They also note, as did Defendants Prister, Freeman and Sampson that: Plaintiffs *presumably* contend that Indiana law governs their causes of action..." (Italics added)

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Defendant Yahoo! Inc., "Introduction" page 1 legal paragraphs 2 and 3 of its memorandum in support motion to dismiss states: "Rather than making cohesive factual allegations, this Complaint is made up primarily of exhibits and repetitive prayers for relief. The result is a very confusing, imprecise and muddled set of allegations that collectively fail to state any claim for relief. This is particularly true as to defendant Yahoo!" And: "So incomprehensible are the allegations that *it is impossible to decipher even the precise claims* for relief alleged".

Because the defendants have elected to adopt similar arguments, have complained of an inability to make out the factual allegations requiring them to tease enough understanding or to guess in an attempt to formulate a response, and complained of the lack of facts, Plaintiffs, for a judicial savings of time, responds to all motions herein and would move the Court to consider the defendants motions to dismiss as motions for more definite statement.

ARGUMENT

A. Defendants collectively complain, that they cannot discern from the complaint as written, the precise nature of plaintiff's claims and thus cannot prepare a responsive pleading. If the defendants can not ascertain the precise nature and scope of plaintiffs claims the only question then is the appropriate remedy.

Federal Rule of Civil Procedure 8(a) provides in relevant part that, "[a] pleading which sets forth a claim for relief . .. shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . .." Fed. R. Civ. P. 8(a).

The Seventh Circuit recently elaborated on the meaning of Rule 8(a)'s short and plain statement requirement: While defendants did not move for relief under Rule 12(e) courts can order a more definite statement *sua sponte*. *See Moore's Federal Practice* ¶ 12.36(1) (3d Ed.

2004) and cases cited therein. Rule 8(a) requires parties to make their pleadings straightforward, so that judges and adverse parties need not try to fish a gold coin from a bucket of mud.

Fortunately, the Federal Rules of Civil Procedure provide another mechanism to remedy the defects in plaintiff's complaint. Federal Rule of Civil Procedure 12(e) provides: "Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired."

The Defendants have pointed out the defects complained of and the details required in their joint motions.

If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. Fed. R. Civ. P. 12(e). Rule 12(e) is often employed where the pleadings are insufficient. In such cases, the motion for more definite statement can assist the court in 'the cumbersome task of sifting through myriad claims, many of which may be foreclosed by various defenses." *2 James Wm. Moore et al., Moore's Federal Practice* ¶ 12.36(1) (3d Ed. 2004), (quoting *Anderson v. Board of trustees*, 77 F.3d 364, 367 (11th Cir. 1996.) While, Rule 12(e) is disfavored, plaintiffs' complaint is precisely the type of pleading to which it is properly applied.

B. Granting *sua sponte* a motion for more definite statement would also allow the Plaintiffs to fortify their complaint with as much detail as they can now muster so the facts plead show " facial plausibility" consist with the standards set out in *Bell Atlantic Corp. v. Twombly*,

550 U.S. 544 (2007) and *Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).*[1] It is worthwhile to show the differences in this case from *Iqbal* by analogizing some helpful decision that have come down since *Iqbal*.

In *Smith v. Duffey*, 576 F.3d 336, 339–40 (7th Cir. 2009), for example, Seventh Circuit Judge Richard Posner suggested in dicta that *Twombly* may be limited to complex cases and *Iqbal* may be limited to government official immunity cases. In another Seventh Circuit case, *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F. 3d 849 (7th Cir. 2009), Judge Frank Easterbrook reversed the dismissal of a qui tam complaint where the complainant, Curtis Lusby, alleged that Rolls-Royce defrauded the United States regarding the quality of certain turbine blades, knowing that the blades failed to meet the required specifications. The defendant argued, and the district court agreed, that without specific allegations relating to the invoices, Lusby's complaint failed for lack of particularity. Judge Easterbrook held that because Lusby was "unlikely to have those documents unless he works in the defendant's accounting department, the district court's ruling takes a big bite out of qui tam litigation." *Id.* at 854. He noted that, although it is essential to show a false statement in a qui tam suit, "much knowledge is inferential —people are convicted beyond a reasonable doubt of conspiracy without a written contract to commit a future crime—and the inference that Lusby proposes is a plausible one."*Id.*

In *Taylor v. Pittsburgh Mercy Health System, Inc.*, the district court held: "*Twombly* and

1 Recently however, courts have found the *Iqbal* standard is unquestionably subjective and difficult to apply. The four dissenting justices harshly criticized the majority, accusing them of a "fundamental misunderstanding of the enquiry that *Twombly* demands."*Id.* at 1959 (Souter, J., dissenting). As the dissent points out, both *Twombly* and *Neitzke v. Williams* require judges to assume that all the allegations in the complaint are true (even if doubtful in fact) and that " 'Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations.' " *Id.* (quoting *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). The dissent in *Iqbal* goes so far as to say that only those complaints with "allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel" are of the ilk that warrant dismissal.*Id.*

Iqbal notwithstanding, the notice pleading standard still applies in federal court. All plaintiffs must do is allege sufficient 'factual content [to] allow the Court to draw the reasonable inference that . . . [the] defendant[s are] liable for the misconduct alleged." *Id.* at *2 (citing *Iqbal*, 129 S. Ct. 1937, 1949).

C. Finally, if the Court determines *sua sponte* to consider the defendants motion s to dismiss as motions for more definite statement, Plaintiff will propound limited initial discovery relating to any allegations that the Court may consider weak, specifically with regard to the continuing harm and continuing nature of the Plaintiffs alleged damages. The Plaintiffs point to the language in Rule 26(f)(1) that "the parties must confer as soon as practicable" and the given *Iqbal's* fact-pleading requirements. The federal rules presumptively provide for the early initiation and continuance of discovery and disfavor blanket stays of discovery. Further, after Iqbal, there is a need for limited discovery on the particular allegations the defendants are challenging as unsupported by sufficient facts.

There are many federal decisions rejecting the pendency of a motion to dismiss as a basis for granting a blanket discovery stay. *See e.g. SK Hand Tool Corp. v. Dresser Indus.*, 852 F.2d 936, 945 (7th Cir. 1988); *Lofton v. Bank of Am. Corp.,* 2008 WL 2037606, at *2 (N.D. Cal. May 12, 2008); *Gray v. First Winthrop Corp*., 133 F.R.D. 39, 40 (N.D. Cal. 1990); *C&F Packing Co. v. IBP, Inc.,* 1994 WL 36874, at *3 (N.D. Ill. Feb. 7, 1994); *Turner Broad. Sys., Inc. v. Tracinda Corp.,* 175 F.R.D. 554, 556 (D. Nev. 1997).

Iqbal has created a dilemma for plaintiffs and judges. The fundamental problem is that this new pleading standard requires specificity that plaintiffs cannot provide until they have conducted discovery—once they have access to files and internal company documents.

As one lawyer said, "How do you get there if you're not allowed to go there?*"See Alison Frankel, Two More Iqbal Dismissals Emerge in Product Liability Cases, Am. Law.* (Aug. 4, 2009).

Moreover, to the extent that this Court should find dismisal is appropriate on even a single cause of action, the approriate remedy would be to allow Plaintiffs to amend their complaint, rather than deprive a party, Mr. Firth, who has already been deprived of so much, his day in court.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully prays that this Court will deny the Defendants motions to dismiss, and *sua sponte* order a more definite statement from the Plaintiffs within the time alotted by FRCP 12(e).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of March, 2010, a true and correct copy of the above and foregoing was served on the following interested parties in this action via the Court‟s CM/ECF system:

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