

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION**

ROBERT FIRTH, FAN ACTION, INC., BLUE)
AND GOLD.COM,)

Plaintiffs,)

vs.)

CAUSE NO. 3:10-CV-00075)

YAHOO! INC. dba: RIVALS.COM, TIM)
PRISTER, JACK FREEMAN, PETE)
SAMPSON, SHANNON TERRY, BOBBY)
BURTON,)

Defendants.)

DEFENDANT YAHOO!, INC.’S REPLY IN SUPPORT OF MOTION TO DISMISS

Defendant Yahoo! Inc. (“Yahoo!”) hereby submits their Reply in Support of Motion to Dismiss.

I. INTRODUCTION

Plaintiffs’ Response raises the old adage “a day late and a dollar short.” Defendant Yahoo! served its motion to dismiss on Plaintiffs on March 10, 2010. Northern District of Indiana Local Rule 7.1 obliges a party opposing a motion to file an opposition within fourteen days of service. In this case, Plaintiffs’ Opposition was due on March 24, 2010, but was filed on March 25, 2010. Accordingly, pursuant to Local Rule 7.1(a), the Court should disregard it and grant summarily Yahoo!’s motion.

Even if it considers the Opposition, the Court should nonetheless grant the motion. By seeking leave to file a more definite statement under Rule 12(e), Plaintiffs concede that their Complaint falls short.¹ A more definite statement, however, is obviously futile if the underlying

¹ No defendant moved under Rule 12(e) for a more definite statement. And, plaintiffs cannot ask the Court to rule *sua sponte*. Accordingly, plaintiffs’ Response can at best be interpreted as a request for leave to file a more definite statement.

claims are time barred or preempted, neither of which Plaintiffs addressed in their brief. In fact, they failed to acknowledge, let alone oppose, defendants' statute of limitations and preemption arguments.

Last, Plaintiffs make some arguments regarding a discovery stay. Plaintiffs' point is not entirely clear, although it appears as though they are asking for the right to conduct discovery to obtain facts to plead. Discovery here, however, would be futile. Even setting aside the dispositive statute of limitations and preemption arguments, the types of facts that Plaintiffs must allege in order to state their claims here are uniquely within their own knowledge. This is not a conspiracy case (at least it doesn't seem to be) or other type of case where essential facts are exclusively within the defendant's control. Thus, Plaintiffs' discussion of potential pleading difficulties created by *Twombly*, as interesting as it is, is wholly academic here.

Defendants are not advocating that Rule 8 requires specificity that only discovery can provide. Rather, Defendants are asking for a cogent statement of facts sufficient to plausibly state some claim for relief that is not time-barred or pre-empted. Based on the sparse facts that are alleged, Plaintiffs cannot plead around the statute of limitations applicable to Counts I, II, IV, V, VI, VII and VIII [sic] and they should be dismissed outright. As to the remaining counts, the facts alleged fail to support them. Consequently, they should be dismissed.

II. ARGUMENT

A. LEAVE TO FILE A MORE DEFINITE STATEMENT WOULD BE FUTILE

As Plaintiffs point out, Rule 8, as interpreted by *Twombly*, requires plaintiffs to plead facts sufficient for the court to draw a plausible inference that the defendants are liable for the wrongs alleged. *See*, Opposition, p. 5, referencing, *Taylor v. Pittsburgh Mercy Health Systems, Inc.*² The pleading here, however, allows no such inference. Save the caption, there is not a single reference to Yahoo! in the Complaint, a point which Plaintiffs do not address in their brief. Moreover, Counts

² Plaintiffs provide no citation for the *Taylor* case and there are at least six different opinions with that name in Westlaw.

I, II, IV, V, VI, VII and VIII [sic] are unquestionably time-barred based on the face of the Complaint, and Plaintiffs offer no explanation as to how they can plead around the present allegations. Indeed, they cannot.

With respect to the remaining two counts: Breach of contract and RICO, Plaintiffs fail to set forth facts in their Opposition that could save their pleading. They identify no contract between Plaintiffs and Yahoo! and they fail to elaborate at all on their RICO allegations. Rather, they strangely ask the Court to “*sua sponte*” order a more definite statement under Rule 12, subdivision (e). Rule 12, subdivision (e), however, addresses unintelligibility, not lack of detail. *See, Castillo v. Norton*, 219 F.R.D. 155, 163 (D.Ariz.2003) (ordering more definite statement where complaint was 202 pages long and contained 302 factual averments),(citing *Sheffield v. Orius Corp.*, 211 F.R.D. 411, 414-15 (D.Or.2002)). While the present Complaint is certainly unintelligible, it is unintelligible for want of factual allegations and the failure to aver legal theories supported by factual allegations. It is missing the basics such as: the identification of a trade secret(s), the identification of a contract, the identities of the RICO conspirators, the RICO enterprise and the pattern of racketeering activity. Thus, a motion to dismiss is proper here, and the Complaint should be dismissed.

B. PLAINTIFFS’ NOTION OF FLESHING OUT THE COMPLAINT WITH DISCOVERY IS MISPLACED

While Plaintiffs’ final argument is not clear, they seem to suggest that any deficiencies in the Complaint can be remedied by discovery. To support this, Plaintiffs embark on a discussion of the Supreme Court’s decision in *Twombly*, focusing on its most recent criticism. While the discussion may prove an interesting basis for debate, it is of no moment here. This Complaint is so utterly deficient factually that discovery would prove impossible. The scope of discovery under the federal rules is framed by the allegations of the complaint. While the Federal Rules are broad and allow discovery into any matter that is relevant to the subject matter of the litigation or reasonably calculated to lead to the discovery of admissible evidence, it is the very subject matter of the litigation that is in question here. The claims are undecipherable. The parties certainly cannot

conduct discovery before they know what it is that they are discovering.

Plaintiffs then attempt to argue that they cannot provide the specificity required by Rule 8 after *Twombly* without discovery, noting that courts reject the notion that a motion to dismiss effectively stays discovery. The argument makes no sense. First, while as pointed out above, discovery on this Complaint would be impossible, no party advocated the position that discovery should be stayed or requested a discovery stay. Second, the cases that Plaintiffs cite, all of which save for one were decided well before *Twombly*, do not stand for the proposition that Plaintiffs should be allowed to conduct discovery to support their claims. The facts that are missing from Plaintiffs' Complaint are basic ones that should be within Plaintiffs' knowledge, and in some instances, their sole knowledge: the contract they claim was breached, the trade secret they claim was misappropriated, the copyright and/or trademark they claim was infringed.

The cases Plaintiffs cite hold nothing to the contrary and, in fact, they are wholly inapposite. *SK Hand Tool Corp. v. Dresser Indus.*, 852 F. 2d 936 (7th Cir. 1988) was a several count case that had been pending for at least *two years* when defendant renewed its motion to dismiss the RICO claim. *Lofton v. Bank of Am. Corp.*, 2008 WL 2037606 (N. D. Cal. 2008) was a case involving a motion to compel for lack of personal jurisdiction, which is an evidentiary motion. *Gray v. First Winthrop Corp.*, 133 F. R. D. 39 (N. D. Cal. 1990) was a case involving bifurcating discovery on class certification. The only case even addressing a discovery stay on a motion to dismiss was *Turner Broad Sys., Inc. v. Tracinda Corp.*, 175 F. R. D. 554 (D. Nev. 1997), and the court here made the unremarkable finding that the propriety of a stay is determined on a case-by-case basis.

No one has requested a stay, and there is no basis for discovery on the Complaint as pleaded. The facts that Plaintiffs need in order to state a claim should be within their own knowledge and Plaintiffs fail to identify any facts necessary to satisfy Rule 8 that would be exclusively in the control of any of the Defendants. Moreover, most of the deficiencies cannot be cured by amendment since the majority of claims are time-barred on their face. Accordingly, the Complaint must be dismissed.

III. CONCLUSION

Based on the foregoing law and argument, defendant Yahoo! respectfully requests that the Court grant its motion and dismiss the Complaint. Yahoo! further requests that Counts I, II, IV, V, VI, VII and VIII [sic] be dismissed with prejudice as they are time-barred.

Dated: March 30, 2010

Respectfully submitted,

/s/ Clay M. Patton

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th 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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