

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**AARON CLARK,**

*Plaintiff,*

v.

**THE WALT DISNEY COMPANY, et  
al.,**

*Defendants.*

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**Case No. 2:08CV982**

**Judge Holschuh**

**Magistrate Judge Abel**

**PLAINTIFF AARON CLARK’S MOTION TO STRIKE  
DECLARATION OF GRANT KINSEL  
FILED IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS**

Now comes Plaintiff, Aaron Clark (“Plaintiff”) by and through undersigned counsel and pursuant to Federal Rules of Civil Procedure 12(f), respectfully submits this Motion to Strike the Declaration of Grant Kinsel attached to and filed in support of Defendants JAKKS Pacific, Inc.’s (“JAKKS”), Play Along Toys (“PAT”) and Toys “R” Us’ (collectively “Defendants”) Motion to Dismiss (Doc. 11). For the reasons set forth in the accompanying Memorandum in Support, Mr. Kinsel’s Declaration should be stricken as immaterial and superfluous.

Respectfully submitted,

**THE DICKERSON LAW GROUP, P.A.**

/s/ Brian E. Dickerson

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## MEMORANDUM IN SUPPORT

Plaintiff's Motion to Strike raises the issue as to the admissibility of the evidence offered in Mr. Kinsel's declaration and the competency of Mr. Kinsel to testify to the matters as it pertains to matters outside the record in support of Defendants' Motion to Dismiss. This Honorable Court has discretion to disregard facts which would not be admissible in evidence, and to rely on those facts which are competent evidence. *Wimberly v. Clark Controller Co.*, 364 F.2d 225, 228 (6<sup>th</sup> Cir. 1966).

When deciding a motion to dismiss for failure to state a claim, a court generally considers only the complaint and not any material beyond the pleadings. *See, Phonometrics, Inc. v. Hospitality Franchise Systems, Inc.*, 203 F.3d 790, 794 (Fed. Cir. 2000) ("The Rule 12(b)(6) pleading requirement for a complaint for infringement cannot be extended to require a plaintiff to specifically include each element of the claims of the asserted patent."). *See also, McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356-57 (Fed. Cir. 2007); *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 155 (6<sup>th</sup> Cir. 1983). Rule 12(b)(6), by its terms, refers to statements in Plaintiff's Complaint. Extraneous matters in declarations, affidavits or otherwise may not be introduced in support of a motion to dismiss. *See, Notes of Advisory*, Fed.R.Civ.P. 12(b). Mr. Kinsel's Declaration and the exhibits attached are extraneous material beyond the pleadings.

As such, based on the foregoing, Plaintiff respectfully request this Honorable Court grant his Motion to Strike and not consider Mr. Kinsel's Declaration and any documents and evidence referred, cited or attached thereto for purposes of the pending Motion to Dismiss, thereby limiting the information before it to that contained in Plaintiff's well-pleaded Complaint.

Respectfully submitted,

**THE DICKERSON LAW GROUP, P.A.**

/s/ Brian E. Dickerson

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 30, 2009, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system upon counsels of record.

/s/ Sharlene I. Chance

Sharlene I. Chance (0069227)

*Attorney for Plaintiff Aaron Clark*