IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

ENABLE COMMERCE, INC.,

Plaintiff, : Case No. 3:09-cv-328

-vs- Magistrate Judge Michael R. Merz

:

THE STANDARD REGISTER COMPANY, et al.,

Defendants.

DECISION AND ORDER

This case is before the Court on Motion of Defendant United Stationers to Dismiss Claims for Relief E, F, and G (Doc. No. 14). Plaintiff Enable Commerce, Inc., opposes the Motion, except for withdrawing Claim E (Doc. No. 22). United has filed a reply in support (Doc. No. 24).

A motion to dismiss involuntarily is a dispositive motion under 28 U.S.C. § 636(b)(1)(A) and ordinarily requires a recommendation, rather than a decision, from a magistrate judge. Here, however, the parties have unanimously consented to plenary magistrate judge jurisdiction (Doc. No. 26) and the case has been referred on that basis (Doc. No. 27).

Enable argues this case must be decided under Texas law, given that the Court's subject matter jurisdiction is grounded in the diverse citizenship of the parties and arguing that the Ohio courts would apply Texas law. United responds that the Complaint is deficient under either State's law, so the Court need not decide the choice of law question at this point.

The Motion to Dismiss was made under Fed. R. Civ. P. 12(b)(6) whose purpose is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if

everything alleged in the complaint is true. *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993), citing *Nishiyama v. Dickson County, Tennessee*, 814 F.2d 277, 279 (6th Cir. 1987). Put another way, "The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief; it is not a procedure for resolving a contest about the facts or merits of the case." Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: Civil 2d §1356 at 294 (1990).

The test for dismissal under Fed. R. Civ. P. 12(b)(6) has recently been re-stated by the Supreme Court:

> Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed.2004)("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the assumption that all the allegations in the complaint are true (even if doubtful in fact), *see, e.g., Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989)(" Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

Bell Atlantic Corp. v. Twombly, 550 U.S.544, 555 (2007).

> [W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, " 'this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court.' " 5 Wright & Miller § 1216, at 233-234 (quoting *Daves v. Hawaiian Dredging Co.*, 114 F.Supp. 643, 645 (D. Hawaii 1953)); see also *Dura [Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005),, at 346, 125 S.Ct. 1627; *Asahi Glass Co. v. Pentech Pharmaceuticals, Inc* ., 289 F.Supp.2d 986, 995 (N.D.Ill.2003) (Posner, J., sitting by designation) ("[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase").

Bell Atlantic, 550 U.S. at 558; *see also Association of Cleveland Fire Fighters v. City of Cleveland,*

Ohio, 502 F.3d 545 (6th Cir. 2007). To survive a motion to dismiss under Rule 12(b)(6), the allegations in a complaint "must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief." *Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008), quoting *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007)(emphasis in original).

Bell Atlantic overruled *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)(Specifically disapproving of the proposition that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.")

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "a ... complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory." *Scheid v. Fanny Farmer Candy Shops, Inc*., 859 F.2d 434, 436 (6th Cir. 1988); *followed Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236 (6th Cir, 1990); *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101 (6th Cir. 1995). The Court "need not accept as true legal conclusions or unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). Bare assertions of legal conclusions are not sufficient. *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 726 (6th Cir. 1996); *Sogevalor S.A. v. Penn Central Corp*., 771 F. Supp. 890, 893 (S.D. Ohio 1991). It is only well-pleaded facts which are construed liberally in favor of the party opposing the motion to dismiss. *Id.*, citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); see also Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: Civil 2d §1357 at 311-318 (1990). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S.544, 555 (2007), *citing Papasan v. Allain*, 478 U.S. 265, 286 (1986)(on a motion

to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation.")

The contested claims for relief read as follows:

> **F. Defamation**
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> 4.12 Upon information and belief, Plaintiff contends that United Stationers interfered with Plaintiff's business relationship with Standard Register, thereby defaming and/or slandering Plaintiff's reputation, ability and contribution in regards to the Project. Plaintiff would show that such defamatory language was false and was said maliciously by United Stationers for the purpose of ingratiating their own business purpose.
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> **G. Misappropriation of Time, Labor, Skill, and Resources**
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> 4.13 United Stationers has taken information and value from Plaintiff, which was obtained by significant time, labor, skill, and money and that United Stationers use of that information and value was in business competition with Plaintiff, thereby diminishing the profits and benefits Plaintiff would otherwise have garnered.

(Complaint, Doc. No. 1, at 6-7.)

In its Memorandum in Opposition, Enable relies upon the assertion of a number of facts not pled in the Complaint. It is axiomatic, however, that a civil complaint must be sufficient in itself to withstand a motion under Rule 12(b)(6). Without deciding whether the Complaint would be sufficient if it included the facts relied upon in the Memorandum in Opposition, the Court concludes that the Complaint does not state claims for relief against United in Claims F and G as they stand.

Accordingly, the Motion to Dismiss is granted and Claims F and G are ordered dismissed without prejudice for failure to state a claim upon which relief can be granted under either Ohio or Texas law. Claim E is dismissed without prejudice upon Enable's withdrawal of that claim.

November 30, 2009.

s/ **Michael R. Merz**
United States Magistrate Judge