

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

SUSAN POLGAR,
Plaintiff,

V.

UNITED STATES OF AMERICA
CHESS FEDERATION, INC.
and
BILL GOICHBERG, JIM BERRY,
RANDY BAUER, and
RANDALL HOUGH, all Individually
and in their Representative Capacities as
Members of the Executive Board of the
United States of America Chess Federation;
BILL HALL, Individually and in his
Representative Capacity as Executive
Director of the United States of America
Chess Federation;
BRIAN MOTTERSHEAD;
HAL BOGNER;
CHESS MAGNET, L.L.C.;
CONTINENTAL CHESS INCORPORATED;
JEROME HANKEN;
BRIAN LAFFERTY;
SAM SLOAN;
KARL S. KRONENBERGER; and
KRONENBERGER BURGOYNE, L.L.P.;

Defendants.

**PLAINTIFF SUSAN POLGAR’S RESPONSE TO DEFENDANT KRONENBERGER
BURGOYNE, L.L.P.’S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM
UNDER FED. R. CIV. P. 12(b)(6), OR IN THE ALTERNATIVE, MOTION FOR A
MORE DEFINITE STATEMENT PURSUANT TO FED. R. CIV. P. 12(e) AND BRIEF IN
SUPPORT THEREOF**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE SAM R. CUMMINGS:

COMES NOW, **SUSAN POLGAR**, Plaintiff, files this her Response to Defendant Kronenberger Burgoyne L.L.P.'s Motion to Dismiss for Failure to State a Claim Under FED. R. CIV. P. 12(b)(6), or in the Alternative, Motion for a More Definite Statement pursuant to FED. R. CIV. P. 12(e), and shows the Court as follows:

Procedural History

1. On August 7, 2008, Plaintiff filed her Original Petition in the 72nd District Court of Lubbock County, Texas. On August 20, 2008, ten of the defendants removed the lawsuit to the United States District Court for the Northern District of Texas, Lubbock Division, now present before the Court. On September 26, 2008, Defendant Kronenberger Burgoyne, L.L.P. (hereinafter "Defendant") filed its Motion to Dismiss for Plaintiff's Failure to State a Claim under Fed. R. Civ. P. 12(b)(6), Or in the Alternative, Motion for a More Definite Statement Pursuant to Fed. R. Civ. P. 12(e), to which Plaintiff now responds.

RESPONSE AND BRIEF IN SUPPORT OF DEFENDANT'S 12(b)(6) MOTION

Standards of Law

Rule 12(b)(6)

2. In light of the Federal Rules of Civil Procedures' liberal pleading policy, a Rule 12(b)(6) motion to dismiss is disfavored and rarely granted. *Ramirez v. Walker*, 199 F. App'x 302, 306 (5th Cir. 2006) (citing *Lowrey v. Texas A&M Univ.*, 117 F.3d 242, 247 (5th Cir. 1997)). The Court should liberally construe the complaint in favor of the non-moving party, and the Court must determine whether the complaint states any valid claim for relief whenever viewed in the light most favorable to the non-moving party and with every doubt resolved on their behalf. *Id.* The Court should accept

all well-pleaded facts as true and should view them in the light most favorable to Plaintiff. *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004). A rule 12(b)(6) motion will only succeed whenever it can be shown that the opposing party did not present “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1960, 167 L. Ed. 2d 929 (2007). A claim cannot simply be conceivable, but must be “nudged...across the line from conceivable to plausible.” *Id.*

Argument

A. Defamation

3. Defendant’s claim that Plaintiff failed to state a claim for defamation because the pleadings fail to provide specific examples and because “Plaintiff has chosen to sue so many Defendants, Plaintiff needed to *specifically* state whatever Defendant did or said, when such alleged acts were done and how Plaintiff was damaged by said alleged acts” is untenable. Defendant’s argument is not supported by law, and Defendant’s claim improperly heightens the “short and plain statement” pleading requirements of Rule 8. FED. R. CIV. P. 8(a). Plaintiff clearly indicated in Part XVIII of her original petition that the defamatory statements made by defendants are contained in electronic form in archives controlled by Defendants; therefore, Plaintiff’s ability to state Defendant’s defamatory statements “specifically” is dependant on her access to these archives.

4. Defendant’s further objections regarding media and non-media, public and private matter, private and public-figure, and malice are not pertinent to a Rule 12(b)(6) or 12(e) determination because no Defendant is a member of the media. It is also clear from the pleadings that Defendant’s defamatory statements relate to both private and public matters. Also, as to the public figure issue and the related malice issue, the Texas Supreme Court held that the status of a public figure is a

question of constitutional law for the courts to decide. *WFAA-TV v. McLemore*, 978 S.W.2d 568, 571. Therefore, Defendant cannot rely on the public figure and malice issue to prevail in a 12(b)(6) motion. Even if the Court determined that Plaintiff is a public figure, Plaintiff has plead enough facts demonstrating that the Defendants knew the statements were false, recklessly disregarded the fact that a statement was false, and acted with ill will or intended to interfere with the Plaintiff's economic interests, which is sufficient to show malice under Texas law. *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987).

B. Business Disparagement

5. Defendant's claim that Plaintiff failed to state a claim for business disparagement because the pleadings fail to "identify with specificity" particular facts is untenable because Defendant's argument is not supported by law and because it improperly heightens the "short and plain statement" pleading requirements of Rule 8. Plaintiff clearly indicated in Part XVIII of her original petition that most of the defamatory statements are contained in electronic form in archives controlled by Defendants; therefore, Plaintiff ability to state Defendant's defamatory statements "specifically" is dependant on her access to these archives.

6. Furthermore, Plaintiff's pleadings by way of example and not limitation speak of the SPICE program and her insurance benefits as examples of the economic interests affected by Defendant's disparaging statements. As to Defendant's claim that Plaintiff failed to allege that the statements were made without privilege is without merit because this element has never been discussed as part of the plaintiff's burden. Restatement (2d) of Torts §651(2) and *Daystar Residential v. Collmer* indicate that privilege is a defense to a business disparagement claim rather than an element of the plaintiff's cause of action. *See* RESTATEMENT (2D) OF TORTS §651(2); *Daystar Residential v. Collmer*, 176

S.W.3d 24 (Tex. App.–Houston [1st Dist.] 2004, pet. denied) Finally, Plaintiff has plead sufficient facts demonstrating that Defendant knew the statements were false, recklessly disregarded the fact that a statement was false, and acted with ill will or intended to interfere with Plaintiff's economic interests, which is sufficient to show malice under Texas law. *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987).

C. Tortious Interference With Contracts

7. Defendant has properly outlined the elements to prove a claim for tortious interference with contracts in its brief, which are as follows: a) Plaintiff had a valid contract; b) Defendant willfully and intentionally interfered with the contract; c) the interference proximately caused Plaintiff's injury; and d) Plaintiff incurred actual loss. Plaintiff has plead facts in her original petition sufficient to create a fact issue, if not satisfy each element, for tortious interference with contracts. Plaintiff pleads in her petition that she has been hired by Texas Tech University (contract element), that Defendant, along with others, caused telephone call to be made to Plaintiff's superiors at Texas Tech, causing interference with Plaintiff's contract, and that said interference has deterred donors from contributing to Plaintiff's SPICE program at Tech, and has caused actual loss to Plaintiff in the form of her reputation. These facts Plaintiff pleads support her claim for tortious interference with contracts, and Defendant's motion should be denied.

D. Intentional Infliction of Emotional Distress

8. Defendant's argument that Plaintiff "fails to state that she is asserting this cause of action against this Defendant in Plaintiff's individual capacity" is untenable. Nowhere in Plaintiff's pleadings does she indicate that she is suing in any capacity other than in her individual capacity.

9. Furthermore, under Texas law, a defendant's intent can be inferred from the circumstances

and the defendant's conduct, not just from the defendant's overt expressions. *Twyman v. Twyman*, 855 S.W.2d 619, 623 (Tex. 1993). Proving the severity of distress requires showing the way a plaintiff reacted to the Defendant's conduct. *See, e.g. GTE Sw. v. Bruce*, 998 S.W.2d 605, 618-19. Therefore, requiring Plaintiff to factually demonstrate that Defendant's conduct was intentional or reckless and catalog her reaction to said conduct would require Plaintiff to discuss all of the circumstances surrounding this case and her reactions to this conduct, which would be far more than the short plain statement required by Rule 8. For the same reason, Defendant's complaint that Plaintiff failed to show that Defendants conduct was extreme or outrageous is not in accordance with Rule 8. Furthermore, a 12(b)(6) or 12(e) motion is not the proper motion for Defendant to find remedy for the assertion that Plaintiff's claim for emotional distress must fail because Plaintiff failed to assert that this claim cannot be remedied by any other cause of action.

E. Civil Conspiracy

10. The final paragraph on the tenth page of Plaintiff's original petition, by way of example and not limitation, shows that alleges that all defendants conspired to publish defamatory statements. The unlawful purpose, defamation, falls within the scope unlawful purpose as it is known under Texas law. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1995) (an underlying tort forms the basis of a claim for civil conspiracy). Plaintiff's pleadings show that this underlying tort was intentional, which would indicate knowledge that the acts would result in harm. Further, Plaintiff's pleading alleges that the Defendants used the Internet and other media outlets to accomplish the objects of the agreement.

F. Attorney's Fees

11. Regardless of the statutory or contractual basis for attorney's fees, which may or may not arise during litigation, Plaintiff may be entitled, and thus is required to plead, attorney's fees in

accordance with equitable principles. For example, and not as a limitation, Plaintiff may be entitled to attorneys fees under the *Turner* Rule given the litigious nature of many of the Defendants involved in this case. *Turner v. Turner*, 385 S.W.2d 230 (Tex. 1964).

G. Exemplary Damages

12. Plaintiff pleads facts sufficient on which to base a recovery for exemplary damages. When viewed objectively from Defendant's point of view, causing telephone calls to be made to Polgar's superiors at Texas Tech involved an extreme degree of risk considering the probability and magnitude of the potential harm to Polgar and her reputation. Given the infancy of the SPICE program and Polgar's related employment, Defendant had actual, subjective awareness of the risk but proceeded anyway with a conscious indifference to the rights, safety, and/or welfare of Polgar. Furthermore, Plaintiff pleads multiple facts which substantiate specific-intent malice characterized by ill will, spite, and the purpose to injure developed by Defendant as a result of Plaintiff's rise to fame in the international chess world. With these facts, Plaintiff pleads sufficiently to establish a claim for exemplary damages, and Defendant's motion should be denied.

H. Breach of Fiduciary Duty

13. Defendant correctly states the elements required to claim a breach of fiduciary duty: a) plaintiff and defendant had a fiduciary relationship; b) defendant breached its fiduciary duty to plaintiff; and c) the breach resulted in injury to the plaintiff or benefit to the defendant.

14. Polgar pleads sufficient facts in her petition for this claim against Defendant. Polgar pleads Defendant Kronenberger Burgoyne, L.L.P. owed Polgar a fiduciary duty because Kronenberger Burgoyne, L.L.P. served as counsel for the USCF, and Polgar is a member of the Executive Board of the USCF. Kronenberger Burgoyne, L.L.P. breached that fiduciary duty when he went around

Polgar and conspired with the other USCF board members to contact the USCF's insurance carrier and convince the carrier to deny Polgar insurance coverage and a defense in the New York lawsuit. The insurance carrier agreed, and Polgar suffered injury when the insurance carrier revoked Polgar's defense of the lawsuit beyond defense by way of a 12(b)(6) motion that was filed in that cause. Should Plaintiff prove all these facts to be true, she would be entitled to recovery for breach of fiduciary duty against Defendant; therefore, Defendant's motions should be denied.

I. Legal Malpractice

15. Defendant correctly states the elements required to claim legal malpractice: a) the attorney owed the plaintiff a duty; b) the attorney's negligent act or omission breached that duty; and c) the breach proximately caused the plaintiff.

16. Polgar pleads sufficient facts in her petition for this claim against Defendant. Polgar pleads Defendant Kronenberger Burgoyne, L.L.P. owed Polgar a duty because Kronenberger Burgoyne, L.L.P. served as counsel for the USCF, and Polgar is a member of the Executive Board of the USCF. Kronenberger Burgoyne, L.L.P. breached that duty when he went around Polgar and conspired with the other USCF board members to contact the USCF's insurance carrier and convince the carrier to deny Polgar insurance coverage and a defense in the New York lawsuit. The insurance carrier agreed, and Polgar suffered injury when the insurance carrier revoked Polgar's defense of the lawsuit beyond defense by way of a 12(b)(6) motion that was filed in that cause. Should Plaintiff prove all these facts to be true, she would be entitled to recovery for legal malpractice against Defendant; therefore, Defendant's motions should be denied.

RESPONSE AND BRIEF IN SUPPORT OF DEFENDANT’S 12(e) MOTION**Standards of Law***Rule 12(e)*

17. In light of the Federal Rules of Civil Procedure liberal pleading policy, a Rule 12(e) motion for a more definitive statement is disfavored and should not be granted unless the challenged complaint is so unintelligible that a responsive pleading cannot be framed. *Guess?, Inc. v. Chang*, 912 F.Supp.327, 381 (N.D. Ill. 1995); *Delta Educ., Inc. V. Langlois*, 719 F. Supp. 42, 50 (D.N.H. 1989). A motion for a more definite statement should not be granted if the plaintiff’s claim comports with Rule 8 and gives the defendant fair notice of the basis for the plaintiff’s claim. *See Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964 (2007); *Swierkiewicz v. Sorema*, 534 U.S. 506, 512, 122 S.Ct. 992, 998 (2002). A lack of detail in a complaint is not a ground for requiring a more definite statement. *Swierkiewicz*, 534 U.S. at 512, 122 S.Ct. At 998. Furthermore, a motion for a more definite statement should not be granted if the information a party wishes to obtain can be obtained through discovery. *Mitchell v. E-Z Way Towers, Inc.*, 269 F.2d 126, 132-33 (5th Cir. 1959); *Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563, 572-73 (N.D. Tex. 1997).

Argument

18. The motion for a more definite statement filed by the Defendant misapprehends the purpose of the motion. Rule 12(e) states clearly that “[a] party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that a party cannot reasonably prepare a response.” FED. R. CIV. P. 12(e).

19. Subject to the special requirements of Rule 9, there is no requirement in the Federal Rules of Civil Procedure that pleadings be particular or “specific” as the Defendant repeatedly requests. *See*

FED. R. CIV. P. 8(a) and 9. Therefore, where a pleading meets the requirement of Rule 8 by fairly notifying the opposing party of the nature of the claim, a motion for a more definite statement should not be granted. *See* FED. R. CIV. P. 8(a) and 12(e). All that is required is a concise statement of the circumstances alleged to constitute a cause of action. In the present case, Rule 12(e) cannot be employed to require elaborate detail. *See* FED. R. CIV. P. 8(a), 9, and 12(e).

20. It is clear from an examination of the motion that defendant is attempting to obtain evidentiary detail which is properly the subject of discovery under Federal Rules 26 through 36. The court should deny Defendant's motion for a more definite statement because Plaintiff cannot determine the extent of each defendant's participation until after discovery.

21. Moreover, it is difficult to understand how this defendant, represented by competent counsel, can take the position that a responsive pleading cannot be framed in view of the fact that one of its co-defendants, Sam Sloan, has already filed an answer to the same complaint. The fact that a pro-se co-defendant succeeds in responding by admitting or denying each of the allegations is evidence that the complaint is not vague or ambiguous, but instead a short and plain statement that conforms with Rule 8 and is comprehensible to even those without legal training.

22. It is apparent that Defendant, who is represented by counsel, is capable of admitting or denying the allegations set forth in Plaintiff's complaint, and that the complaint is capable of being responded to and that, accordingly, the motion for a more definite statement should be denied.