

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**OULAWLESSNESS PRODUCTIONS INC.;**  
**BAND OF OUTLAWS TOURING, INC.; and**  
**GUITAR ARMY PUBLISHING, INC.,**

**Plaintiffs,**

**CASE NO.: 8:10-cv-00024-RAL-TBM**

**v.**

**HENRY PAUL; MONTE YOHO;**  
**CHRIS ANDERSON; BILLY CRAIN;**  
**RANDY THREET; JOHN COLEMAN;**  
**JOHN GELLMAN; BLACKHAWK;**  
**and THE HENRY PAUL BAND;**

**Defendants.**

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**DEFENDANTS' MOTION TO DISMISS  
"PLAINTIFF'S [*sic.*] AMENDED COMPLAINT FOR BREACH OF CONTRACT,  
TRADEMARK INFRINGEMENT, UNFAIR COMPETITION, DILUTION, AND  
CYBERPIRACY," ALTERNATIVE MOTION FOR MORE DEFINITE  
STATEMENT AND MOTION TO STRIKE, AND  
SUPPORTING MEMORANDUM OF LAW**

Pursuant to Rules 12 (b)(6), (e), and (f), Federal Rules of Civil Procedure, and Local Rule 3.01, Rules of the Middle District of Florida, Defendants, Henry Paul, Monte Yoho, Chris Anderson, Billy Crain, Randy Threet, John Coleman, John Gellman, Blackhawk, and The Henry Paul Band (collectively, the "Defendants"), move on the following grounds for the Court to dismiss the Amended Complaint or, in the alternative, to order that the Plaintiffs provide a more definite statement of the Amended Complaint, and to strike certain portions of the prayer for relief:

1. On March 23, 2010, the Court *sua sponte* ordered Plaintiffs to replead the Complaint on the ground the Complaint constituted a shotgun pleading. [Dkt #10].

2. Plaintiffs filed their Amended Complaint for Breach of Contract, Trademark Infringement, Unfair Competition, Dilution, and CyberPiracy on April 7, 2010 (the “Amended Complaint”). [Dkt# 18].

3. The Amended Complaint dropped one (1) plaintiff and three (3) claims without notice<sup>1</sup>, and added one (1) new cause of action to the litigation. *See* Amended Complaint, Dkt. #18. Despite these changes, Plaintiffs’ Amended Complaint is another “shotgun” pleading.

4. Each of the Amended Complaint’s 123 paragraphs are (once again) incorporated into each count – regardless of relevance or materiality of the allegations. Each count consequently contains multiple causes of action and irrelevant factual and legal allegations.

5. The singular “Plaintiff” is also employed again in numerous paragraphs without identifying which of the two (or maybe three) plaintiffs is intended. By incorporating all such paragraphs into each count and by omitting a prayer for relief at the end of each count, it is difficult (if not impossible) to discern which plaintiff is the actual party bringing the claim or may be entitled to relief.

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<sup>1</sup> Guitar Army Publishing, Inc. was named a plaintiff in the original Complaint but is curiously not mentioned in the Amended Complaint. Guitar Army Publishing, Inc. has not dismissed its claims nor requested to be dropped from the litigation so it is unclear whether its omission is proper.

6. The single prayer for relief at the end remains problematic because it lumps together nineteen (19) different forms of relief without identifying the relief each Plaintiff is seeking for each claim.

7. The prayer for relief is substantively deficient, as well. It requests injunctive relief in paragraphs F, G, H, N, and O (and audaciously seeks to enjoin free speech), *yet the Amended Complaint fails to allege any of the required elements for such injunctive relief.*

8. As a result of the pleading flaws identified above, the Court should dismiss the Amended Complaint and direct the Plaintiffs to try one more time to make a “short and plain statement” of their case, if they can.

9. Alternatively, for the foregoing reasons, the Court should require Plaintiffs to provide a more definite statement of each cause of action and the relief sought for each claim in the Amended Complaint.

10. Finally, Defendants request the Court strike paragraphs O and R of the prayer for relief because there is no legal basis supporting the injunctive relief sought in paragraph O and there is no alleged basis for an award of attorneys’ fees in R.

WHEREFORE, Defendants respectfully request the Court grant their Motion to Dismiss and dismiss the Amended Complaint, or, alternatively, grant their Motion for More Definite Statement and require Plaintiffs to amend the Amended Complaint, grant the Motion to Strike, and grant such other and further relief which this Court deems just and appropriate.

**MEMORANDUM OF LAW**

The second time's not the charm. Plaintiffs'<sup>2</sup> Amended Complaint, which admittedly corrects some of the many glaring deficiencies of the original Complaint, still fails to contain a "short and plain statement of the claim" and still constitutes a "shotgun pleading." Spanning 123 paragraphs and three (3) counts, and demanding nineteen (19) different forms of relief, the Amended Complaint is a crazy quilt stitching together irrelevant factual and conclusory allegations. This is, "in no sense the 'short and plain statement of the claim' required by Rule 8." *Magluta v. Samples*, 256 F.3d 1282, 1284-85 (11<sup>th</sup> Cir. 2001).

The Amended Complaint also violates the requirement of Rule 10(b), Federal Rules of Civil Procedure, that the allegations "shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances...[and][e]ach claim found upon a separate transaction or occurrence ...shall be stated in a separate count." Because each count incorporates all preceding allegations, each count of the Amended Complaint, including the first count, potentially states several different causes of action.

Throwing competing theories of relief together in one count raises not only procedural difficulties but substantive, as well. For example, the economic loss or preemption doctrines would appear to bar one or more of the counts, but the manner of Plaintiffs' pleading makes it impossible to untangle the allegations and conduct the needed legal and factual analysis. Additionally, Count Two purports to bring separate

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<sup>2</sup> Defendants assume that "*Plaintiff's* Amended Complaint" instead of "*Plaintiffs'* Amended Complaint" is a scrivener's error given the multitude of errors in the Amended Complaint.

claims against each of the Defendants for separate acts constituting different claims for trademark infringement, unfair competition, and dilution for an unspecified Plaintiff. *See* Amd. Cmplt. at paras. 106 through 115, at pp. 21-23, Dkt. #18. Count Three, as well, asserts a cause of action against each of the Defendants for separate acts allegedly constituting different acts of cyberpiracy. *See* Amd. Cmplt. at paras. 116 through 123, at pp. 23-25, Dkt. #18.

The incorporation of all preceding allegations into each count of the Amended Complaint constitutes a “shotgun pleading” which, as this Court noted in its March 23<sup>rd</sup> Order, the Eleventh Circuit has condemned “on numerous occasions”. [Dkt. # 10 at p. 1]. “Shotgun pleadings ... impede[] the due administration of justice and, in a very real sense, amount[] to obstruction of justice.” *Byrne v. Nezhat*, 261 F.3d 1075, 1128-34 (11<sup>th</sup> Cir. 2001). “[I]t is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief.” *Anderson v. Dist. Bd. Of Trustees of Cent. Fl. Comm. College*, 77 F.3d 364, 366 (11<sup>th</sup> Cir. 1996).

Plaintiffs’ “shotgun” amended complaint must be dismissed. *Strategic Income Fund, L.L.C. v. Spear, Leads & Kellogg Corp.*, 305 F.3d 1293, 1297 (11<sup>th</sup> Cir. 2002)(affirming dismissal of ‘shotgun’ complaint); *Roundtree v. Countrywide Home Loans, Inc.*, 2009 WL 5215334 \*3-4 (M.D. Fla. December 29, 2009)(dismissing ‘shotgun’ complaint).

Further, Plaintiffs’ request for injunctive relief in paragraphs F, G, H, N, and O of their singular prayer for relief must be dismissed for failure to state a claim for which injunctive relief may be granted. Although the Lanham Act, 15 U.S.C. § 1125(a) and the

federal Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) both provide for injunctive relief, the plaintiff must still satisfy the four (4) prerequisites for an injunction. *See E. Remy Martin & Co., S.A. v. Shaw-Ross Int'l Imports, Inc.*, 756 F.2d 1525, 1529-30 (11<sup>th</sup> Cir. 1985)(trademark infringement); *DaVinci Tech. Corp. v. Rubino*, 2005 WL 1249462 \*6-10 (D.N.J. May 25, 2005)(cyberpiracy). Although the Amended Complaint sets forth 123 paragraphs, none of the paragraphs state any of the elements necessary for granting injunctive relief. Thus, the Court should dismiss Plaintiffs' request for injunctive relief in paragraphs F, G, H, N, and O of the *ad danum* clause.

Paragraph O should alternatively be stricken under Rule 12 (f), Federal Rules of Civil Procedure for lacking legal merit. In that paragraph, Plaintiffs make a bold request: that the individual defendants be enjoined from “*discussing, commenting upon, or mentioning*” the plaintiffs. Obviously, the Court cannot enjoin Defendants from merely “mentioning” the corporate Plaintiffs. Clearly more of a petulant child demand than something that is in the public interest, Paragraph O should be struck. *Spitalny v. Insurers Unlimited, Inc.*, 2005 WL 1528629, \*4 (M.D. Fla. June 24, 2005)(striking request for injunctive relief where there was no alleged basis for demand).

Likewise, paragraph R should be stricken. This paragraph demands reasonable attorney's fees but fails to identify the basis for awarding such fees.<sup>3</sup> *Id.* (striking request for fees where there was no basis for demand).

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<sup>3</sup> There is no contractual basis for awarding fees as the license agreement does not provide for such recovery. See Exhibit B to Amd. Cmplt., Dkt. #18.

As an alternative to dismissal of the Amended Complaint, because a “shotgun” complaint “presents an unfair burden on the defendant, the plaintiff should be required to provide a more definite statement of his complaint.” *Beckwith v. Bellsouth Telecomm., Inc.*, 146 Fed. Appx. 368, 2005 WL 2012667 (11<sup>th</sup> Cir. August 22, 2005)(affirming district court order directing plaintiff to file more definite statement of its claim); *see Anderson*, 77 F.3d at 366 (opining that district court would have granted a motion for more definite statement of plaintiff’s “shotgun” complaint had defendant actually moved for one).

Plaintiffs should also be required to provide a more definite statement of their prayer for relief because it is impossible to know which plaintiff is seeking what remedy. The *ad damnum* clause again refers to the singular “Plaintiff” without naming the particular entity demanding relief, and again throws in nineteen (19) different forms of relief at the end of the pleading. As an example of the confusion created by Plaintiffs’ carelessness in drafting this clause, paragraph F requests that the Court:

Find that Licensee Defendants and Defendant Gellman have violated 15 U.S.C. § 1125 (d) and order these Defendants to re-register the Domain Name in the name of ‘Outlawlessness Productions, Inc.’ as registrant and reveal to Plaintiff the User Identification and Password, or other information required to access GoDaddy Domain Name account, and further order these Defendants to abstain from any future involvement with any of Plaintiff’s Domain Name registrations.

(Amd.Cmplt. at p. 26, Dkt. #18). It appears from paragraph F that it is Plaintiff Outlawlessness Productions, Inc. which is making this request. Yet, paragraph 54 of the Amended Complaint alleges that the Domain Name was registered in the “name of Plaintiff Band of Outlaws.” Neither the Defendants nor this Court should have to expend

time, energy, and resources to figure out what relief each Plaintiff is demanding for each count. Rather, it is the Plaintiffs' obligation to state their claims for relief.

If the Amended Complaint is not dismissed in its entirety, at a minimum, Plaintiffs should be ordered to amend their Amended Complaint to add a prayer for relief following each count specifically stating what relief is sought by which Plaintiff against which Defendant.

### **CONCLUSION**

For all of the foregoing reasons, Plaintiffs' Amended Complaint should be dismissed, or, in the alternative, Plaintiffs should provide a more definite statement of their claims. Paragraphs R and O of the prayer for relief should also be stricken.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 22, 2010, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: David MacTavish, Esq., 8N341 Thomas Rd., Maple Park, IL 60151.

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