

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

(1) QUILL INK BOOKS LIMITED, a
foreign corporation, and

Plaintiff,

v.

(1) ABCD GRAPHICS AND DESIGN,
INC., D/B/A BLUSHING BOOKS
PUBLISHING, a foreign corporation, *et al.*,

Defendants.

Case No.: CIV-18-920-G

**PLAINTIFF QUILL INK BOOKS LIMITED'S
MOTION TO DISMISS THE COUNTERCLAIM OF
DEFENDANT ABCD GRAPHICS AND DESIGN, INC.,
D/B/A BLUSHING BOOKS PUBLISHING**

Plaintiff Quill Ink Books Limited (“Quill”), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, moves the Court for an order dismissing the counterclaim filed by Defendant ABCD Graphics and Design, Inc. d/b/a Blushing Books Publishing (“Blushing”). [Defendant’s Answer and Counterclaim, Dkt. No. 32]. In support thereof, Quill shows the Court as follows:

PRELIMINARY STATEMENT

This action arises from false and defamatory communications delivered to Quill’s eBook distributor in Oklahoma, Draft2Digital, L.L.C.(“Draft2Digital”), and to various other online vendors. Quill filed the instant action on October 17, 2018, seeking injunctive relief for intentional interference with contract and for copyright misuse; and for damages for misrepresentation of copyright claims under the DIGITAL MILLENNIUM

COPYRIGHT ACT (“DMCA”), tortious interference with prospective and existing business relationships, defamation, false light, civil conspiracy; and for declaratory relief.

On February 17, 2019, Blushing filed its answer and asserted a counterclaim against Quill. The counterclaim, however, is full of obscurities rendering it unintelligible. Blushing, itself, even states *“it is extremely difficult if not impossible for anyone to gauge how and to what extent Plaintiff filing this lawsuit has harmed Blushing Books.”* [*Id.* at ¶77 (emphasis added)]. Blushing then cites an Oklahoma pleading statute, 12 OKLA. STAT. § 2013, as a basis for recovery regarding an unidentified “financial injury.” [*Id.* at ¶79].

Blushing’s counterclaim, in total, alleges:

76. ABCD Graphics and Design is one of the largest “digital first” publishers in the world. Furthermore, it is one of the longest lived, out lasting literally dozens of romance “eBook” publishers, including Ellora’s Cave, Loose ID, Samhain, and many others. ABCD Graphics’ reputation in the industry is truly its bread and butter.

77. All of that said, it is extremely difficult if not impossible for anyone to gauge how and to what extent Plaintiff filing this lawsuit has harmed Blushing Books. What is objective, quantifiable, and verifiable are the losses Defendant has incurred defending this meritless lawsuit. At this point, Defendant estimates that figure to be in the area of \$11,500 in legal fees, loss of wages, filing fees, and various other extraneous expenses. Further, even having an established presence, reputation, and relative success in the online romance world, Blushing Books is a tiny company in southern Virginia that does not possess an infinite amount of financial resources. Forcing Blushing Books to defend against a federal lawsuit, (particularly one involving such vague and unsubstantiated claims) in a foreign jurisdiction places undue financial and logistical hardship on this small publishing entity.

78. The lawsuit is particularly troubling and unacceptable given the amount of money actually at issue as a result of the takedown notices being filed. For example, Defendant is fully aware of sales of other authors books, through various tracking tools only available to Publishers. Across dozens of titles Defendant tracks correlation of sales ranks to sales (on Amazon) and also is well-aware that sales on the secondary vendors remains a surprisingly

consistent percentage of Amazon sales. Based on these metrics, Defendant can state with confidence that the actual LOSS OF SALES' related damages in this case is likely less than \$2000.00 and may be less than \$1000.00.

79. This is not a matter that ever needed to be brought to court given factual circumstances giving rise to the claim, in addition to the minimal amount of lost sales. Defendant has made diligent efforts to resolve this matter to prevent further expenses from being incurred, and Plaintiff has emphatically rejected any settlement option. As a result, Defendant is forced to file this counterclaim in an attempt to mitigate further financial injury pursuant to 12 OK Stat § 12-2013 (2014).

[*Id.* at ¶¶76-79].

Oddly, Blushing asserts Quill's lawsuit is "meritless," but acknowledges Plaintiff has been damaged by Blushing's conduct, which Blushing has allegedly attempted to settle. And, while claiming "undue financial and logistical hardship," Blushing has and continues to be represented by counsel out of Denver, Colorado. The juxtaposition of these conflicting claims demonstrates Blushing has absolutely no basis to file a counterclaim against Quill, but, nevertheless, advances frivolous and unfounded claims against Quill solely because Blushing has been sued for filing false DMCA notices.

Accordingly, Quill is entitled to the dismissal of Blushing's counterclaim on the grounds it fails to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6).

ARGUMENT AND AUTHORITIES

A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a). Additionally, it must contain "a demand for the relief sought, which may include relief in the alternative or different types of relief."

Id. The failure to allege facts sufficient to support an identifiable claim for relief is subject

to a motion to dismiss for “failure to state a claim upon which relief can be granted.” FED. R. Civ. P. 12(b)(6).

I. BLUSHING’S COUNTERCLAIM FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Blushing’s counterclaim fails to identify anything to support a claim against Quill. Blushing, instead, starts by stating its history and business model [*see* Dkt. 32, ¶76], alleges it has incurred attorney’s fees and costs in defending against the Quill’s lawsuit [*Id.* at ¶77], claims that it has certain insider information related to damages [*Id.* at ¶ 78], and admits Quill was damaged by Blushing’s conduct [*Id.* at ¶79]. Blushing concludes by suggesting the Oklahoma Pleading Code provides a statutory basis for it to recover on some undisclosed “financial injury.” [*Id.*].

Blushing’s allegations do not even remotely contain a single ascertainable cause of action to which Quill can respond. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (“[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the pleader is entitled to relief.”); *see also Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (“[W]e have concluded the Twombly/Iqbal standard is ‘a middle ground between heightened fact pleading, which is expressly rejected, and allowing complaints that are no more than labels

and conclusions or a formulaic recitation of the elements of a cause of action, which the Court stated will not do.”) (citations omitted).

Thus, to withstand a motion to dismiss, Defendant’s counterclaim must contain enough allegations of fact “to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Here, Blushing has failed to establish anything **whatsoever** supporting a counterclaim against Quill. Blushing’s counterclaim fails to comply with even the most basic pleading requirements. Therefore, Blushing’s counterclaim must be dismissed.

CONCLUSION

WHEREFORE, for the reasons stated herein, Plaintiff Quill Ink Books Limited prays that the Court dismiss the counterclaim filed by Defendant ABCD Graphics and Design, Inc., d/b/a Blushing Books Publishing, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and grant any further relief as the Court deems just and equitable.

Dated this 11th day of March, 2019.

Respectfully submitted,

s/ Dylan D. Erwin

Gideon A. Lincecum, OBA No. 19674

Dylan D. Erwin, OBA No. 31987

HOLLADAY & CHILTON, PLLC

204 North Robinson, Suite 1550

Oklahoma City, OK 73102

Telephone: (405) 236-2343

Facsimile: (405) 236-2349

Email: glincecum@holladaychilton.com

derwin@holladaychilton.com

**ATTORNEYS FOR PLAINTIFF
QUILL INK BOOKS LIMITED**

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 2019, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Rebecca L Briggs

beckybriggslaw@gmail.com

Shawn M Dellegar

shawn.dellegar@crowedunlevy.com,carol.welch@crowedunlevy.com,ECFT@crowedunlevy.com,tammy.shaddox@crowedunlevy.com

Deric J McClellan

deric.mcclellan@crowedunlevy.com,pat.george@crowedunlevy.com,ecft@crowedunlevy.com

Gideon A Lincecum

glincecum@holladaychilton.com,cburgess@holladaychilton.com,ECF_Service@holladaychilton.com

Dylan D Erwin

derwin@holladaychilton.com,lspencer@holladaychilton.com,ecf_service@holladaychilton.com

s/ Dylan D. Erwin
