

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

_____	)	
DANIEL T. CALDEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	12-10874-FDS
ARNOLD WORLDWIDE LLC, et al.,	)	
	)	
Defendants.	)	
_____	)	

**MEMORANDUM AND ORDER ON MOTION TO DISMISS**

SAYLOR, J.

This is a case alleging copyright infringement. Plaintiff Daniel T. Calden is proceeding *pro se*. He contends that defendants Arnold Worldwide LLC; McDonald’s USA, LLC; Joshua Peck; and Joseph Auch copied a video he created for a McDonald’s “Big Mac” hamburger contest, and used his ideas in a later television commercial for the McDonald’s “Filet-O-Fish” sandwich.

Defendants have moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. For the reasons set forth below, the motion to dismiss will be granted.

**I. Background**

**A. Factual Background**

Unless otherwise noted, the facts are set forth as alleged in the complaint. The Court also refers to facts and documents that are incorporated by reference in the complaint, as well as matters of public record.

**1. The Big Mac Chant-Off Contest**

In 2008, McDonald's held a contest called the "Big Mac Chant-Off Contest." It sought audio and video remixes of the "Big Mac Chant" ("Two all-beef patties, special sauce, lettuce, cheese, pickles, onions, on a sesame seed bun."). (See Compl. ¶¶ 1, 9; see also Press Release, dated Jun. 18, 2008, available at:

[http://mcdepk.com/yousowantone/mediadocs/Big\\_Mac\\_Chant\\_Release.pdf](http://mcdepk.com/yousowantone/mediadocs/Big_Mac_Chant_Release.pdf) (last viewed Nov. 26, 2012)). Submissions had to be uploaded onto a contest entry page on the social media site MySpace.com. (Compl. ¶ 1).

Calden entered the Big Mac Chant-Off Contest on June 27, 2008, by uploading a video to Myspace.com. (Compl. ¶ 1). The entry was viewable on the site for a short period of time. (*Id.*). On June 30, 2008, Calden's entry was taken down from the contest entry page. (*Id.*).

Calden's entry shows a close-up of a man sitting on a couch inside a house.<sup>1</sup> The man is wearing sunglasses and a t-shirt, and has a gray-and-white sock puppet with hand-drawn features on his left hand. Synthesized music begins to play in the background, and the man and the sock puppet sing along. At first the lyrics are: "Big Mac. Big Mac. Big Mac. Everybody wants to eat a Big Mac." This repeats several times before the music transitions, and the sock puppet begins to lip-sync a solo rap version of the Big Mac Chant. The man joins back in on lyrics about the sesame-seed bun. The man and the sock puppet then repeat the song.

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<sup>1</sup> The Court's descriptions of Calden's competition entry and the Filet-O-Fish commercial that he contends copied his entry are based upon the Court's viewing of audio/video files provided by the defendants. (Def.'s Mot. to Dismiss, Ex. A). Because the complaint referred extensively to both the submission and advertisement, the Court will consider them in connection with the motion to dismiss. See *Giragosian v. Ryan*, 547 F.3d 59, 65 (1st Cir. 2008).

**2. The Filet-O-Fish Commercial**

In February 2009, McDonald's began airing a television commercial for its "Filet-O-Fish" sandwich. (Compl. ¶ 13). The commercial depicts a man, sitting in a garage, eating a Filet-O-Fish sandwich. A blue fish mounted on the wall begins singing: "Give me back that Filet-O-Fish, give me that fish. Give me back that Filet-O-Fish, give me that fish. What if it were you hanging up on this wall? If it were you in that sandwich you wouldn't be laughing at all." The man watches the singing fish and continues to eat his sandwich. Shortly thereafter, another man walks into the garage. He looks at the fish, and then at the original man, who shrugs and continues eating. The commercial ends with a close-up of the sandwich with a voice-over describing an "Extra Value Meal Deal."

Arnold Worldwide was the advertising agency involved in the creation of the Filet-O-Fish advertisement. (Compl. ¶ 14). Joseph Auch and Joshua Peck were involved in creating the advertisement. (*Id.*).

**B. Procedural Background**

Plaintiff filed a complaint in Norfolk Superior Court on February 15, 2012. The complaint alleges claims of "Intellectual Property Theft" (Count I), "Breach of Contract" (Count II), "Impropriety in the Method of Acquiring an Idea" (Count III), "Copyright Infringement" (Count IV), and "Interference of Monies Earned" (Count V). (Compl. ¶¶ 17-21). In essence, plaintiff contends that defendants stole the idea set out in his Big Mac contest submission, and used it for the Filet-O-Fish television commercial without credit or payment to him. Plaintiff seeks credit for his material, money damages, and payment of costs and expenses.

On May 15, 2012, Arnold filed a notice of removal in accordance with 28 U.S.C. § 1446,

and the case was removed to federal court. On June 22, 2012, defendants Arnold and McDonald's moved to dismiss for failure to state a claim pursuant to Rule 12(b)(6). That same day, individual defendants Auch and Peck moved to join the motion to dismiss.

Fed. R. Civ. P. 12(b) states that “[a] motion asserting [failure to state a claim] must be made before pleading if a responsive pleading is allowed.” According to the state court record, Auch and Peck filed an answer to plaintiff's complaint on May 14, 2012. Thus, their motion to dismiss is untimely because it was made after their responsive pleading was filed. However, Fed. R. Civ. P. 12(c) allows for judgment on the pleading upon a motion that is made “[a]fter the pleadings are closed—but early enough not to delay trial . . . .” A Rule 12(c) motion for judgment on the pleadings “is treated much like a Rule 12(b)(6) motion to dismiss.” *Perez-Acevedo v. Rivero-Cubano*, 520 F.3d 26, 29 (1st Cir. 2008). It differs from a Rule 12(b)(6) motion primarily because it is filed after the close of pleadings and “implicates the pleadings as a whole.” *Aponte-Torres v. University of Puerto Rico*, 445 F.3d 50, 54-55 (1st Cir. 2006).

Accordingly, although defendants Auch and Peck have styled their filing as a motion to join the motion to dismiss, the Court will grant the motion and treat it as one for judgment on the pleadings under Rule 12(c). *See Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001) (holding that a motion to dismiss that is filed after the close of pleadings should be construed as a motion for judgment on the pleadings).

## **II. Standard of Review**

On a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court “must assume the truth of all well-plead[ed] facts and give the plaintiff the benefit of all reasonable inferences therefrom.” *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 5 (1st Cir. 2007)

(citing *Rogan v. Menino*, 175 F.3d 75, 77 (1st Cir. 1999)). To survive a motion to dismiss, the complaint must state a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). That is, “[f]actual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.* at 555 (citations omitted). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556). Dismissal is appropriate if plaintiff’s well-pleaded facts do not “possess enough heft to show that plaintiff is entitled to relief.” *Ruiz Rivera v. Pfizer Pharms., LLC*, 521 F.3d 76, 84 (1st Cir. 2008) (quotations and original alterations omitted).

In considering a motion to dismiss, the Court is generally “limited to considering facts and documents that are part of or incorporated into the complaint.” *Giragosian v. Ryan*, 547 F.3d 59, 65 (1st Cir. 2008) (citation and internal quotation marks omitted). However, these limitations are not absolute. *Id.* When a complaint’s factual allegations are dependent upon a document, “that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6).” *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 17 (1st Cir. 1996); *see also McGee v. Benjamin*, 2012 WL 959377, at \*4 (D. Mass. March 20, 2012). The Court may also consider “documents incorporated by reference in [the complaint], matters of public record, and other matters susceptible to judicial notice.” *Giragosian* 547 F.3d at 65 (quoting *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 20 (1st Cir. 2003)).

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