

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA**

**U.S. COMMODITY FUTURES)
TRADING COMMISSION and)
OKLAHOMA DEPARTMENT OF)
SECURITIES *ex rel.* IRVING L.)
FAUGHT,)**

Plaintiffs,)

v.)

Civil Action No. 09-CV-1284 (DLR)

**PRESTIGE VENTURES CORP., a)
Panamanian corporation, FEDERATED)
MANAGEMENT GROUP, INC., a Texas)
corporation, KENNETH WAYNE LEE,)
an individual, and SIMON YANG (a/k/a)
XIAO YANG a/k/a SIMON CHEN), an)
individual,)**

Defendants, and)

**SHEILA M. LEE, an individual, DAVID)
A. LEE, an individual, and DARREN A.)
LEE, an individual,)**

Relief Defendants.)

**PLAINTIFFS’ MOTION AND BRIEF IN SUPPORT TO STRIKE, OR IN THE
ALTERNATIVE, DISMISS DEFENDANT SIMON YANG’S “INNOCENCE OF
CHARGES AND COMPENSATION FOR SIMON YANG”**

Although docketed as one document (Doc. No. 95), Defendant Simon Yang’s filing on July 13, 2010, appears to be two separate documents titled: “Defendant’s Rule 26(a)(1) Initial Disclosures,” and “Innocence of Charges and Compensation for Simon Yang” (the “Pleading”). The exact nature of the Pleading is unclear. The document is not titled in any meaningful way but contains statements and prayers for relief suggesting

that it could be either an amended or supplemental answer to Plaintiffs U.S. Commodity Futures Trading Commission and Oklahoma Department of Securities *ex rel.* Irving L. Faught's (together, "Plaintiffs") Complaint for Injunctive and Other Equitable Relief and for Civil Monetary Penalties Under the Commodity Exchange Act and the Oklahoma Uniform Securities Act, dated November 20, 2009 ("Complaint")¹, or an unsubstantiated motion for summary judgment.

Plaintiffs assert that the Pleading should be treated as an amended or supplemental answer to the Complaint because it: (1) responds to allegations in the Complaint, (2) alleges "misconduct" by Plaintiffs, (3) requests orders directing Plaintiffs to pay Defendant Yang for his direct losses and mental anguish and punitive damages, and (4) contains no brief, legal citations, affidavits, declarations, evidence or citations to evidence.

However, Defendant Yang does not have Plaintiffs' consent nor leave of Court, as required by Fed. R. Civ. P. 15 and paragraph 2 of the Court's Scheduling Order², to file an amended or supplement answer. Regardless, even if he did have such consent or leave, the Pleading should be dismissed for failure to state a claim upon which relief can

¹ On March 4, 2010, Plaintiffs filed an Amended Complaint for Injunctive and Other Equitable Relief and for Civil Monetary Penalties Under the Commodity Exchange Act and the Oklahoma Uniform Securities Act adding individuals Sheila, David, and Darren Lee as Relief Defendants ("Amended Complaint"). The Amended Complaint did not assert any new allegations against Defendant Yang and Defendant Yang has not answered the Amended Complaint.

² Under paragraph 2 of the Scheduling Order, motions to amend the pleadings were due by July 20, 2010. Defendant Yang has not moved in any way for the Court to grant him leave to amend his pleadings.

be granted. Accordingly, Plaintiffs respectfully move the Court to: (1) strike the Pleading in its entirety, (2) dismiss the counterclaim, if any, pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that Defendant Yang failed to state a claim upon which relief can be granted, or (3) if the Court finds that the Pleading should be treated as a motion for summary judgment rather than an amended or supplemental answer, grant Plaintiffs an opportunity to respond accordingly.

MOTION TO STRIKE

The Pleading is procedurally deficient and should be stricken. On or before December 14, 2009, Defendant Yang served his answer to the Complaint (“Answer”) on Plaintiffs. Defendant Yang’s Answer contained no counterclaims and required no response, and accordingly, Plaintiffs did not file a response or a motion pursuant to Fed. R. Civ. P. 12(b), (e), or (f). Defendant Yang may now only amend his Answer with Plaintiffs’ written consent or the Court’s leave, pursuant to Fed. R. Civ. P. 15(a)(2). Prior to July 20, 2010, he could have moved to amend his Answer under paragraph 2 of the Court’s Scheduling Order. Similarly, Defendant Yang may only supplement his Answer with the Court’s permission, pursuant to Fed. R. Civ. P. 15(d). Defendant Yang has amended/supplemented his answer without leave of Court or Plaintiffs’ written consent and has not sought either. “[A]n amendment that has been filed or served without leave of court or consent of the [opposing party] is without legal effect.” *Murray v. Archambo*, 132 F.3d 609, 612 (10th Cir. 1998) (citing *Hoover v. Blue Cross & Blue Shield*, 855 F.2d 1538, 1544 (11th Cir. 1988)). A supplemental answer filed without leave of Court should

be treated the same way. Accordingly, the Court should strike the Pleading in its entirety.

MOTION TO DISMISS

In the alternative to the motion to strike, Plaintiffs move the Court to dismiss the counterclaim, if any, asserted against Plaintiffs in the Pleading, pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that Defendant Yang fails to state a claim upon which relief can be granted.

The Pleading does not expressly state that Defendant Yang is asserting a counterclaim against Plaintiffs. However, the Pleading contains unsubstantiated allegations of “misconduct” by Plaintiffs and requests orders directing Plaintiffs to pay Defendant Yang specific monetary amounts for direct losses, mental anguish and punitive damages. Despite the leniency typically afforded a *pro se* party, the *pro se* status does not “immunize” a party “from pleading facts upon which a valid claim can rest.” *Hutchens v. U.S.*, 89 Fed. Cl. 553, 560 (2009) (citations omitted). To the extent the Pleading’s baseless allegations amount to a counterclaim, it should be dismissed for failure to state a claim upon which relief can be granted.

This Court recently stated the following standard for a motion to dismiss for failure to state a claim:

Dismissal under Rule 12(b)(6) for failure to state a claim is proper “if, viewing the well-pleaded factual allegations in the complaint as true and in the light most favorable to the non-moving party, the complaint does not contain ‘enough facts to state a claim to relief that is plausible on its face.’” *Macarthur v. San Juan County*, 497 F.3d 1057, 1064 (10th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); see *Aschcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008). “While a complaint attacked by a Rule

12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted). Claimants must "do more than generally allege a wide swath of conduct" but, instead, must allege sufficient facts to "nudge[e] their claims across the line from conceivable to plausible." *Robbins*, 519 F.3d at 1247 (quoting *Twombly*, 550 U.S. at 570); see *Iqbal*, 129 S.Ct. at 1952. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949. The question to be decided is "whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Lane v. Simon*, 495 F.3d 1182, 1186 (10th Cir. 2007) (internal quotation omitted).

Wells v. City of Lawton, 2010 WL 2610669, *1 (W.D. Okla. 2010).

Courts generally begin their analysis of a Fed. R. Civ. P. 12(b)(6) motion by determining the elements necessary to state a claim under the proposed legal theory. See *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1947-48 (2009); *Wells*, 2010 WL 2610669 at *3.

Courts then determine whether the claimant alleged sufficient facts to support the elements. *Id.*

In the Pleading, Defendant Yang fails to propose any legal theory as a basis for the relief requested and alleges only conclusory labels and vague and unsubstantiated facts. For example, Defendant Yang states that there was "misconduct" by Plaintiffs, but the only support that Defendant Yang gives for such a conclusion is the following allegations: (1) "[F]alse statements were repeatedly presented by the witnesses to the plaintiffs as well as the court in their declarations as I have pointed out in my answer to the complaint," (2) Plaintiffs chose to ignore the solicitation of investors by certain other

individuals, and (3) “The plaintiffs . . . would not apply the same rules and regulations by charging against their witnesses without fairness, but discriminately did against me.”

Even if these baseless allegations are true, they are not sufficient to support a claim against Plaintiffs because they do not allow the Court “to draw the reasonable inference” that Plaintiffs are “liable for the misconduct alleged.” *Wells*, 2010 WL 2610669 at *1 (quoting *Iqbal*, 129 S.Ct. at 1949).

Defendant Yang further states in the Pleading that, “As one of public investors and one of defendants I have suffered much from this lawsuit financially, physically and mentally.” Again, Defendant Yang does not state sufficient facts to support a claim against Plaintiffs. Defendant Yang does not even state that Plaintiffs caused his purported suffering.

In light of Defendant Yang’s failure to assert a legal theory for his claim, it is futile, if not impossible, to further address the insufficiencies of the facts plead. Defendant Yang’s allegations and requested relief have no basis in fact or law and do not amount to a legitimate counterclaim. In the event they do amount to a counterclaim, the counterclaim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because Defendant Yang failed to state a claim for relief that is “plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Relief Requested

For the reasons stated above, and to the extent the Pleading is an amended or supplemental answer, Plaintiffs respectfully move the Court to: (1) strike the Pleading in

its entirety because it was filed without the consent of Plaintiffs or leave of Court required by Fed. R. Civ. P. 15, or (2) dismiss the counterclaim, if any, asserted against Plaintiffs in the Pleading, pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that Defendant Yang failed to state a claim upon which relief can be granted.

Further, Plaintiffs respectfully request that if the Court determines that the Pleading should be treated as a motion for summary judgment, rather than an amended or supplemental answer, Plaintiffs be afforded the opportunity to respond accordingly.

Dated: July 22, 2010.

Respectfully Submitted,

/s/ Katherine S. Driscoll

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2010, I caused the above reply to be served by U.S. mail on the following, who are not registered participants of the ECF System:

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I hereby certify that on July 22, 2010, I electronically transmitted the above reply 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:

Katherine S. Driscoll

Stephen J. Moriarty

Warren F. Bickford, IV

/s/ Terra Shamas Bonnell
Terra Shamas Bonnell