IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

EUCLID DISCOVERIES LLC, J. ROBERT WERNER and RICHARD Y. WINGARD, Plaintiffs, v. MARK NELSON, SACHIN GARG and JOHN DOES 1-150, all of whose true names are unknown, Defendants.	Case No. 1:11-cv-11393-DJC **MEMORANDUM IN SUPPORT OF DEFENDANT MARK NELSON'S MOTION FOR MORE DEFINITE STATEMENT**

Pursuant to Fed. R. Civ. P. 12(e), and without waiving any potential defenses, including those based on lack of personal jurisdiction, improper service of process, and improper venue, Defendant Mark Nelson ("Nelson") respectfully requests that the Court order Plaintiffs to provide a more definite statement of the allegations in their Complaint, which is so vague and ambiguous that he cannot reasonably respond. The Complaint alleges that Nelson and as many as 151 other defendants have published unspecified defamatory statements over the past five years, but does not identify a single specific statement as defamatory and does not identify who Plaintiffs believe to be liable for any of those statements. Instead the Complaint states generally that "paragraphs containing" the statements are somewhere within the nearly 500 pages of exhibits containing in excess of 1,600 separate Internet comments made by innumerable commenters since 2006, the overwhelming majority of which (if not all) seem to provide no basis whatsoever for the Complaint. Accordingly, the Complaint is so vague and ambiguous that Nelson (and the other defendants) have no way of responding and a more definite statement is required.

FACTUAL BACKGROUND

According to the Complaint, Euclid is a "research and technology development company" that focuses on video processing and data compression technology, and was co-founded by Plaintiffs Werner and Wingard, who are Euclid's President and CEO, respectively. The Complaint alleges that Defendant Sachin Garg publishes an Internet blog entitled "The Data Compression News Blog," hosted at www.c10n.info (the "Blog"). The Complaint alleges that Nelson, a resident of Texas, is "an editorial contributor of content to the Blog" and has published several articles there pertaining to Euclid.

The Complaint alleges that Nelson, Garg, and each of the up to 150 John Doe defendants have made unspecified defamatory statements about Euclid, Werner, and Wingard that they posted on the Blog. However, it does not specify a single allegedly defamatory statement that Nelson or any other defendant is alleged to have made. Rather than provide this basic and critical information, the Complaint refers generally to certain articles written by Nelson without alleging that any of them contained defamatory statements (or what they might be) and states that "[p]aragraphs containing defamatory content published on the Blog by Nelson, Garg and the 'John Doe' defendants" are buried somewhere within the exhibits to the Complaint, which comprise ***473 pages*** of Internet postings that in turn comprise ***1,634 separate comments*** by ***innumerable individuals*** over a ***five-year period*** from 2006 through 2011. (Complaint ¶ 10.) It is quite literally impossible to determine which of those 1,634 comments Euclid contends is defamatory (a quick perusal indicates that at least the overwhelming majority provide no basis for the defamation claims). Moreover, it is impossible to determine whether Euclid contends that Nelson himself has defamed the Plaintiffs and if so, by which statements, or whether Nelson's

alleged liability somehow derives in part or in whole from unidentified but allegedly defamatory statements posted by any of the other defendants.

ARGUMENT

Federal Rule of Civil Procedure 12(e) provides that a party may move for a more definite statement of a pleading that is "so vague or ambiguous that the party cannot reasonably prepare a response." The rule requires that such a motion be made prior to filing a responsive pleading and that it "point out the defects complained of and the details desired." Rule 12(e) motions are warranted where the complaint is so unintelligible that it prevents the movant from "determining the issues he must meet." *Hayes v. McGee*, 2011 WL 39341, at *2 (D. Mass. Jan. 6, 2011) (quoting *Hilchey v. City of Haverhill*, 233 F.R.D. 67, 69 (D. Mass. 2005)).

Although Rule 8(a) generally permits notice pleading, in the context of defamation "it is recognized that a defendant … has a right to know the substance of the statements that underlie the action." *Kelley v. Corr. Med. Servs., Inc.*, 2011 WL 3490084, at *23 (D. Me. Aug. 8, 2011). "The failure to plead the publishers of defamatory statements is sufficient grounds for allowing the generally discouraged motion for a more definite statement." *Fickes v. Sun Expert, Inc.*, 762 F. Supp. 998, 1002 (D. Mass. 1991). Similarly, "countless district courts have found that the requirements of Rule 8 have not been met" in defamation cases where the complaint fails to allege "the substance of the statements and/or the time and place in which they were made." *Hawkins v. Kiely*, 250 F.R.D. 73, 75 (D. Me. 2008) (quoting *PAI Corp. v. Integrated Sci. Solutions, Inc.*, 2007 WL 1229329, at *8 (N.D. Cal. Apr. 25, 2007)). *See, e.g.*, *Householder v. Cedars, Inc.*, 2008 WL 4974785, at *1 (D. Kan. Nov. 19, 2008) (granting Rule 12(e) motion where defamation claim failed to identify "any particular statement" alleged to be defamatory or time and place); *FLSmidth A/S v. Jeffco, LLC*, 2008 WL 4426992 (N.D. Okla. Sept. 15,

2008)(granting motion in corporate defamation case where counterclaim "does not specify what statements were made or which [counterclaim-defendant] made the allegedly defamatory statements"); *Hackman v. Dickerson Realtors, Inc.*, 520 F. Supp. 2d 954, 975 (N.D. Ill. 2007) (more definite statement required where complaint fails to specifically plead the content, context, speaker, recipient, and timing of the allegedly defamatory statement); *Coffman v. United States*, 2007 WL 1598635, at *1 (W.D. Okla. June 4, 2007) (more definite statement required, *inter alia*, where allegations do not identify and provide the substance of the statements); *Hides v. CertainTeed Corp.*, 1995 WL 458786, at *3 (E.D. Pa. July 26, 1995)(complaint that identified substance of statement but that did not identify who made the statement was insufficient to put defendant on notice and to permit it to respond).

Here, the Complaint alleges only in the most general terms that each of the up to 151 defendants at some point between 2006 and 2011 made one or more unidentified defamatory statements about one or both individual plaintiffs, the corporation, or all three. Nelson (and all other defendants) are left in the dark as to specifically what statements are defamatory, who said them, which of the plaintiffs purportedly was defamed by the statement, and whether the named defendants and the unnamed defendants are alleged to be liable for their own statements, their own statements and statements by others, or only the statements of others. Indeed, the Complaint alleges that "the Blog—while being maintained by Garg and Nelson—posted" defamatory statements (Complaint ¶¶ 7, 8) and that all of the defendants are "jointly and severally liable" for all of the statements made by any other defendant (*ad damnum* ¶¶ 1-2), indicating that Plaintiffs contend that Nelson is personally liable for statements that he did not even make and that he has no way to identify.

It is entirely insufficient for Plaintiffs to point to hundreds of pages and well over a thousand comments by myriad named and unnamed individuals and expect the defendants to parse through them trying to determine which of them Plaintiffs allege are defamatory, when they were made, who made them, who they were about, and who may be liable for them. Given that the mere failure to identify the publisher of a defamatory statement is "sufficient grounds" by itself to grant a Rule 12(e) motion, *Fickes*, 762 F. Supp. at 1002, as is the failure to identify when the statement was made, *Hawkins* 250 F.R.D. at 75, the utter absence of any information at all about the statements alleged to be defamatory is certainly grounds to grant this motion.

Absent a more definite statement, Nelson and the other defendants will be forced to guess. This is a critical problem because without knowing the allegations against them, Nelson and the other defendants have no way of determining applicable defenses, including but not limited to the statute of limitations and privilege, or whether the statements are non-defamatory as a matter of law. Neither Nelson nor the Court has any way to evaluate the appropriateness or the merits of a motion to dismiss because there is no way of determining when the statements were made or what the statements are—let alone whether they are capable of defamatory meaning or are protected opinion that cannot constitutionally be held defamatory. The inability to determine what defenses are available is a further reason to order a more definite statement. *Hawkins*, 250 F.R.D. at 76; 5C Wright & Miller, *Federal Practice & Procedure* (3d ed.), § 1376 ("many courts have found it expedient to require claimants to state more fully matters relating to possible threshold defenses").

Accordingly, Defendant Nelson requests that the Court order Plaintiffs to provide a more definite statement that provides at least the following information:

(i) Identify each comment or article in the Exhibits to the Complaint that contains an allegedly defamatory statement (which will necessarily identify the person who made that statement);

(ii) Identify the particular statement in the comment or article that is alleged to be defamatory;

(iii) Identify whether the statement is alleged to have personally defamed one or both of the individual defendants (and if one, which) or to be commercial defamation of Euclid, or both personal and commercial defamation;

(iv) State whether each defendant is alleged to be liable for any statement made by any other person, and if so, specify the statement and identify the basis for such liability.

CONCLUSION

For the foregoing reasons, Defendant Nelson respectfully requests that the Court order Plaintiffs to file a more definite statement that provides at least the information specified above.

Respectfully submitted,

MARK NELSON,

By his attorney,

/s/ Mitchell J. Matorin
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Certificate of Service

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on August 22, 2011.

/s/ Mitchell J. Matorin