UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WISCONSIN

DEBRA TIETJEN, individually

and as the SPECIAL ADMINISTRATOR OF THE ESTATE OF JAMES TIETJEN, the ESTATE OF JAMES TIETJEN, on

behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Case No. 2:16-cv-01542

MARIAN NINNEMAN, MILWAUKEE COUNTY, and

EMPLOYEE MEMBERS’ RETIREMENT SYSTEM OF THE COUNTY OF MILWAUKEE,

Defendants.

# BRIEF IN SUPPORT OF DEFENDANTS MILWAUKEE COUNTY AND MARIAN NINNEMAN’S

**MOTION FOR A MORE DEFINITE STATEMENT OF THE COMPLAINT**

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# INTRODUCTION

Plaintiffs have filed suit claiming that Defendant Milwaukee County (“County”), the Employee Members’ Retirement System of the County of Milwaukee (“ERS”)1, and Marian Ninneman, the Director of ERS have “recently disclosed” that “as a practice and a rule”:

After a retiree selects his or her retirement benefit, without telling the retiree Defendants reduce the years of service credit component of the calculation of the [retiree’s] retirement benefit given . . . in order for the retiree to make his or her retirement benefit selection.

(Complaint2, “Preface.”) The Complaint then goes on to say that the named Plaintiff is the widow of a deceased ERS participant, not the “retiree” who was supposedly misinformed. (¶ 3.) The claim presents an assortment of alleged facts, theories, speculations, and conclusions which are so vague, unclear, and lacking in detail that the County cannot reasonably prepare a response to them. For these reasons, the County and Ms. Ninneman request relief pursuant to Rules 8(a) and 12(e) of the Federal Rules of Civil Procedure. The County and Ms. Ninneman request that Plaintiffs be ordered to replace the Complaint with a new pleading which is sufficiently clear and specific that a reasonable response can be made to it.

# ARGUMENT

1. **A MORE DEFINITE STATEMENT IS APPROPRIATE WHEN THE DEFENDANT CANNOT REASONABLY PREPARE A RESPONSE BECAUSE THE COMPLAINT IS AMBIGUOUS.**

Fed. R. Civ. P. 12(e) provides that a “party may move for a more definite statement of a pleading . . . which is so vague or ambiguous that the party cannot reasonably prepare a response.” Normally, the course of action when a complaint is unclear about the meaning of a particular allegation among a larger exposition of the case is to move for a more definite

1 The correct name of the party apparently sued here is the Employee Retirement System of the County of Milwaukee.

2 Hereafter, all references to paragraph numbers are in regard to those numbered paragraphs in Plaintiffs’ November 18, 2016 Complaint (Docket No. 1) served on the County November 28, 2016.

statement of that isolated allegation instead of a dismissal of the full Complaint. *Potts v. Howard University*, 269 F.R.D. 40, 42 (D.D.C. 2010) (quoting *Am. Nurses’ Ass’n v. Illinois*, 783 F.2d 716, 725 (7th Cir. 1986)). Fed. R. Civ. P. 8(a) requires that a plaintiff give a defendant nothing more than fair notice, the defendant is entitled to expect nothing less. Here, the failures of clarity and specificity are so extensive that the entire Complaint violates the Rules to the point that a wholesale rewriting is necessary. Although Rule 8(a) “requires only a ‘short and plain statement of the claim showing that the pleader is entitled to relief,’ the complaint must be detailed enough to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests[.]’” *Dorsey v. American Express Co*., 499 F. Supp. 2d 1, 3 (D.D.C. 2007) (alteration in original) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation marks omitted)); *see, e.g., Fraternal Order of Police v. Library of Congress*, 692 F. Supp. 2d 9, 20 (D.D.C. 2010) (“Because the Court cannot ascertain what the [plaintiff]’s promotion-related claim is, it cannot find that defendants are able to respond to it.”). Plaintiffs’ failure to clearly state a viable cause of action requires more than revision of a particular allegation. It requires a totally new pleading which includes the specific details absent here.

# BY FAILING TO JOIN THE FACTUAL ALLEGATIONS IN THE COMPLAINT TO THE STATED CAUSES OF ACTION, PLAINTIFFS HAVE PRESENTED DEFENDANTS AND THE COURT WITH A DOCUMENT SO INCOHERENT IT CANNOT BE ANSWERED.

* 1. **The Lack of Clarity in the Allegations of Fact.**

Having identified the parties and the legal framework by which ERS was created (all “on information and belief”), ¶¶ 3-19, the Complaint makes allegations about:

* + - The “buy-in” and “buy-back” program (“BIBB”) by which, at one time, County employees could purchase additional service credits toward pension eligibility. (¶¶ 20-22.)
    - Plaintiffs’ speculations that people remained in County employment to obtain an ERS benefit, although no connection is made between a BIBB transaction and such continued employment. (¶¶ 23-24, 29, 31-32.)
    - The employees being periodically informed of their credited service, although there is no allegation about what the BIBB program had to do with these reports. (¶¶ 25, 29-30.)
    - Plaintiffs’ belief that the employees thought their service credits could not be diminished once “accrued,” but without any explanation of what this had to with the BIBB program or whether any accrued service credits were reduced. (¶¶ 26-28.)
    - Employees’ reliance on the accuracy of the reports from ERS about their service credits, while the Defendants, for their own (unidentified) economic interests, were secretly reducing the employees’ service credits after giving the information about them. (¶¶ 34, 71.)
    - The secret reduction of service credits causing damages and an unconstitutional denial of property, again with no specific reference to the BIBB program or the value of whatever damages are being claimed. (¶¶ 35-37.)
    - A claim for a life insurance benefit and a question about employee premiums for life insurance, again with no indication of how this is related to the BIBB program or to service credits for retirement benefits, and with no indication of the source, financing, or administration of this insurance. (¶¶ 38-40.)

Then the Complaint recites several causes of action without stating what they have to do with the earlier allegations.

The first cause of action seeks to define a class of plaintiffs appropriate for certification under Fed. R. Civ. P. 23. However, this definition depends on plausible linkage to BIBB purchases in cash “in order to enhance their eligibility for retirement benefits,” who earned other ERS service credits, and whose service credits were secretly and involuntarily reduced to correspondingly reduce eventual benefits which those employees had used “to make retirement benefit decisions.” (¶¶ 42-43.)

The Complaint – for the first time – then alleges that other employees were not made subject to those secret reductions, causing “disparate treatment” and “unequal protection.” (¶¶ 52-54.) At no time does the Complaint state when these events occurred; the names of any victims or the perpetrators of those secret reductions; the amounts, dates, types of benefits, comparators for purposes of disparate treatment, or any other detail which would allow Defendants to investigate what individuals are in this class and/or who, on behalf of Defendants, dealt with them. There is no way to make a reasonable response because there is no clarity as to the persons Plaintiffs allege made BIBB payments; why these individuals made those payments (e.g., for additional service credits, to change their ERS entry date, to change their eligibility for a particular benefit etc.); who told them of the BIBB program; when the payments were made; when the payments were accepted or acknowledged; what the payments were supposed to buy; how much money was involved in each person’s “secret deduction;” or anything else which would support the allegations of unconstitutional misconduct.

The second and third causes of action simply seek different remedies for the same allegations of undefined conduct as are stated in the first cause of action.

The fourth cause of action also relies on the “facts” recited above, but presents a contract theory. Here Plaintiffs allege a “third party implied contract” with employees and their spouses that these employees continued working for the County to obtain “full, undiminished retirement benefits . . . .” (¶ 63.) No explanation is given to identify who made that bargain; how it excluded people who had any other motivation to be employed by the County (e.g., salary, health care benefits, and/or professional training, experience and advancement); nor if or what difference there was between those who participated in the BIBB program and those who did not. (¶ 65.)

The fifth cause of action relies on the same alleged facts but then states, with no particularity, that “Defendants represented . . . that Defendants had special knowledge ” (¶¶

69-70.) Which Defendants? When? To whom? About what? It states that “Defendants had an economic interest in each employee entering into the transaction under BIBB” and the claims

of continued employment and secret reduction of benefits. (¶ 71.) Again: Which Defendants? Who acted for them? About which employees? What was the nature of the alleged economic interest? Is the class limited to those who used the BIBB program, or does it include anyone else who received a statement about service credits? In what way, and to what extent, if any, were these statements inaccurate? How did any inaccuracy relate to whatever benefits Plaintiffs did or did not receive?

No reasonable response can be made to allegations which do not provide any specific details about names, dates, payment amounts, sources of statements, or any other way to identify the conduct in issue. Neither does the Complaint indicate what are the “economic interests” of the ERS, its board, its director, or any other person on the ERS staff, which motivated the disbursal of incorrect information. What is this case supposed to be about? The document is too vague and unspecific to allow a response.

# Defendants are entitled to Reasonable Notice of the Basis for the Complaint.

The interplay of Rules 8 and 12 provides a useful explanation of the need for clear and specific pleading in every complaint. Indeed, a complaint may be dismissed if it does not state a claim.

It is by now well established that a plaintiff must do better than putting a few words on paper that, in the hands of an imaginative reader, *might* suggest that something has happened to her that might be redressed by the law. *Cf. Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), disapproved by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 . . . .

*Swanson v. Citibank, NA*, 614 F.3d 400, 403 (7th Cir. 2010) (emphasis in original). Judge Wood has explained “that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together.” *Id*. at 404. To stay in court, it is not enough to make “abstract recitations of the elements of a cause of action or conclusory legal statements . . . .” *Id*. at 405, discussing *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009).

A complaint only satisfies Rule 8 standards when it tells the defendant sufficient details to allow an investigation upon which an accurate answer can be based. In *Swanson*, the alleged discriminatee had to identify the type of discrimination of which she complained (racial), by whom it was committed (Citibank through its alleged agents), and when it occurred (when plaintiff sought a loan in early 2009). *Id*. The Complaint gave no specific facts about the form, time, amount, motivation, or perpetrator of the alleged misconduct. Unlike Ms. Swanson placing her claim in 2009, no date of an offense is ever mentioned here. Ms. Swanson identified the business, its department, and its outside agents who allegedly discriminated against her. Plaintiffs here do no more than say, without any specificity, that all of County government, the staff and Board of ERS, and the Director of ERS participated in soliciting BIBB payments, disbursing service credit information, having personal economic interests which motivated changing the service records to reduce benefits for some ERS participants, and doing all this in secret. Far from fair notice of the legal offenses being alleged, this Complaint is nothing more than vague accusations that some people received fewer ERS service credits than they had expected, and it does not indicate what the economic impact of that “reduction” actually was upon anyone in the purported class.

Again, to satisfy Rule 8(a)(2) “a complaint must contain sufficient factual matter[s] . . . to state a claim to relief that is plausible on its face In other words, a plaintiff must plead some

facts that suggest a right to relief that is beyond the speculative level.” *Smith v. Dart*, 803 F.3d 304, 309 (7th Cir. 2015) (internal citations and quotation marks omitted). There must be enough “factual enhancement [so that it does not] stop[] short of the line between possibility and plausibility of entitlement to relief.” *Bell Atl. Corp. v. Twombly*, *supra*, 550 U.S. at 557 (internal citations and quotations omitted).

The Complaint here does not meet that standard. It may present an interesting speculation that unnamed ERS representatives deliberately collected BIBB money from unnamed employees, hid their secret manipulations behind false service credit reports, and then, for unidentified economic interests of their own, reduced retirement benefits after giving incorrect information about service credits. However attractive this tale may be to a fan of conspiracy theories, that story must be rejected as too vague to allow an answer and too implausible to proceed in litigation. There must be “some specificity in pleading before allowing a potentially massive factual controversy to proceed.” *Id*., at 558, quoting *Assoc. Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528, n. 17 (1983).

# CONCLUSION

The absence of specificity and clarity in the instant Complaint prevents any reasonable response.

Without specific allegations of fact, a claim has not been stated, and an answer cannot reasonably be made. The Complaint should be replaced *in toto* with a pleading which satisfies all the requirements of Rules 8 and 12.

Dated at Milwaukee, Wisconsin this 19th day of December, 2016.

Respectfully submitted,

s/Alan M. Levy Alan M. Levy

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