

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger**

Civil Action No. 08-CV-00309 MSK-KMT

SUZANNE SHELL,
Plaintiff,

v.

AMERICAN FAMILY RIGHTS ASSOCIATION, et al.,
Defendants.

**MOTION TO DISMISS DEFENDANTS BARNES, CPS WATCH, AND THOMPSON
AND FOR SANCTIONS AGAINST PLAINTIFF PURSUANT TO RULES 12 (B) (2) AND
12 (B) (6)**

COME NOW, Defendants Cheryl Barnes, CPS Watch, Inc. and Sarah Thompson (hereinafter, “CPS Watch Defendants”), by and through their attorney, Daniel B. Slater, and (pursuant to F.R.C.P. R. 12 (b)) hereby MOVE this Court to dismiss the Plaintiff’s case against them, and for the Court to levy sanctions against Plaintiff. In support of this Motion, CPS Watch Defendants state as follows:

1. The Defendants certify that, pursuant to D.C. Colo. L. Civ. R. 7.1(A), this motion was not discussed with Plaintiff due to the fact that this is a Rule 12 Motion to Dismiss, and it is expected that Plaintiff will oppose this Motion.

FACTS

2. While the Plaintiff’s specific allegations against the CPS Watch Defendants are somewhat murky, it appears that the Plaintiff has alleged eleven different causes of

action, most apparently arising from allegations of copyright infringement, and collusion among the Defendants to infringe on Plaintiff's alleged copyrights.

ARGUMENT

Personal Jurisdiction (All Causes of Action Except RICO)

3. Plaintiff's Complaint should be dismissed because it fails under F.R.C.P. R. 12 (b) (2), in that this Court lacks personal jurisdiction (either general or specific) over CPS Watch Defendants. See Brief In Support of Motion to Dismiss ("Brief") at ¶¶ 4-11.

Subject-Matter Jurisdiction (Diversity Claims)

4. Plaintiff's claims that arise due to the Court's diversity jurisdiction should fail because there is not absolute diversity of the parties involved. See Brief at ¶¶ 12-13. This applies to Plaintiff's First, Fifth, Sixth, Ninth and Tenth causes of action.

Failure to State a Claim (All Claims)

5. Plaintiff's Complaint should further be dismissed under F.R.C.P. R. 12 (b) (6) because the Plaintiff has failed to state any claim against CPS Watch Defendants upon which relief can be granted.

First Cause of Action (Misappropriation / Theft of Trade Secrets)

6. **Burden of Proof:** The Plaintiff has the burden of production to come forward with facts demonstrating a *prima facie* case. *DTM Research v. AT&T Corp.*, 245 F.3d 327 (4th Cir. 2001).
7. **Elements:** The Plaintiff must allege that: (1) there exists an idea not generally known and treated by the owner as a secret; (2) improper disclosure or use; and, (3) proof of

loss, either present or future. *Texas Urethane, Inc. v. Seacrest Marine Corp.*, 608 F.2d 136, 138 (5th Cir. 1979)¹. CPS Watch Defendants concede that Plaintiff has pled the third element, loss (although there does not appear to be any causal connection pled between any of the CPS Watch Defendants' actions and the losses pled).

8. **Elements Not Supported by Complaint:**

- a. **Element 1:** Plaintiff has failed to allege any specific trade secret that is not generally known; she has merely made legal conclusions masquerading as a factual allegation.
- b. **Element 2:** Plaintiff has failed to allege any improper disclosure or use by the CPS Watch Defendants.

Second Cause of Action (Copyright Infringement)

9. **Burden of Proof:** The Plaintiff has the burden of production to come forward with facts demonstrating a *prima facie* case on both elements of a copyright infringement case. *Palladium Music, Inc. v. EatSleepMusic, Inc.*, 398 F.3d 1193, 1196 (10th Cir. 2005).
10. **Elements:** The Plaintiff must allege: (1) ownership of a valid copyright; and (2) copying of constituent elements of the work that are original. *Feist Pub'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). CPS Watch Defendants concede that Plaintiff has pled that she owns certain valid copyrights.

11. **Elements Not Supported by Complaint:**

¹ This claim is a state-law claim; however, there do not appear to be any reported Colorado appellate cases that address either theft of trade secrets or misappropriation of trade secrets. Accordingly, this common-law test seems the most appropriate; however, since no Colorado appellate court appears to have recognized the common-law tort of theft of trade secrets or misappropriation of trade secrets, it is questionable whether such a tort exists in Colorado.

- a. **Element 2:** Plaintiff has failed to allege any facts that a valid copyright was violated through copying of any original copyrighted works of hers by the CPS Watch Defendants. By definition, copying of an item that didn't exist when it was allegedly copied cannot meet the second element of copyright infringement. See Brief at ¶¶ 24-27.
12. In addition, Plaintiff has failed to plead a claim that falls within the statute of limitations for copyright infringement. See Brief at ¶¶ 33-35.
13. Furthermore, the facts pled by Plaintiff make her claim invalid under the doctrine of laches. See Brief at ¶¶ 36-42.

Third Cause of Action (Contributory Copyright Infringement)

14. **Burden of Proof:** Contributory copyright infringement must follow a finding of direct copyright infringement. *Cable/Home Comm. Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845 (11th Cir. 1990). Accordingly, the Plaintiff has the burden of production to come forward with facts demonstrating a *prima facie* case. *Palladium Music, supra*.
15. **Elements:** The Plaintiff must allege that: (1) defendants had knowledge of another person's infringement; and, (2) defendants either materially contributed to or induced that infringement. *Perfect 10, Inc. v. Visa Intern. Serv. Ass'n.*, 494 F.3d 788, 795 (9th Cir. 2007).
16. **Elements Not Supported by Complaint:**
 - a. **Element 1:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal

allegation. This must lead to dismissal of this claim. See Brief at ¶ 2.

- b. **Element 2:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2.
17. Finally, to the extent that Plaintiff is basing these contributory acts on infringements that occurred more than three years prior to the filing of the Complaint, those claims would be barred by the applicable statute of limitations. See Brief at ¶¶ 33-35.

Fourth Cause of Action (Vicarious Copyright Infringement)

18. **Burden of Proof:** The Plaintiff has the burden of production to come forward with facts demonstrating a *prima facie* case. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001).
19. **Elements:** The Plaintiff must allege that: (1) defendants had a right and ability to supervise the infringing conduct; and, (2) a direct financial interest in the infringing activity. *Perfect 10* at 802.
20. **Elements Not Supported by Complaint:**

- a. **Element 1:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2.

Furthermore, the mere ability to control one's website does not give a defendant "the right to control the infringing acts of third parties even though that ability would allow [the defendants] to affect those infringing acts to some degree.

Perfect 10 at 803.

- b. **Element 2:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2.
- Furthermore, the conclusory legal allegation Plaintiff has made alleges only indirect financial benefits, not direct financial benefits as this element requires.
21. Finally, to the extent that Plaintiff is basing these vicarious acts on infringements that occurred more than three years prior to the filing of the Complaint, those claims would be barred by the applicable statute of limitations. See Brief at ¶¶ 32-34.

Fifth Cause of Action (Breach of Contract)

22. **Burden of Proof:** The Plaintiff has the burden of production to come forward with facts demonstrating a *prima facie* case. *Western Distributing Co. v. Diodosio*, 841 P.2d 1053, 1057-1058 (Colo. 1992).
23. **Elements:** The Plaintiff must allege that: (1) a contract existed between Plaintiff and each Defendant; (2) Plaintiff performed its obligations under that contract, or that the Plaintiff had substantial justification for her nonperformance; (3) each Defendant failed to perform its obligation under the contract; and, (4) damage to Plaintiff resulted from that failure. *Hemmann Mgt. Srvs. v. Mediacell*, 176 P.3d 856, 859 (Colo. 2007)².

24. **Elements Not Supported by Complaint:**

² Because Plaintiff fails to make a factual allegation that there exists any contract between CPS Watch Defendants and herself, it is difficult to analyze, under choice of law principles, which jurisdiction's law should apply to the breach of contract claims. (Defendants would note that the factual allegations Plaintiff makes against other defendants indicate contracts that may have been entered into and performed in Florida, as well as many other

- a. **Element 1:** Plaintiff makes no factual allegations indicating that a contract existed between any of the CPS Watch Defendants and the Plaintiff.
- b. **Element 2:** Because Plaintiff fails to allege the existence of a contract, Plaintiff necessarily has failed to allege her own performance under that contract.
- c. **Element 3:** Because Plaintiff has failed to allege the existence of a contract, Plaintiff has also failed to allege the failure of the CPS Watch Defendants to perform under that contract.
- d. **Element 4:** Because Plaintiff has failed to allege the existence of a contract or the breach of that contract by the CPS Watch Defendants, Plaintiff has failed to allege that damages resulted from such a breach.

Sixth Cause of Action (Tortious Interference with Business Relationship and/or Business Contract)

- 25. **Burden of Proof:** The Plaintiff has the burden of production to come forward with facts demonstrating a *prima facie* case. *Western Distributing Co. v. Diodosio*, 841 P.2d 1053, 1057-1058 (Colo. 1992).
- 26. **Elements:** The Plaintiff must allege that: (1) There existed a valid contract between the Plaintiff and a third party; (2) each Defendant knew of this contract, or had knowledge of facts that should lead it to inquire as to the existence of a contract; (3) intent by each Defendant to induce a breach of the contract by a third party; (4) action by each Defendant that induced a breach of the contract; and, (5) damage to the plaintiff.

undescribed jurisdictions.) For the purposes of this Motion, CPS Watch Defendants have cited the law of the venue of this action, Colorado.

Control, Inc. v. Mountain States Tel. & Teleg. Co., 513 P.2d 1082, 1084 (Colo. App. 1973)³. CPS Watch Defendants concede that Plaintiff may have pled facts which, if proven, may show the existence of some contract between the Plaintiff and certain co-defendants, the first element of this cause of action.

27. **Elements Not Supported by Complaint:**

- a. **Element 2:** Plaintiff has failed to allege facts that would show that each of the CPS Watch Defendants had knowledge of the contracts mentioned in the Complaint.
- b. **Element 3:** Plaintiff has failed to allege facts specific to the CPS Watch Defendants that show that there was any intent by any CPS Watch Defendant to induce a breach by a third party.
- c. **Element 4:** Plaintiff has failed to allege any facts showing that any CPS Watch Defendant took any action to induce such a breach.
- d. **Element 5:** Plaintiff has failed to allege any damages resulting from any inducement by CPS Watch Defendants.

28. In addition to not meeting the elements outlined above, the Plaintiff's action for this cause of action must fail because it was brought outside of the applicable two-year statute of limitations. C.R.S. § 13-80-102 (1) (a). With respect to the contracts described with Defendants Swallow and Durand⁴, it appears that the breaches of those contracts are

³ As with the breach of contract claim, it is not apparent which jurisdiction's law would apply under choice of law principles. For the purposes of this motion, CPS Watch Defendants are utilizing the law of the forum, Colorado.

⁴ Defendants would further note that it is only with respect to the Swallow and Durand contracts that there is even a conclusory allegation that any defendants had knowledge of a contractual relationship, the second element.

alleged to have occurred in 2005; accordingly, the Plaintiff would have had to file suit by 2007 in order to preserve these claims. Since the Complaint was filed in 2009, these claims must fail.

Seventh Cause of Action (Racketeering or RICO)

29. **Burden of Proof:** The Plaintiff has the burden of production to come forward with facts demonstrating a *prima facie* case. *Preferred Mut. Ins. Co. v. Dumas*, 905 F.2d 1538, 1990 WL 87048, *3 (6th Cir. 1990).
30. **Elements:** The Plaintiff must allege that: (1) defendants had investment in, control of, or conduct in (2) an enterprise (3) through a pattern (4) of racketeering activity. *Tal v. Hogan*, 453 F.3d 1244, 1261 (10th Cir. 2006).
31. **Elements Not Supported by Complaint:**
- a. **Element 1:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2. .
 - b. **Element 2:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2.
 - c. **Element 3:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2.

Accordingly, due to the statute of limitations issue, Plaintiff has failed to state an actionable claim against *any* Defendant on this cause of action.

- d. **Element 4:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2.
32. In addition, Plaintiff relies on mail fraud as a predicate act which would trigger RICO liability. However, Plaintiff has failed to adequately plead with particularity the facts necessary to establish a fraud claim. See Brief at ¶¶ 28-30.
33. Finally, Plaintiff's RICO claims are barred by the applicable statutes of limitations.
- a. Plaintiff claims that "the predicate acts have been committed by The Enterprise *continuously* since 2000." Complaint at ¶ 185 (emphasis added).
 - b. The applicable statute of limitations for RICO actions is four years. *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 156 (1987).
 - c. The Supreme Court has clearly indicated that RICO actions cannot use the "last predicate act" to relate back to all actions and preserve the legitimacy of a claim. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 190 (1997).
 - d. Since the applicable statute of limitations began to run in 2000, and this suit was filed nine years later, the Plaintiff's RICO claims are barred by the statute of limitations.

Eighth Cause of Action (False and Misleading Advertising)

34. **Burden of Proof:** The Plaintiff has the burden of production to come forward with facts demonstrating a *prima facie* case. *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 167 (2nd Cir. 1991).

35. **Elements:** The Plaintiff must allege that: (1) each Defendant made material false or misleading representations of fact in connection with the commercial advertising or promotion of its product; (2) in commerce; (3) that are either likely to cause confusion or mistake as to (a) the origin, association, or approval of the product with or by another, or (b) the characteristics of the goods or services; and (4) injure the plaintiff. *Cottrell v. Biotrol Int'l*, 191 F.3d 1248, 1252 (10th Cir. 1999). CPS Watch Defendants concede that the Plaintiff has alleged the fourth element; that is, that she was injured.

36. **Elements Not Supported by Complaint:**

- a. **Element 1:** The Plaintiff has not alleged any actions by any specific defendants; furthermore, the Plaintiff has not alleged that any representations took place as a part of *commercial* advertising or promotion.
- b. **Element 2:** The Plaintiff has not alleged any facts to show that these statements were made in the course of commerce.
- c. **Element 3:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2.

37. The Lanham Act does not contain a statute of limitations, so the appropriate state statute of limitations must be borrowed. *See, e.g., Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, n.11 (9th Cir. 2006). C.R.S. § 13-80-102 (1) (g) provides that the statute of limitations is two years on “All actions upon liability created by a federal statute where no period of limitation is provided in said statute.” The only date mentioned in the cause

of action is August of 2000 – well beyond the statute of limitations. Complaint at ¶ 231.

Accordingly, Plaintiff's claims under this cause of action are barred.

Ninth Cause of Action (Unfair or Deceptive Trade Practices and Unfair Methods of Competition)

38. **Burden of Proof:** The Plaintiff has the burden of production to come forward with facts demonstrating a *prima facie* case. *Western Distributing Co. v. Diodosio*, 841 P.2d 1053, 1057-1058 (Colo. 1992).
39. **Elements:** The Plaintiff must allege that: (1) Each defendant engaged in an unfair or deceptive trade practice; (2) the challenged practice occurred in the course of each defendant's business, vocation, or occupation; (3) it significantly impacts the public as actual or potential consumers of the defendant's goods, services or property; (4) the Plaintiff suffered injury in fact to a legally protected interest; and, (5) the challenged practice caused the Plaintiff's injury. *Rhino Linings USA, Inc. v. Rocky Mtn. Rhino Lining, Inc.*, 62 P.3d 142, 146-147 (Colo. 2003).
40. **Elements Not Supported by Complaint:**
 - a. **Element 1:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2..
 - b. **Element 2:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2.

- c. **Element 3:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2.
 - d. **Element 4:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2.
 - e. **Element 5:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2.
41. Further, the statute of limitations for this action is three years. C.R.S. § 6-1-115.

Plaintiff has alleged that these practices began in August 2000, well beyond the date allowed under the statute of limitations. Accordingly, Plaintiff is barred from recovery under this claim.

Tenth Cause of Action (Conspiracy)

42. **Burden of Proof:** The Plaintiff has the burden of production to come forward with facts demonstrating a *prima facie* case. *Western Distributing Co. v. Diodosio*, 841 P.2d 1053, 1057-1058 (Colo. 1992).
43. **Elements:** The Plaintiff must allege that: (1) there is a combination of two or more persons; (2) there exists an object to be accomplished; (3) there existed a meeting of the minds on the object or the course of action; (4) there were one or more unlawful, overt acts; (5) damages exist as a proximate result thereof. *Orient Mineral Co. v. Bank of*

China, 506 F.3d 980, 1004 (10th Cir. 2007).

44. **Elements Not Supported by Complaint:**

- a. **Element 1:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2..
- b. **Element 2:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2.
- c. **Element 3:** Plaintiff has failed to even make the customary conclusory legal allegation regarding a meeting of the minds, and thus this claim must fail.
- d. **Element 4:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2.
- e. **Element 5** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2.

Eleventh Cause of Action (Antitrust / The Sherman Act)

45. **Burden of Proof:** The Plaintiff has the burden of production to come forward with facts demonstrating a *prima facie* case. *Pfizer Inc. v. Lord*, 456 F.2d 545, 550 (8th Cir. 1972).
46. **Elements:** The Plaintiff must allege that: (1) the existence of a conspiracy; (2) specific intent to monopolize; and, (3) overt acts in furtherance of the conspiracy. *Full Draw*

Prod. v. Easton Sports, Inc., 182 F.3d 745, 757 (10th Cir. 1999).

47. **Elements Not Supported by Complaint:**

- a. **Element 1:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2.
- b. **Element 2:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2.
- c. **Element 3:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim. See Brief at ¶ 2.

CONCLUSION

48. The Plaintiff has presented the Court with a textbook case of a complaint that provides nothing more than “conclusory allegations or legal conclusions masquerading as factual conclusions,” as the court in *Fernandez-Montes* described it. In this instance, there is simply no way that the Plaintiff’s Complaint can possibly proceed against the CPS Watch Defendants – or against nearly any of the defendants in this case.

WHEREFORE, Defendants Barnes, CPS Watch, Inc., and Thompson hereby request that this Court DISMISS all claims against them. The aforementioned Defendants further request that this Court award sanctions against Plaintiff and in favor of Defendants in the form of attorneys’ fees, costs, and such other relief as the Court may deem necessary due to the groundless, frivolous,

and vexatious nature of this litigation.

DATED this 10th day of May, 2009.

/s Daniel B. Slater
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Certificate of Service:

I hereby certify that a copy of this pleading was served on Plaintiff via the Court's ECF system on May 10, 2009.

/s Daniel B. Slater
For Law Office of Dan Slater