

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 09-CV-00309 MSK-KMT

SUZANNE SHELL
Plaintiff

v.

AMERICAN FAMILY RIGHTS ASSOCIATION, et. al.

Defendants

**PLAINTIFF’S RESPONSE TO MOTION TO DISMISS AND QUASH SERVICE OF
SUMMONS FOR LACK OF PERSONAL JURISDICTION [#172]**
filed on 06/01/2009

COMES NOW Plaintiff Suzanne Shell to respond in opposition to Defendant Brenda Swallow’s Motion to Dismiss and Quash Service of Summons for Lack of Personal Jurisdiction [#172]. I contend that I have alleged sufficient facts in the Complaint to assert personal jurisdiction over the defendant and have alleged sufficient facts to support the claims in my Complaint and that the content of the defendant’s motion to dismiss constitutes an insufficient defense or is redundant, immaterial, impertinent, or scandalous and/or does not merit a response due to lack of relevance.

“If the plaintiff has pled facts that would support a legally cognizable claim for relief, a motion to dismiss should be denied. In evaluating a 12(b)(6) motion to dismiss, ‘all well pleaded factual allegations in the . . . complaint are accepted as true and viewed in the light most favorable to the nonmoving party.’ *Sutton v. Utah State Sch. for Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). . .

“. . .Fed. R. Civ. P. 12(b)(6) does not provide a procedure for resolving a contest about the facts or the merits of the case. Thus, one must read Fed. R. Civ. P. 12(b)(6) in conjunction

with Fed. R. Civ. P 8(a), which sets forth the requirements for pleading a claim in federal court. Federal R. Civ. P 8(a) requires ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’ The statement need not contain detailed facts, but it must ‘give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’ *Conley v. Gibson*, 355 U.S. 41 at 47, 4546, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). A plaintiff is not required to state precisely each element of the claim. *See* 5 Charles A. Wright and Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1216, at 15459 (1990). Nonetheless, a plaintiff must ‘set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory.’ *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988),” as cited in *Internet Archive v. Shell*, 06-cv-01726-LTB-CBS (2/13/2007).

Furthermore, the defendant has asserted a laundry list of affirmative defenses and is seeking equitable remedies based on her cited affirmative defenses. The clean hands maxim dictates that one who has engaged in improper conduct regarding the subject matter of the cause of action may, as a result, lose entitlement to an equitable remedy. *Salzman v. Bachrach*, 996 P.2d 1263 (Colo. 2000); see *Ajay Sports, Inc. v. Casazza*, 1 P.3d 267 (Colo. App. 2000) (court will not consider a request for equitable relief under circumstances where the litigant’s own acts offend the sense of equity to which he or she appeals). The doctrine of unclean hands is an equitable defense to proceedings in equity and is premised on the theory that one who requests equity must do so with clean hands. *Wilson v. Prentiss*, 140 P.3d 288 (Colo. App. 2006). I contend that the defendant has committed fraud and has wilfully defied court orders in her conduct which give rise to these claims and is not entitled to the protection of the affirmative defenses she cites under two theories:

- a. The defendant committed fraud when she signed the non-disclosure agreement as a condition of attending my seminar and subsequently stole her copy and her daughter’s copy of the contracts they had freely and

knowingly signed and still attended the presentation and received the information. She stole the signed contracts from my personal belongings at the seminar¹, and

- b. The defendant's conduct has been in direct violation of court orders prohibiting her from engaging in the conduct described in my complaint including the claims of false advertising, unfair trade practices, copyright infringement and racketeering.

For the purposes of this response, I incorporate by reference:

Document #109-2 with special attention to pp. 11,15, and

Document #109-4 with special attention to pp. 4, 6, 11, 12, 16, 19, 20, 21.

1. **Personal Jurisdiction** - I contend I have alleged facts sufficient to defeat the defendants's motion to dismiss based on lack of personal jurisdiction. See attached memorandum on Personal Jurisdiction.

2. **Res Judicata or Claim Preclusion:** Colorado uses the term "claim preclusion" instead of the term "res judicata." *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 608 (Colo. 2005).

a. **Burden of Proof:** Claim preclusion is an affirmative defense and the defendant bears the burden of proof. *Taylor v. Sturgell*, 128 S.Ct. 2161, 2179-80 (2008) (citing *Jones v. Bock*, 549 U.S. 199, 204, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007); *Nwosun v. Gen. Mills Rest. Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997).

b. **Elements:** Under Tenth Circuit law, claim preclusion applies when three elements exist: (1) a final judgment on the merits² in an earlier action; (2) identity of the parties in the two

¹ Exhibits attached

² A judgment rendered through analysis and adjudication of the factual issues presented.

suits; and (3) identity of the cause of action in both suits.” *MACTEC, Inc. v. Gorelick*, 427 F.3d 821 at 831. The defendant cites no facts or legal authority for asserting this affirmative defense upon which I can base any specific response. This fact, construed in the light most favorable to the Plaintiff, is sufficient to defeat the affirmative defense of claim preclusion.

i. **Element 1:** The defendant’s assertion fails on this element because the defendant failed to answer the Florida complaint and defaulted on the claims in the Florida court action. The claims were not actually litigated, and the court never reached the merits of the claims. I incorporate by reference document #190-4 *Judgement Granting Monetary Damages and Other Relief*, issued by the Honorable Richard Tombrink, Circuit Judge, In the Circuit Court for the Fifth Judicial District In and For Hernando County, Florida, Case No. H-27-CA-2006-000181-RT, wherein the judge cites the default by the defendant. This fact, construed in the light most favorable to the Plaintiff, is sufficient to defeat the affirmative defense of claim preclusion.

c. **Discussion:**

i. “Under Tenth Circuit law, claim preclusion applies when [certain] elements exist [including] a final judgment on the merits in an earlier action,” *MACTEC, Inc. v. Gorelick*, 427 F.3d 821 at 831.

ii. “Under res judicata, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in the prior action.” *Wilkes v. Wyo. Dep’t of Employment Div. of Labor Standards*, 314 F.3d 501, 503-04 (10th Cir. 2002)

iii. Res judicata only bars a collateral attack on claims that were “actually litigated and those that were or could have been raised in the first action.” *Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1520 (10th Cir. 1990).

iv. To be “actually determined,” an issue must be both (1) properly raised and (2) actually litigated and necessarily adjudicated. See *In re Tonko*, 154 P.3d at 405-06; *Bebo*

Constr. Co. v. Mattox & O'Brien, P.C., 990 P.2d 78, 85-86 (Colo. 1999); Restatement (Second) of Judgments § 27 cmt. d.

v. The issue must have been submitted for determination and “actually determined” by the adjudicatory body. *Bebo Constr. Co.*, 990 P.2d at 85

vi. Under Colorado case law, a “final judgment” is one which “disposes of the entire litigation on the merits.” *Hierath-Prout v. Bradley*, 982 P.2d 329, 330 (Colo. App. 1999).

vii. In *Arizona v. California*, 530 U.S. 392 (2000), the United States Supreme Court stated, “In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated.” Quoted in *In re Corey*, No. KS-07-115 (10th Cir. 10/06/2008).

d. Therefore, the facts construed in the light most favorable to the Plaintiff prove the claims against the defendant are not barred by claim preclusion, or

e. In the alternative, the claims against the defendant are the result of acts committed subsequent to the filing of the Florida case.

3. **Conspiracy:**

a. **Burden of Proof: Tenth Cause of Action (Conspiracy):** I concede that I bear the burden of proof of production of a *prima facie* case.

b. **Elements:** There are five elements required to establish a civil conspiracy in Colorado. “[T]here must be: (1) two or more persons, and for this purpose a corporation is a person; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof.” *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486, 502 (Colo. 1989) (quoting *More v. Johnson*, 193 Colo. 489, 493, 568 P.2d 437, 439-40 (1977))

c. The defendant cites no facts or legal authority for challenging this claim upon which I can base any specific response. This fact, construed in the light most favorable to the Plaintiff, is sufficient to defeat the defendant’s challenge.

Alternatively, The complaint sufficiently alleges the requisite elements. In ¶328 I incorporated by reference, all unlawful acts and resultant damages described in the preceding causes of action.

i. **Element 1:** In addition to the referenced facts, I alleged the following facts, in my Complaint which, construed in the light most favorable to the Plaintiff, sufficiently alleges a combination of two or more persons:

(1) ¶330 “The parties to the conspiracy are American Family Rights Association, William O. Tower, Ann Tower, Leonard Henderson, Susan Adams Jackson Aka Susan Wolverton, Cletus Kiefer, FAR Defense Alliance, Francine Renee Cygan, Mark Cygan, Illinois Family Advocacy Coalition, Dorothy Kernaghan-Baez, Georgia Family Rights, Inc., Dennis Hinger, National Association of Family Advocates, Aimee Dutkiewicz, Thomas Dutkiewicz, Connecticut DCFWatch, William Wiseman, Wiseman Studios, Dee Contreras, Randall Blair, Brenda Swallow, Ann Durand, Lloyd Phillips, Ringo Kamens, Cheryl Barnes, CPS Watch, Inc., Sarah Thompson, and Desere’ Clabo.”

ii. **Element 2:** In addition to the referenced facts, I alleged the following facts, in my Complaint which, construed in the light most favorable to the Plaintiff, sufficiently alleges an object to be accomplished:

(1) ¶336 “The purpose of the conspiracy has been to deprive me of my business and my business reputation, to deprive me of my professional reputation, deprive me of my property, to deprive me of my property rights under copyright to control the uses of or exploit my intellectual property, to deprive me of my professional reputation and stature, to deprive me of my legitimate livelihood, to drive my business off of the Internet, to defraud the public, and to eliminate me as competition.”

iii. **Element 3:** In addition to the referenced facts, I alleged the following facts, in my Complaint which, construed in the light most favorable to the Plaintiff, sufficiently alleges

a meeting of the minds on the object or course of action:

(1) ¶331 “The defendants knowingly entered into the conspiracy.”

(2) ¶334 “The defendants used legal means to accomplish an illegal result, and/or used illegal means to achieve something that in itself is lawful in furtherance of the conspiracy.”

(3) ¶335 “The defendants acted intentionally, purposefully and without lawful justification.”

(4) ¶338 “The defendants committed multiple overt acts in furtherance of the common design.”

(5) In addition, there are alleged certain courses of action, as well as the sheer volume of wrongful acts factually alleged, from which can be reasonably inferred a meeting of the minds by virtue of the corresponding actions being performed:

(a) ¶74 “The defendants entreated authorized users of that proprietary content to abrogate their contractual obligations related to their possession and use of that information and to give it to the defendants,” which the defendants interfered with the contracts and subsequently disseminated and/or acquired.

(b) ¶76 “On August 26, 2004, Hinger stated on AFRA Directors that feedback from attendees at my seminars was 99.5% positive. He wanted AFRA to create online tutorials and tests based on my proprietary content to reinforce the training without seeking or obtaining my permission,” which proprietary content the defendant subsequently provided to the other defendants in 2006 in breach of her non-disclosure contract with me.

(c) ¶¶103 -110 states facts related to engaging in wilful copyright infringement, which was prior to and subsequently accomplished by the defendants.

(d) The scope and similarity of the copyright infringements, the perpetrators and facilitators of those infringements and the particular forums upon which the

infringements occurred, and the fact that this defendant provided proprietary content to the defendants for publication indicates proof of circumstances from which it reasonably follows, or at least may be reasonably inferred, that the conspiracy existed.

(e) The scope and similarity of the false advertisements referring to me and my business, the authors of those publications, including this defendant and the particular forums upon which they were published indicates proof of circumstances from which it reasonably follows, or at least may be reasonably inferred, that the conspiracy existed.

(f) The scope and similarity of the unfair trade practices employed against me and my business, by the same actors, including this defendant, on various fora indicates proof of circumstances from which it reasonably follows, or at least may be reasonably inferred, that the conspiracy existed.

(g) See *Exhibit Blackball* showing the publication of the conspiracy by the defendants.

iv. **Element 4:** In addition to the referenced facts, I alleged the following facts, in my Complaint which, construed in the light most favorable to the Plaintiff, sufficiently alleges one or more unlawful, overt acts:

(1) ¶337 “The defendants conspired to commit multiple wrongful acts against me including but not limited to false advertising and unfair trade practices, copyright infringement, theft and/or misappropriation of trade secrets and proprietary information, plagiarism, a pattern of racketeering activity, to induce or commit breach of contract, and tortious interference with business relationships.” The specific wrongful acts committed by these defendants were included by reference and described in the prior causes of action.

v. **Element 5:** In addition to the referenced facts, I alleged the following facts, in my Complaint which, construed in the light most favorable to the Plaintiff, sufficiently alleges damages as a proximate result thereof:

(1) ¶339 “As proximate cause of the conspiracy, I have suffered injury and damages including damage to my business and my business reputation, loss of my professional reputation, deprivation of my property and my rights under copyright to control the uses of that property and exploit that property, loss of stature in the business community, loss of my business and livelihood, loss of goodwill, diversion of sales, continued, ongoing and far reaching copyright infringement, effectuation of new and further infringements, depreciation in the value of and ability to sell and license my work, and lost profits and/or opportunities.”

d. Discussion:

i. “Civil conspiracy is an ‘independent tort,’ and ‘[a] claim for damages arising from a civil conspiracy may be pled as a separate claim.’ See, e.g., CJI-Civ. 4th 27:1, notes on use. Thus, civil conspiracy provides plaintiffs with damage remedies independent of those provided under [the previous claims].” *Double Oak Construction, L.L.C. v. Cornerstone Development International, L.L.C.*, 97 P.3d 140 (Colo.App. 09/25/2003)

ii. C.R.S. 13-21-111.5(4) provides that “[j]oint liability shall be imposed on two or more persons who consciously conspire and deliberately pursue a common plan or design to commit a tortious act.” The supreme court held that the term “tortious act” in § 13-21-111.5(4) includes “any conduct other than breach of contract that constitutes a civil wrong and causes injury or damages.” Thus, “tortious act” encompasses any wrongful conduct. *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049, 1055 (Colo. 1995).

iii. There is no requirement of an underlying garden variety “tort” to establish a claim for civil conspiracy. Rather, the elements for a civil conspiracy claim require that the underlying acts be unlawful and create an independent cause of action. *McElhanon v. Hing*, 728 P.2d 256 (Ariz. Ct. App. 1985) (a legal wrong will support a conspiracy claim), *aff’d in part and vacated in part on other grounds*, 728 P.2d 273 (Ariz. 1986).

iv. While it is not necessary to provide direct evidence of a formal agreement in

order to demonstrate a meeting of the minds, there must be proof of circumstances from which it reasonably follows, or at least may be reasonably inferred, that the conspiracy existed. Subsection (4) does not require an express agreement to cause injury in order to sustain a claim for civil conspiracy. *Schneider v. Midtown Motor Co.*, 854 P.2d 1322 (Colo. App. 1992); *Loughridge v. Goodyear Tire & Rubber Co.*, 192 F. Supp.2d 1175 (D. Colo. 2002).

v. There need not be a “specific intent” to commit a tortious act for the actors to be subject to joint liability. *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049 (Colo. 1995). However, it is clear from my complaint that there was specific intent as well as an identifiable common design to commit some of the tortious acts.

vi. The evidence must reveal some indicia of an agreement sufficient to prove that the defendants consciously conspired and deliberately pursued a common plan or design that resulted in a tortious act. *Loughridge v. Goodyear Tire & Rubber Co.*, 192 F. Supp.2d 1175 (D. Colo. 2002).

vii. In this situation, evidence of a course of conduct is sufficient to imply a tacit agreement to consciously conspire and deliberately act in concert. See *Schneider v. Midtown Motor Co.*, 854 P.2d 1322, 1327 (Colo. App. 1992) at 1326-27 (concluding that a jury could find the requisite nexus that would establish a tacit agreement). *cf. Glasser v. United States*, 315 U.S. 60, 80, 86 L. Ed. 680, 62 S. Ct. 457 (1942) (“Participation in a . . . conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a ‘development and a collocation of circumstances.’”) (quoting *United States v. Manton*, 107 F.2d 834, 839 (2d Cir. 1939)); *United States v. Fox*, 902 F.2d 1508, 1515 (10th Cir. 1990) (“By their very nature conspiracies are often provable only by circumstantial evidence.”); *United States v. Peveto*, 881 F.2d 844, 854 n.12 (10th Cir. 1989), cert. denied, 110 S. Ct. 348 (1989).

viii. “. . .[the conspiracy] need not be shown to have been entered into for the specific purpose of [injuring] the particular person damaged. . . . If such agreement and concert

of action resulted in damages . . . it is such result that constitutes [the] cause of action, and it is good as against all who participated in producing it. *Morrison v. Goodspeed*, 100 Colo. 470, 68 P.2d 458, 465 (1937)) “ *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049 (Colo. 06/26/1995).

4. **Conspiracy under the Sherman Act:**

a. **Burden of Proof:** I bear the burden of proof of production of a *prima facie* case.

b. **Elements:** The defendant has not identified any challenged elements of this claim.

This fact, construed in the light most favorable to the Plaintiff, is sufficient to defeat the defendants’ challenge to this claim. To support a per se violation of the Sherman Act, a complaint alleging price fixing, group boycott, or an exclusive dealing arrangement must allege conspiracy by competitors. See *Elliot Indust. Ltd. v. BP Am. Prod. Co.*, 407 F.3d 1091, 1123 n.29 (10th Cir. 2005) (claim of horizontal price fixing requires alleged conspiracy “among actual competitors (i.e. at the same level of distribution)”); *Key Financial Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 641--42 (10th Cir. 1987).

i. **Element 1:** I alleged the following facts, in my Complaint which, construed in the light most favorable to the Plaintiff, sufficiently alleges the existence of a conspiracy:

(1) ¶340 “I repeat and re-allege the facts in the preceding paragraphs this Complaint as if fully set forth herein.” This includes the prior cause of action for conspiracy.

(2) ¶341 “A combination or conspiracy among all of the defendants existed as described in the cause of action for Conspiracy and in the rest of this complaint.”

ii. **Element 2:** I alleged the following facts, in my Complaint which, construed in the light most favorable to the Plaintiff, sufficiently alleges specific intent to monopolize:

(1) ¶342 “Another purpose of this conspiracy was to engage in price-fixing of the products offered to the public by me and by the defendants.”

(2) ¶345 “When I charged for certain of my products and services, the defendants attempted to eliminate me as competition.”

iii. **Element 3:** I alleged the following facts, in my Complaint which, construed in the light most favorable to the Plaintiff, sufficiently alleges overt acts in furtherance of the conspiracy:

(1) ¶343 “The defendants determined that the products and services offered should be made available to the public for free.”

(2) ¶344 “The defendants subsequently made their products available to the public for free.”

(3) ¶346 “The defendants also stole my copyrighted intellectual property that I license for a fee, without paying for it, and gave it away to the public for free, sometimes as verbatim content, sometimes after altering it and creating derivative works from it.”

(4) ¶347 “The defendants also refused to deal with me or my associates and boycotted and encouraged the public to boycott my and my associates’s products, services and training events.” *See Exhibit Blackball*

(a) I identified the market ¶¶42-44, 218-219.

(b) I identified the defendants as competitors ¶¶42-44, 56-62, 70-74, 216-233, 276-288, 292-299.

c. Discussion:

i. Horizontal price fixing and group boycott are per se violations. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 219 (1940); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998).

ii. Per se violations are restricted to those restraints “that would always or almost always tend to restrict competition and decrease output.” *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 723 (1988).

iii. This concern is greatest when actual competitors enter agreements because cooperation among would-be competitors will “deprive the marketplace of the independent

centers of decisionmaking that competition assumes and demands,” and risk anti-competitive effects. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768--69 (1984).

iv. To support a per se violation of the Sherman Act, a complaint alleging price fixing or group boycott must allege conspiracy by competitors. See *Elliot Indust. Ltd. v. BP Am. Prod. Co.*, 407 F.3d 1091, 1123 n.29 (10th Cir. 2005).

5. **Diversity:** I concede the absence of complete diversity. However, this complaint was not based solely on jurisdiction arising out of § 1332, therefore error this is not fatal to the court assuming personal and subject matter jurisdiction over the defendant under alternate theories which were adequately preserved in the complaint at ¶¶ 32-35 and 37-41.

6. **Unclean Hands:** Whether the clean hands doctrine applies in a given case is a question of fact. *McCann v. Jackson*, 163 Colo. 163, 165-66, 429 P.2d 265, 266 (1967).

a. **Burden of Proof:** The moveant bears the burden of proof when asserting an affirmative defense.

i. **Elements:** The defendant cites no facts or legal authority for asserting this affirmative defense upon which I can base any specific response. This fact, construed in the light most favorable to the Plaintiff, is sufficient to defeat the affirmative defense of unclean hands.

b. “The [unclean hands doctrine] is intended to protect the integrity of the court, and simply means that equity refuses to lend its aid to a party who has been guilty of unconscionable conduct in the subject matter in litigation.” *Jameson v. Foster*, 646 P.2d 955, 958 (Colo. App. 1982). The defendant is named in this lawsuit for acts done in violation of court order, and for signing a contract only to steal it from me so I could not sue her for breach and is not, therefore, entitled to this equitable remedy.

7. **Laches:** Whether the elements of the doctrine are proved essentially presents a question of fact to be determined upon the evidence in the case. *Colo. State Bd. of Med. Exam'rs v. Ogin*, 56

P.3d 1233 (Colo. App. 2002). The defendant cites no facts or legal authority for asserting this affirmative defense upon which I can base any specific response. This fact, construed in the light most favorable to the Plaintiff, is sufficient to defeat the affirmative defense of laches.

i. Laches is an equitable remedy. Therefore, one seeking application of this doctrine has an obligation to “do equity.” See *Golden Press, Inc. v. Rylands*, 124 Colo. 122, 126, 235 P.2d 592, 595 (1951)(“courts require that he who seeks equity should do equity and come with clean hands”). The clean hands maxim dictates that one who has engaged in improper conduct regarding the subject matter of the cause of action may, as a result, lose entitlement to an equitable remedy. *Salzman v. Bachrach*, 996 P.2d 1263 (Colo. 2000); see *Ajay Sports, Inc. v. Casazza*, 1 P.3d 267 (Colo. App. 2000)(court will not consider a request for equitable relief under circumstances where the litigant’s own acts offend the sense of equity to which he or she appeals). The defendant is barred from this equitable remedy by virtue of her concealment of her misconduct.

a. **Burden of Proof:** Laches is an affirmative defense that requires the asserting party to prove that he or she was prejudiced by the opposing party’s unconscionable delay. *People v. Robbins*, 87 P.3d 120 (Colo. App. 2003)(cert. granted Apr. 12, 2004).

b. **Elements:** The elements of laches in Colorado are: “(1) full knowledge of the facts; (2) unreasonable delay in the assertion of available remedy; and (3) intervening reliance by and prejudice to another.” *Manor Vail Condo. Ass’n v. Vail*, 604 P.2d 1168, 1170 (Colo. 1980) (en banc).

i. **Element 1** - I did not have full knowledge of the facts due to the defendants’s concealment of their conduct, and the defendant has not asserted that I did have full knowledge of the facts. In fact, I still don’t have full knowledge of all the facts, and only recently acquired sufficient knowledge of the facts to support filing this complaint.

ii. **Element 2** - the defendant has not asserted there is an “unreasonable delay” in the filing of this lawsuit, and I assert that there has been no unreasonable delay.

iii. **Element 3** - the defendant has not asserted that she relied on the unreasonable delay nor prejudiced by any unreasonable delay.

8. **Statue of Limitations:** see attached Brief on Statutes of Limitations.

a. **Burden of Proof:** The statute of limitations is an affirmative defense to be pleaded and proved by the defendants. See C.R.C.P.8(c); *Comfort Homes, Inc. v. Peterson*, 37 Colo. App. 516,549 P.2d 1087(Colo. App. 1976).

i. **Elements:** The defendant cites no facts or legal authority for asserting this affirmative defense upon which I can base any specific response. This fact, construed in the light most favorable to the Plaintiff, is sufficient to defeat the affirmative defense of statute of limitations.

9. **Freedom of Speech:** There is no freedom of speech protection for false advertising or for slander and libel.

i. The defendant is not entitled to this equitable remedy by virtue of already being under court order not to slander me personally or professionally.

ii. In the alternative, I assert that the defendant is engaged in commercial speech as described in my complaint at ¶¶ 216-289.

b. **Burden of Proof:** The moveant bears the burden of proof when asserting an affirmative defense.

c. **Elements:** The defendant cites no facts or legal authority for asserting this affirmative defense upon which I can base any specific response. This fact, construed in the light most favorable to the Plaintiff, is sufficient to defeat the defendant’s affirmative defense of freedom of speech.

d. Discussion

- i. This case concerns pure commercial advertising, for which the courts have always reserved a lesser degree of protection under the First Amendment.”); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1513 (10th Cir. 1994).
- ii. Commercial speech is that which “does no more than propose a commercial transaction.” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).
- iii. Advertising is widely recognized as the most obvious example of commercial speech. *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1546 (10th Cir. 1991).
- iv. The distinction between commercial and noncommercial speech rests on the “common-sense” grounds that the former “occurs in an area traditionally subject to government regulation.” *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978)).
- v. Commercial speech therefore occupies a “subordinate position in the scale of First Amendment values.” *Ohralik*, 436 U.S. at 456; see also *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-65 (1983). “[T]he State’s power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is linked inextricably to those transactions.” *Liquormart v. Rhode Island*, 517 U.S. 484, 499 (1996) (internal quotations omitted).
- vi. The Supreme Court has emphasized that it will review a “combination” of factors in sorting out commercial from non-commercial speech, including several characteristics of commercial speech that, in our view, help illuminate the issue. According to the Court, speech may properly be characterized as commercial speech where, among other things, (1) it is concededly an advertisement, (2) it refers to a specific product, or (3) it is motivated by an economic interest in selling the product. See *Bolger*, 463 U.S. at 66--67.

vii. The Supreme Court “made clear that advertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded noncommercial speech,” despite “the fact that [the pamphlets] contain discussions of important public issues.” *Bolger*, 463 U.S. at 67-68 (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 563 n.5 (1980)).

10. **Statute of Frauds:** The Colorado’s statute of frauds requires certain agreements to be in writing and, in general, states that, absent a writing, such agreements are void. *Premier Farm Credit, PCA v. W-Cattle, LLC*, No. 05CA0444 (Colo.App. 10/05/2006) .

a. **Burden of Proof:** The moveant bears the burden of proof when asserting an affirmative defense.

b. **Elements:** The defendant cites no specific facts or legal authority for asserting this affirmative defense upon which I can base any specific response.

i. This defense is being used by the defendant who freely entered into a fair contract³, then breached it and subsequently wishes to avoid having to fulfill her agreements or to be held liable for her breach, and

ii. The defendant is misleading this court by inferring there was no signed contract when, in fact, she stole my copy of the contract she signed from my personal belongings at the seminar. The defendant is barred from asserting this defense because she has admitted she stole the plaintiff’s copy of the contract she signed. See *Exhibit 1* and *Affidavit of Kay Henson*.

11. **Conclusion.**

Defendant has relied on certain misapprehensions of the facts and misrepresentations in support of her motion to dismiss. I will concede that the complexity of this complaint may cause some confusion, which may be reflected in certain inadvertent errors in the complaint, which I

³ I have entered into this same contract with many other individuals and organizations nationwide, and none of them have breached it nor challenged it as unfair or fraudulent.

am willing to correct should that be necessary. However, I contend that I have stated sufficient facts in my complaint to defeat the motion to dismiss.

“The court’s function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff’s complaint alone is legally sufficient to state a claim for which relief may be granted.” *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (internal quotation omitted).

The complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims. *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

“To state a claim, a plaintiff’s complaint must “show[] that the pleader is entitled to relief.” Fed. R. Civ. P. (8)(a)(2). This means that the plaintiff must allege enough factual matter, taken as true, to make his “claim to relief . . . plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (2007). This is not to say that the factual allegations must themselves be plausible; after all, they are assumed to be true. It is just to say that relief must follow from the facts alleged. *Robbins v. Oklahoma ex rel. Dep’t of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008).

“If a complaint explicitly alleges every fact necessary to win at trial, it has necessarily satisfied this requirement. If it omits some necessary facts, however, it may still suffice so long as the court can plausibly infer the necessary unarticulated assumptions. . . . While a complaint must be “short and plain,” it must also “show[]” (not merely assert) that relief is appropriate if it is true. Fed. R. Civ. P. 8(a)(2). Thus, “[d]espite the liberality of modern rules of pleading, a complaint still must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.’ In re *Plywood Antitrust Litigation*, 655 F.2d 627, 641 (5th Cir. Unit A Sept. 1981); see generally Charles B. Campbell, A ‘Plausible’ Showing After *Bell Atlantic Corp. v. Twombly*, 9 Nev. L.J. (forthcoming 2008). This

is the compromise enacted by Rule 8's notice pleading. Technical fact pleading is not required, but the complaint must still provide enough factual allegations for a court to infer potential victory.” *Bryson v. Gonzales*, 534 F.3d 1282 (10th Cir. 07/28/2008).

I request that the court will permit me to amend or correct any errors or deficiencies in the complaint. “. . .leave [to amend the complaint] shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a); *Calderon v. Kan. Dept. of Social and Rehabilitation Services*, 181 F.3d 1180, 1185 (10th Cir. 1999).

“Under Rule 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon.” (quoting *Neitzke v. Williams*, 490 U.S. 319, 329 (1989)).

“[P]ro se litigants are to be given reasonable opportunity to remedy the defects in their pleadings,” *Hall v. Bellmon*, 935 F.2d 1106, 1110 n.3 (10th Cir. 1991).

Accordingly, the defendant’s motion to dismiss should be denied:

Or, if my complaint is deficient, I request that I be afforded the opportunity to correct any errors or deficiencies.

Respectfully submitted June 22, 2009

/s/ Suzanne Shell

Suzanne Shell
14053 Eastonville Rd.
Elbert, CO 80106
719-749-2971
dsshell@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the attached documents **PLAINTIFF'S RESPONSE TO MOTION TO DISMISS AND QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION [#172]** filed on 06/01/2009 and attachments were placed in the United States Mail, first class mail, postage prepaid on June 23, 2009

National Association of Family Advocates
and
Dorothy Kernaghan-Baez and
Georgia Family Rights, Inc.
each @ 811 Aumond Place East
Augusta, GA 30909

William Wiseman dba Wiseman Studios
PO Box 693
1625 Siskiyou St
Klamath Falls OR 97601-2046

Leonard Henderson
4773 Salmon River Highway
Otis, OR 97368

Susan Adams Jackson
40 Orlando Ave.
Winthrop, MA 02152

Anne E. Tower and
William O. Tower and
American Family Rights Association
each @ 7334 Chivalry Way,
Citrus Heights, CA, 95621-4333

Brenda Swallow
815 Hilltop Road
Mary Esther, Florida 32569

Illinois Family Advocacy Coalition and
Renee Cygan and
Mark Cygan
each @ 329 N. Cornell Ave. #D
Villa Park, IL 61081

Thomas M. Dutkiewicz dba Connecticut
DCF Watch
PO Box 9775
Bristol, CT 06011

Aimee Dutkiewicz
P.O. Box 3022
Bristol, CT 06011-3022

Dee Contreras
10571 Colorado Boulevard
Apartment B-101
Thornton, CO 80233

Daniel Slater
attorney for Cheryl Barnes, CPS Watch, Inc.
and Sarah Thompson via Court's ECF
system

Patrick D. Vellone and Jennifer E. Schlatter
attorney for Ringo Kamens/Alex Bryan via
Court's ECF system

/s/ Suzanne Shell June 22, 2009

Suzanne Shell