

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

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

SUZANNE SHELL,  
Plaintiff,

v.

AMERICAN FAMILY RIGHTS ASSOCIATION, et al.,  
Defendants.

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**BRIEF IN SUPPORT OF MOTION TO DISMISS DEFENDANTS WILLIAM O. TOWER  
AND AMERICAN FAMILY RIGHTS ASSOCIATION AND FOR SANCTIONS  
AGAINST PLAINTIFF PURSUANT TO RULES 12 (B)(2) AND 12(B)(6)**

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**STANDARD OF REVIEW**

1. When considering a motion to dismiss under F.R.C.P.R. 12(b)(6), the Court should determine whether the allegations of the complaint are sufficient to state a claim. The Court should accept all well-pleaded allegations of the Complaint as true for the purposes of consideration of the Motion. *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 997 (10th Cir. 2002).

2. Even with the presumption that Plaintiff properly alleges facts presumed to be true, the Court may exercise discretion and is not required to rely on “conclusory allegations or legal conclusions masquerading as factual conclusions,” *Fernandez-Montes v. Allied Pilots Association*, 987 F.2d 278, 284(5th Cir.1993); see also, *Ruiz v. McDonnell*, 299 F.3d 1173, 1181

(10th Cir. 2002) ("All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true."). In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, the Court held that the allegations need not be detailed, but requires more than "the-defendant-unlawfully-harmed-me" accusations, and that pleadings offering "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U.S., at 555, *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) . In order to survive a motion to dismiss, a complaint must contain sufficient factual matter. The complaint, where accepted as true, must state claims subject to relief that are plausible on its face. In order to state a facially plausible claim the plaintiff must plead factual content that allows the court to draw a reasonable inference that defendants are liable for alleged conduct that gave rise to Plaintiff's claim. The plausibility standard requires factual allegations that rise above a mere possibility that a defendant has committed acts giving rise to liability. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929.

3. The Tenth Circuit has stated very clearly that factual allegations cannot mean "likely to be true." Plausibility in the context of the Complaint "must refer to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible. The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief." *Smith v. United States*, 561 F.3d 1090, 1104. This requirement of plausibility serves not only to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success, but also to inform the

defendants of the actual grounds of the claim against them. "Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." ("[A]t some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8."). The Twombly Court was particularly critical of complaints that "mentioned no specific time, place, or person involved in the alleged conspiracies." Given such a complaint, "a defendant seeking to respond to plaintiffs' conclusory allegations . . . would have little idea where to begin." *Robbins v. Oklahoma*, 519 F.3d 1242, 1248 (10th Cir. 2008)

4. In consideration of this Motion, the Court should review the complaint to determine whether it "contains enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

#### **THE COURT LACKS PERSONAL JURISDICTION OVER THESE DEFENDANTS**

5. Plaintiff, throughout her Complaint, makes a blanket allegation that all defendants have "maintained systematic and general business contacts with Colorado."

6.. However, Plaintiff has failed to make any specific allegations about the practices or contacts by any individual Defendants that would make them subject to the personal jurisdiction of this Court. Plaintiff withdrew from AFRA membership in February 2005, and her withdrawal, four years ago, terminated contacts between William Tower and AFRA Defendants.

7. William Tower and AFRA Defendants allege that they have no contacts whatsoever with Colorado that would bring them under the general personal jurisdiction of this Court, and there is not sufficient contacts or activities within Colorado alleged in the present case to bring

them under the specific personal jurisdiction of this Court.

8. The Federal Copyright Act, 17 U.S.C. § 101 et seq., does not allow for nationwide service of process. *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008). Accordingly, the “minimum contacts” due process test announced by the United States Supreme Court in *International Shoe Co. v. Washington* 326 U.S. 310 (1945) applies.

9. “[T]he Supreme Court has instructed that the ‘minimum contacts’ standard requires, first, that the out-of-state defendant must have ‘purposefully directed’ its activities at residents of the forum state, and second, that the plaintiff’s injuries must ‘arise out of’ defendant’s forum-related activities.” *Dudnikov* at 1071 (citing, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). In determining whether an internet website is subject to personal jurisdiction, Colorado Courts have looked first at the types of activities holding that “ Whether a court has jurisdiction over an online business depends on the nature and quality of commercial activity that an entity conducts over the Internet. Where a defendant clearly does business over the Internet by entering into contracts with residents of other states which involve the knowing and repeated transmission of computer files over the Internet, jurisdiction in the state of the recipient is proper.” *State ex rel. Suthers v. Cash Advance & Preferred Cash Loans*, 205 P.3d 389 (Colo. Ct. App. 2008). The Tenth Circuit Court, in 2002, stated that “ Although sites may be somewhat interactive, such as allowing for the exchange of information, the jurisdictional analysis ultimately depends on the level of interactivity and commercial nature of the exchange of information that occurs on the web site. That is, the greater the interactivity the more reasonable it is to find that the defendant purposefully directed activities toward the forum state

and consequently should have foreseen being haled into the forum's jurisdiction.” *SCC Communs. Corp. v. Anderson*, 195 F. Supp. 2d 1257, 1260 (D. Colo. 2002). Plaintiff has made factual allegations that Tower and AFRA Defendants have purposefully directed activities toward Colorado, however she fails to allege with any particularity facts to support this position and instead relies on a legal conclusion. Plaintiff’s allegation that AFRA seeks Colorado members is based on the AFRA mission statement. Yet Plaintiff fails to further allege that AFRA has taken any affirmative steps beyond a publication on a passive website to target Colorado. Plaintiff further fails to provide factual allegations that William Tower and AFRA Defendants have actually conducted any activities in Colorado sufficient to subject them to either personal or general jurisdiction.

10. William Tower and AFRA Defendants do not have sufficient contacts with Colorado to subject them to the personal jurisdiction of this Court. The Complaint should be dismissed against Defendants for lack of personal jurisdiction (with the exception of the RICO claims, which are addressed *infra*).

11. Plaintiff should be required to outline specifically what contacts each Defendant has with Colorado that brings them under the personal jurisdiction of this Court. Failing that, the Court should dismiss William Tower and AFRA Defendants from this action; or, at a minimum, schedule an evidentiary hearing on the issue of personal jurisdiction.

12. With respect to the conspiracy claims (the Plaintiff’s Tenth and Eleventh Causes of Action), the Plaintiff has failed to plead the conspiracy claims with enough specificity to establish personal jurisdiction over the William Tower and AFRA Defendants. In order "to establish jurisdiction under a theory of civil conspiracy, the plaintiff must plead with particularity

overt acts within the forum taken in furtherance of the conspiracy." "[B]ald speculation or a conclusory statement that individuals are co-conspirators is insufficient to establish personal jurisdiction under a conspiracy theory." *FC Investment Group LC v. IFX Markets, Ltd.*, 529 F.3d 1087, 1097 (D.C. Cir. 2008) (internal citations omitted).

13. With the exception of the Plaintiff's RICO claim, the remainder of Plaintiff's claims against William Tower and AFRA Defendants appears to be based on diversity of citizenship. However, it is noted that some of the Defendants reside in Colorado, which is also where Plaintiff resides. See Complaint at ¶¶ 22 (Defendant Contreras) and 26 (Defendant Kamens).

143. It is well established that for diversity of citizenship jurisdiction to apply, there must be absolute diversity. *Strawbridge v. Curtiss*, 7 U.S. 267 (1806). Plaintiff has failed to provide complete diversity; accordingly, the Court lacks subject-matter jurisdiction over the diversity claims.

**THE PLAINTIFF HAS FAILED TO STATE ANY SPECIFIC CLAIM AGAINST  
WILLIAM TOWER AND AFRA, DEFENDANTS IN HER FIRST, THIRD, FOURTH,  
SIXTH, EIGHTH, NINTH, AND ELEVENTH CAUSES OF ACTION**

15. With respect to the Eleventh Cause of Action, while it is not entitled a claim for "conspiracy," a review of the factual basis pled in the Complaint indicates that the cause of action is based solely upon a theory of conspiracy, which triggers the particularity rule.

16. The Plaintiff has listed eleven separate causes of action in her Complaint. However, she has failed to describe any facts that name William Tower and AFRA, Defendants in the first, third, fourth, sixth, eighth, ninth, and eleventh cause of action.

17. Instead, in those causes of action, she merely makes conclusory statements about all defendants, and where she lists specific actions of individual defendants, she fails to list

any specific actions taken by William Tower and AFRA, Defendants.

18. William Tower and AFRA, Defendants are named as part of general group of defendants without any statements of what the Defendants did to result in the present litigation. As such, William Tower and AFRA, Defendants are unable to provide a responsive pleading to the vague allegations of the Plaintiff. William Tower and AFRA, Defendants cannot defend themselves against claims made without regard to time, place and actionable events designated by the Plaintiff.

19. In the First Cause of Action (Misappropriation / Theft of Trade Secrets), Plaintiff claims that the cause of action applies to all defendants except Defendant Phillips and Defendant Kamens. However, a review of the specifics of that cause of action reveals only allegations concerning actions by Defendants Hinger, AFRA, Durand, Swallow, Wiseman, and Wiseman Studios. She then connects those specific allegations by stating, “By virtue of these publications and distributions...” Complaint at ¶ 85 (emphasis added). At no point does she connect any of the William Tower and AFRA, Defendants to her claim in the First Cause of Action. Accordingly, William Tower and AFRA, Defendants should be dismissed from the First Cause of Action.

20. In Plaintiff’s Third Cause of Action (Contributory Copyright Infringement) fails to name any defendant whatsoever, wholly grouping all defendants into a single group all guilty of precisely the same actions. There is no way for William Tower and AFRA, Defendants to adequately respond to such blanket allegations and legal conclusions. Plaintiff has failed to state a claim in her Third Cause of Action upon which relief may be granted.

21. In Plaintiff’s Fourth Cause of Action (Vicarious Copyright Infringement), Plaintiff

again fails to name any defendant whatsoever, or any specific act which gives rise to her claims. There is no way for William Tower and AFRA, Defendants to adequately respond to such general and conclusory allegations. Plaintiff has failed to state a claim in her Fourth Cause of Action upon which relief may be granted.

22. In Plaintiff's Fifth Cause of Action (Breach of Contract), Plaintiff names William Tower and AFRA, Defendants in Count Nine of her complaint for breach of contract. Plaintiff fails to allege any of the rudimentary requirements required to establish that a contract was offered, that Defendant had knowledge of the offer, that Defendant assented to terms, that there was any consideration, duty or required performance. Plaintiff simply makes a legal conclusion that Defendant breached a contract. For remaining counts 1-8 and 9-14, Plaintiff also fails to name specific acts taken by Defendants Durand, Swallow, Wiseman, AFRA, Henderson, Kiefer, Hinger, and Kamens. She does not name any of the other named Defendants in her claims. Accordingly, Plaintiff's Fifth Cause of Action should be dismissed.

23. In Plaintiff's Sixth Cause of Action (Tortious Interference With Business Relationship and/or Business Contract), Plaintiff names Durand and Swallow only. She does not allege any specific action by William Tower and AFRA, Defendants. Plaintiff offers a legal conclusion without offering with any particularity any action by William Tower and AFRA, Defendants. Therefore this cause of action should be dismissed.

24. In Plaintiff's Eighth and Ninth Causes of Action (False and Misleading Advertising; Unfair or Deceptive Trade Practices and Unfair Methods of Competition), Plaintiff continues in her pattern of making generalized allegations of facts that are meant to apply to "all defendants." It is clear from a review of the allegations that no reasonable court

could believe that every single one of the defendants did every single one of the items alleged in the Complaint. Plaintiff's failure to plead with particularity any facts specifically attributable to the William Tower and AFRA, Defendants demonstrates that Plaintiff has, once again, arrived at a sweeping legal conclusion. As such, Plaintiffs Eighth and Ninth causes of action should be dismissed.

25. In Plaintiff's Eleventh Cause of Action (Antitrust / The Sherman Act), Plaintiff again makes allegations regarding conspiracy without naming a single act or action taken by any defendant, William Tower and AFRA, Defendants. Accordingly, Plaintiff's Eleventh Cause of Action must be dismissed.

**THE PLAINTIFF HAS FAILED TO STATE A CLAIM WITH RESPECT TO HER  
SECOND CAUSE OF ACTION, COPYRIGHT INFRINGEMENT**

26. In Plaintiff's Second Cause of Action (Copyright Infringement), Plaintiff's complaint at paragraph 110(b) alleges that "On or about March 18, 2006, Tower impermissibly copied and distributed verbatim content from an article on my copyrighted website to multiple AFRA groups and affiliate groups." Tower and AFRA, Defendants deny this constitutes copyright infringement in that the "verbatim" copyright infringement is squarely within the fair use doctrine as the subject matter concerned Tower, directed threats toward him, the publication was necessary for the purpose of rebuttal, and Plaintiff received full credit for authorship. See *Hustler Magazine, Inc. v. Moral Majority Inc.*, 796 F.2d 1148 (9<sup>th</sup> Circuit 1986); *Savage v. Council on American-Islamic Relations, Inc.*, *Savage v. Council on American-Islamic Rels., Inc.*, 2008 U.S. Dist. LEXIS 60545 (N.D. Cal. July 25, 2008). See exhibit 1.

27. Plaintiffs registered copyright for the Profane Justice Website, TXu1-364-413 is

dated June 6, 2007. William Tower and AFRA, Defendants, committed the alleged infringement, according to Plaintiff's complaint on March 18, 2006.

28. All other allegations contained within the Plaintiff's second cause of action are conclusory factual allegations and fail to allege with any particularity any specific action by Tower and AFRA, Defendants. There is no way for Tower and AFRA, Defendants to respond to Plaintiff's unsupported legal conclusions.

### **PLAINTIFF HAS FAILED TO STATE A VALID RICO CLAIM**

29. At the outset, it should be noted that the Plaintiff has failed, as required by F.R.C.P. R. 9(b), to plead her allegations of fraud with any particularity as to William Tower and AFRA, Defendants. This is necessary in RICO claims. *Andrews v. Heaton*, 483 F.3d 1070, 1076 (10th Cir. 2007). To the extent that Plaintiff's RICO claims are based on allegations of fraud, they should be dismissed.

30. Furthermore, with respect to the allegations of mail fraud as it applies to RICO, any allegation of mail fraud must also include a specific allegation that an individual acted in reliance upon the fraud. *Brown v. Cassens Transport Co.*, 492 F.3d 640, 645-646 (6th Cir. 2007); *McLaughlin v. American Tobacco Co.* 522 F.3d 215, 222-226 (2d Cir. 2008).

31. Plaintiff must plead nine separate factual bases to show the "fraud" section of mail fraud. Actionable fraud consists of (1) a representation; (2) that is false; (3) that is material; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent it be acted on; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance; (8) the hearer's right to rely on it; and (9) injury. Failure to adequately allege any one of the nine elements is fatal to the fraud claim. *Tal v. Hogan*, 453 F.3d 1244, 1263 (10th Cir. 2006).

(internal citations omitted).

32. Plaintiff makes no specific claim against William Tower and AFRA, Defendants on her RICO claim, accordingly Plaintiff's RICO claims against William Tower and AFRA Defendants must be dismissed.

33. Plaintiff alleges conduct by individuals, and alleges the existence of an enterprise, Plaintiff fails to allege that there was any conduct by an enterprise through which William Tower and AFRA, Defendants acted. This is a necessity when pleading RICO claims, and the failure to thus claim should further lead to dismissal of those claims. *Burke v. Woods*, 85 F.3d 640, 1996 WL 223731, \*4 (10th Cir. 1996).

**PLAINTIFF'S COPYRIGHT CLAIMS, AND ALL CLAIMS DERIVATIVE OF HER  
COPYRIGHT CLAIMS, ARE BARRED AS A MATTER OF LAW BY THE DOCTRINE  
OF LACHES AND BY THE STATUTE OF LIMITATIONS**

34. The Copyright Law contains a statute of limitations of three years. 17 U.S.C. § 507 (b).

35. The Plaintiff is barred from any recovery for actions accruing prior to three years before filing suit.

36. Furthermore, the Plaintiff is wholly barred from complaining of these copyright violations under the doctrine of laches.

37. Judge Learned Hand described the importance of laches in the copyright arena: It must be obvious to every one familiar with equitable principles that it is inequitable for the owner of a copyright, with full notice of an intended infringement, to stand inactive while the proposed infringer spends large sums of money in its exploration, and to intervene only when his speculation has proved a success. Delay under such circumstances allows the owner to speculate

without risk with the other's money; he cannot possibly lose, and he may win.

Haas v. Leo Feist, Inc., 234 F. 105, 108 (S.D.N.Y. 1916).

38. In order to show laches, one must show “(1) lack of diligence by a party against whom the defense is asserted, and (2) prejudice to the party asserting it.” *Chirco v. Crosswinds Communities, Inc.*, 474 F.3d 227, 231 (6th Cir. 2007).

39. In the present case, the mere fact that the Plaintiff was so heavily intertwined with all of the other parties in this case, to a degree that she knew of the alleged violations as early as 2002, yet did not choose to file suit on those “continuing” violations until 2009 shows that she sat on her rights for a time too long to now complain of a violation.

40. Furthermore, Plaintiff, as a co-founder of AFRA and a member until February 2005. During her three year membership, Plaintiff interacted with members on yahoo groups. The presumption that extensive commingling existed, may be reasonably inferred. Any claims associated with the possible presence of documents on the AFRA website created or posted prior to terminating membership four years ago should be barred.

41. Laches is a doctrine that is specifically available to copyright cases. “[W]e have explicitly recognized that the doctrine of laches can be applied in copyright infringement cases.” *Chirco* at 233 (emphasis in original). See also, *Jacobsen v. Deseret Book Co.*, 287 F.3d 936 (10th Cir. 2002).

42. Accordingly, the Court should dismiss the Plaintiff’s copyright claims under the doctrine of laches.

43. 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.

### **CONCLUSION**

44. The Plaintiff has offered the Court a Complaint riddled with legal conclusions and conclusory allegations. Plaintiff has concocted an elaborate theory in order to hale all defendants into this court based on her legal conclusion that AFRA, a passive, non commercial website, is at the center of an illegal enterprise. Plaintiff claims this alleged enterprise consists of numerous yahoo groups whose members have collectively conspired for the purpose of misappropriating her trade secrets and copyrights. Allegedly all members engage in misappropriation of her trade secrets and breaches of contract to accomplish these nefarious goals. This conspiracy allegedly exists for the purpose of taking over what Plaintiff defines as a “Market.” Plaintiff lists named defendants, as well as certain government agencies as her competitors in the “Market.” Plaintiff offers the court her legal conclusion that this has resulted in a monopoly that now affects Interstate Commerce across the United States. Plaintiff further alleges all these acts were done by diverse defendants, many of whom are unknown to Defendant William Tower and with no association with AFRA, acting in unison and therefore collectively liable, for the purpose of harming her business interests. Plaintiff presents the legal conclusion that Tower and AFRA Defendants, are the actual and proximate causes of her damages without stating with particularity any facts necessary to support any of her allegations and therefore fails to establish a *prima facie* case as to any of the causes of action. Therefore, this case should not proceed against William O. Tower and AFRA Defendants or any of the other named defendants.

**WHEREFORE**, Tower and AFRA Defendants hereby requests that this Court **DISMISS** all claims against them. The aforementioned Defendants further request that this

Court award sanctions against Plaintiff, 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 5<sup>th</sup> day of July, 2009.

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William O. Tower, individually and for  
AFRA  
In pro per, Defendant  
7334 Chivalry Way  
Citrus Heights, CA 95621

I (William O. Tower) individually and on behalf of AFRA hereby certify that on the 6th day of July, 2009, I served a true and correct copy of my, **Motion to Dismiss and Brief in Support of Motion to Dismiss As follows:**

The Honorable Marcia S Krieger, United States District Court, District of Colorado, 901 19 <sup>th</sup> Street, Denver, Colorado. 80294-3589 By Priority Express, FedEx.	Amiee Dutkiewicz – P.O. Box 3022, Bristol, CT. 06011-3022 – via e-mail
-Leonard Henderson – via e-mail	Susan Adams Jackson – via e-mail
Cletus Kiefer – PO Box 52, St. Charles, MO 63301– via e-mail	Families at Risk Defense Alliance – c/o Cletus Kiefer– via e-mail
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Illinois Family Advocacy Coalition – c/o Renee Cygan	Dorothy Kernaghan-Baez – via e-mail
Georgia Family Rights, Inc. – via e-mail	Dennis Hinger – via e-mail
National Association of Family Advocates via e-mail	Aimee Dutkiewicz – via e-mail
Thomas Dutkiewicz – via e-mail	Connecticut DCF Watch – c/o Thomas Dutkiewicz – via e-mail
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Desere’ Clabo aka Howard – c/o Daniel Slater – via e-mail	Sarah Thompson – c/o Daniel Slater – via e-Mail

And upon the Plaintiff, Suzanne Shell, through The United States Postal Service:

Suzanne Shell  
14053 Eastonville Rd.  
Elbert, CO 80106

Dated: July 6, 2009

William O. Tower individually and on behalf of AFRA