

**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 DEFENDANT CLETUS KIEFER AND FOR
SANCTIONS AGAINST PLAINTIFF PURSUANT TO
RULES 12 (b)(2) AND 12(b)(6)**

COMES NOW, Defendant Cletus Kiefer, a living man, by special appearance, and (pursuant to F.R.C.P.R. 12(b) hereby MOVES this Court to dismiss the Plaintiffs case against him, and for the Court to levy sanctions against Plaintiff. The Defendant Cletus Kiefer in no way voluntarily submits to personal jurisdiction. In support of this motion, Defendant states as follows:

1. The Defendant certifies 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 the Motion.

FACTS

2. Defendant Cletus Kiefer states the following:

1. Defendant Cletus Kiefer has no connection whatsoever with Colorado.

2. Defendant Cletus Kiefer does not reside in Colorado and does not have any regular work in Colorado.
3. Defendant Cletus Kiefer has never solicited business in Colorado or maintained a place of business in Colorado or received or exchanged money in the state of Colorado.
4. Defendant Cletus Kiefer has never had a telephone listing in Colorado.
5. Defendant Cletus Kiefer has never maintained a bank account in Colorado.
6. Defendant Cletus Kiefer has never visited Colorado for any reason either business or personal.

Plaintiff's specific allegations against Cletus Kiefer, Defendant, appear to stem from Plaintiff's conclusion that Cletus Kiefer is a member of the internet group American Family Rights Association (AFRA), a web site that does not sell any product or service, nor charge any membership fee and alleges that Defendant's innocent membership infers an agency relationship with AFRA which the Plaintiff admits she is the co founder. It is now undisputed fact that AFRA is nothing more than a webpage. Plaintiff furthermore alleges that Defendant's membership in a YAHOO Group, AFRA_Eagle, (note here that the Plaintiff is fully aware of the fact that AFRA Eagle has not been an AFRA group for several years.) imputes an agency relationship for USA_Eagle. Plaintiff's conclusions give rise to allegations of eleven different causes of action which appear to be based on allegations of copyright infringement and collusion among Defendants to infringe on Plaintiff's alleged copyrights. The evidence submitted to this honorable court by numerous Defendants, which the Plaintiff could not dispute because it is the TRUTH, is now **undisputed fact**, and proves the Plaintiff's allegations are nothing more than frivolous and malicious.

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 that Court lacks personal jurisdiction (either general or specific) over Cletus Kiefer, Defendant.

Subject Matter Jurisdiction (Diversity Claims)

4. Plaintiff's claims as applies to Plaintiff's First, Fifth, Sixth, Ninth and Tenth causes of action as to diversity jurisdiction should fail because there is not absolute diversity of parties.

Failure to State a Claim (All Claims)

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

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

6. **Burden of Proof:** The Plaintiff bears the burden of production to present 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); *Fast Capital Mktg, LLC v. Fast Capital LLC*, 2008 U.S. Dist. LEXIS 103988 (S.D. Tex. Dec. 24, 2008).

8. Elements Not Supported by Complaint:

a. **Element 1:** Plaintiff has not alleged any specific trade secret that is not generally known. Plaintiff's allegation is vague, lacks specificity and is a legal conclusion.

b. **Element 2:** Plaintiff does not allege any improper disclosure of information by Cletus Kiefer, Defendant.

c. **Element 3:** Evidence has been shown (see Docket item 203), that the Plaintiff has not shown any diligent effort to protect the supposed trade secrets and has freely given away the information. Furthermore, the Plaintiff requested this court seal the evidence in Docket Item 203 as her trade secrets, when in fact it was just proof she committed the acts she has accused all the defendants as well as adding perjury to her list of fraudulent actions in this court.

Second Cause of Action (Copyright Infringement)

9. **Burden of Proof:** The Plaintiff has the burden of production by presenting facts that demonstrate a *prima facie* case on all 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 Publ'n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S. Ct. 1282 (1991). Defendant, Cletus Kiefer, concedes that Plaintiff has pled ownership of some valid copyrights.

11. Elements Not Supported by the Complaint:

a. **Element 2:** Plaintiff did not allege any facts that a valid copyright was violated by copying of Plaintiff's original work by Defendant, Cletus Kiefer.

12. Plaintiff failed to plead a claim for copyright infringement within the Statute of Limitations.

13. The Doctrine of Laches renders the Plaintiff's claim invalid.

14. As shown in Docket Item 245, the Plaintiff has made changes on an almost daily basis on several of the items in which she claims infringement and yet the Plaintiff has not renewed or updated the copyrights which make her claim invalid.

Third Cause of Action (Contributory Copyright Infringement)

15. **Burden of Proof:** "There can be no contributory infringement without a direct infringement." *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004), *La Resolana Architects. PA v. Reno, Inc.*, 555 F.3d 1171 (10th Cir. 2009) It is therefore, Plaintiff' s burden to produce facts necessary to establish a prima facie case, *Palladium Music, supra*.

16. **Elements:** Plaintiff must allege that (1) defendant' had knowledge of another person's infringement; and, (2) defendant either materially contributed to or induced infringement. *Perfect10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 802 (9th Cir. 2007).

17. Elements Not Supported by Complaint:

a. **Element 1:** Plaintiff has made no factual allegations to support her legal conclusion. Such failure must lead to dismissal of this claim.

b. **Element 2:** Plaintiff has made a legal conclusion that is not supported by any factual allegation. This must lead to dismissal or this claim.

18. Plaintiff is barred from raising these claims for contributory infringement because allegations are based on acts that occurred more than three years prior to the filing.

Fourth Cause of Action (Vicarious Copyright Infringement)

19. **Burden of Proof:** The Plaintiff bears the burden of production and must come forward with facts necessary to demonstrate a prima facie case. *A&M Records. Inc. v. Napster*. 239 F.3d 1004, 1013(9th Cir. 2001).

20. **Elements:** The Plaintiff must allege that: (1) defendant had a right and ability to supervise the alleged infringing conduct; and (2) a direct financial interest in the infringing activity. *Perfect 10 at 802*.

21. Elements Not Supported by Complaint:

a. **Element 1:** Plaintiff has made no factual allegation which would lead any reasonable person to arrive at her conclusory legal allegation.

b. **Element 2:** Plaintiff has made a conclusory legal allegation and has not made a single factual allegation that would support her legal conclusion. This must lead to dismissal of the claim. Where the Plaintiff only alleges indirect financial benefits, vice direct financial benefits, this element fails.

22. The Statute of Limitations bars recovery in that the Plaintiff bases her claims on alleged infringements that occurred more than three years prior to the filing of the Complaint.

Fifth Cause of Action (Breach of Contract)

23. **Burden of Proof:** The Plaintiff has the burden of production to come forward with facts demonstrating a prima facie case . *Western Distributing Co. v. Diodosi*, 841 P.2d 1053, 1057-1058.

24. **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 nonperformance; (3) each Defendant failed to perform its obligation under the contract; and, (4) damage to Plaintiff resulted from that failure. *Hemann Mgt. Svcs. V. Mediacell*, 176 P.3d 856, 859 (Colo. 2007).

V. Mediacell, 176 P.3d 856, 859 (Colo. 2007).

25. Elements Not Supported by Complaint:

a. **Element 1:** Plaintiff makes no factual allegations indicating that a contract existed between Plaintiff and Cletus Kiefer, Defendant.

b. **Element 2:** Because Plaintiff failed to allege the existence of a contract, Plaintiff has failed to allege her duty of performance.

c. **Element 3:** Because Plaintiff failed to allege the existence of a contract, Plaintiff has also failed to allege the failure of Cletus Kiefer, Defendant to perform under the contract.

d. **Element 4:** Because Plaintiff has failed to allege the existence of a contract or the breach of that contract by Cletus Kiefer, Defendant, Plaintiff has failed to allege damages resulted from such breach.

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

26. **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).

27. **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.

28. Elements Not Supported by Complaint:

a. **Element 2:** Plaintiff has failed to allege facts that would show that Defendant Cletus Kiefer had any knowledge of any contracts or are any facts alleged that would infer a duty on Defendant to inquire into the existence of any contracts described in the Complaint.

b. **Element 3:** Plaintiff has failed to allege facts specific to Defendant Cletus Kiefer that show that there was any intent by Defendant Cletus Kiefer to induce breach by a third party.

c. **Element 4:** Plaintiff has failed to allege any facts showing that Defendant Cletus Kiefer took any action to induce such a breach.

d. **Element 5:** Plaintiff has failed to allege any damages resulting from any inducement by Defendant Cletus Kiefer.

29. 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 (I (a)).

Seventh Cause of Action (Racketeering or RICO)

30. **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).

31. **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).

32. 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.

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.

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. Accordingly, due to the statute of limitations issue, Plaintiff has failed to state an actionable claim against Defendant Cletus Kiefer.

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.

33. 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.

34. 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."

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, Plaintiff's RICO claims are barred by the statute of limitations.

Eighth Cause of Action (False and Misleading Advertising)

35. **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).

36. **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). Defendant Cletus Kiefer concedes that the Plaintiff has alleged the fourth element; that is, that she was injured.

37. Elements Not Supported by Complaint:

a. **Element 1:** The Plaintiff has not alleged that any representations by Defendant Cletus Kiefer took place as a part of any commercial advertising or promotion.

b. **Element 2:** The Plaintiff has not alleged any facts to show that any statements were made in the course of commerce.

c. **Element 3:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made no factual allegations which would lead to her conclusory legal allegation. This must lead to dismissal of this claim.

38. 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)**

39. **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).

40. **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 US, Inc. v. Rocky Mtn. Rhino Lining, Inc.*, 62 P.3d 142, 146-147 (Colo. 2003).

41. Elements Not Supported by Complaint:

a. **Element 1:** Plaintiff has made a conclusory legal allegation. Plaintiff has made absolutely no factual allegations which would lead to this conclusory legal allegation, nor has Plaintiff alleged any fact that Defendant Cletus Kiefer has engaged in unfair or deceptive trade practice. This must lead to dismissal of this claim.

b. **Element 2:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made no factual allegations which would lead to her conclusory legal allegation. This must lead to dismissal of this claim .

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.

d. **Element 4:** Plaintiff has made a conclusory legal allegation. Plaintiffs has made absolutely no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim.

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.

42. Further, the statute of limitations for this action is three years. C.R.S. § 6-1-115. Plaintiff's allegation that these practices began in August 2000 bars recovery under the statute of limitations. Therefore, Plaintiff is barred from recovery under this claim.

Tenth Cause of Action (Conspiracy)

43. **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).

44. **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).

45. 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. .

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.

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.

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.

Eleventh Cause of Action (Antitrust / The Sherman Act)

46. **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).

47. **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).

48. Elements Not Supported by Complaint:

a. **Element 1:** Plaintiff has made a conclusory legal allegation; Plaintiff has made no factual allegations which would lead to this conclusory legal allegation. This must lead to dismissal of this claim.

b. **Element 2:** While Plaintiff has made a conclusory legal allegation, Plaintiff has made absolutely no factual allegations which would lead to him conclusory legal allegation. This must lead to dismissal of this claim.

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.

CONCLUSION

49. The Plaintiff has offered the Court a Complaint riddled with legal conclusions and conclusory allegations. Plaintiff cannot spin her business disappointments into a Federal Case in order to attach liability to defendants. Plaintiff has not stated factual allegations sufficient to establish *a prima facie* case to support any of the allegations against Defendant Cletus Kiefer and therefore this case should not proceed, either against Cletus Kiefer or other defendants in this case. In fact, despite numerous challenges by various defendants in this case for the plaintiff to present any evidence to support her allegations, the Plaintiff has only claimed that her allegations are good enough for this court to allow this case to proceed. Defendant Kiefer would ask this court to note that several defendants have submitted evidence of numerous criminal acts by the Plaintiff and her associates, which the Plaintiff has not only not been able to refute, but has only tried to seal so that she could hide it.

WHEREFORE, Defendant Cletus Kiefer hereby requests that this Court **DISMISS** all claims against him as they are barred by the doctrines of laches and unclean hands, fraud and the statute of limitations. The aforementioned Defendant further requests that this Court award sanctions against Plaintiff, costs and such other relief as the Court may deem necessary, due to the groundless, frivolous, and vexatious nature of this litigation. The Defendant also requests this Honorable Court remand this matter to the proper authorities for criminal investigation.

Defendant Kiefer would also request this court keep in mind he is not an attorney and grant leave for the defendant to correct any deficiencies in his pleadings the court may identify.

DATED this ___ day of _____, 2009.

Cletus Kiefer, Defendant
292 East Ave. STE. 114
St. Louis, Mo. 63119-1702

Certificate of Service

I hereby certify that on the ____ day of _____, 2009, I served a true and correct copy of this Motion to Dismiss Defendant Cletus Kiefer and for Sanctions Against Plaintiff Pursuant to Rules 12 (B)(2) and 12(B)(6), upon Plaintiff and upon each of the Defendants named as follows:

Suzanne Shell (Plaintiff)

14053 Eastonvile Road

Elbert, Colorado 80106

Via: USPS, with delivery confirmation

And, on the following Defendants:

William O Tower

American Family Rights Association

Ann Tower

Illinois Family Advocacy Coalition

Leonard Henderson

Georgia Family Rights, Inc

Dorothy Baez-Kernaghan

National Association of Family Advocates

Francine Renee Cygan

Wiseman Studios

Mark Cygan

CPS Watch, Inc

Dennis Hinger

Aimee Dutkiewicz

Thomas Dutkiewicz

William Wiseman

Ann Durand

Brenda Swallow

Kathy Tilley

Dee Contreras

Randall Blair

Lloyd Phillips

Ringo Kamens

Cheryl Barnes

Deser' Clabo

Via: fax, email, or other mutually agreed upon electronic means

Cletus Kiefer, Defendant

Dated: _____