

**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 DEFENDANT KAMEN'S (AKA ALEX BRYAN"
MOTION FOR JUDGEMENT ON THE PLEADINGS [#211] filed on 7/7/2009**

COMES NOW Plaintiff Suzanne Shell in opposition to defendants's motion for judgement on the pleadings [#211] filed on 5/10/2009. I contend I have alleged sufficient facts in the Complaint to state claims for all causes of action in my complaint as to Ringo Kamens, aka Alex Bryan.

I incorporate by reference documents #50 (Answer filed by Ringo Kamens), #120 (Amended Answer), and for the references supporting that I met the burden as to the challenged elements of the complaint, I incorporate by reference documents # 171, 196, 235.

RESPONSE TO CLAIMS UPON WHICH JUDGEMENT IS SOUGHT

1. Claim 2: Copyright Infringement

a. Element 1: Defendant alleges "Plaintiff references a 'website,' but fails to identify the website and the copyright registration. " I refer the defendant to Complaint, [#1] at ¶94 which identifies the copyright registration and web site as follows:

- i. b. TX6-404-010; April 10, 2006; profane-justice.org
- ii. c. TX5-989-070, June 21, 2004; profane-justice.org
- iii. d. TX5-907-307, March 15, 2004, profane-justice.org

b. Element 2: I identified the protected components—i.e. my entire website—that the

defendant copied at ¶111(o), “Ringo Kamens advised me on May 30, 2007, that he had willfully circumvented my copy protections and *copied my entire website* onto his hard drive, then onto a removable USB drive, and then printed it out without my permission.”

Discussion

i. For the claim of copyright infringement, I have asserted ownership of the subject property, supported it with copies of the Copyright Registration and have alleged copying by the Defendant. The defendant has admitted copying in publications and in his pleadings. These are sufficient facts to state a prima facie claim for Copyright Infringement.

ii. A prima facie case of copyright infringement is made by showing: (1) ownership of a valid copyright, which is presumed when the copyright is registered with the copyright office and, (2) copying by the defendant of protected elements of the work.

iii. The term “copy” is judicial shorthand for the infringement of any of the copyright owner’s exclusive rights, *Worlds of Wonder, Inc. v. Veritel Learning Systems, Inc.*, 658 F. Supp 351, 354 (N.D. Tex. 1986) including distribution (17 U.S.C. § 106).

iv. Copying a protected work is unlawful, regardless of whether the copying is deliberate, innocent, or even unconscious. Similarly, lack of knowledge such as that in vicarious infringement of the primary infringer’s conduct, is not a defense. 3-12 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.04 [A] [1] (2004).

v. Copyright is universally seen as a strict liability offense. See e.g., *Educational Testing Service v. Simon*, 95 F. Supp.2d 1081, 1087 (C.D.Cal. 1999) and *TVT Records v. Def Jam Music Group*, 279 F.Supp.2d 366, 382 (S.D.N.Y 2003).

c. FAIR USE: Defendant alleges my claim is barred by the doctrine of fair use. I disagree. Defendant waived the affirmative defense of fair use pursuant to the terms of use published on my web site by virtue of not seeking and obtaining permission prior to copying. See copyright notice/security agreement in Exhibits.

d. Burden of Proof. Since fair use is an affirmative defense to a claim of infringement, the burden of proof is on its proponent. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994); *American Geophysical Union v. Texaco, Inc.* 60 F.3d 913, 918 (2d Cir. 1994) .

i. The burden of proving innocent intent is on the infringer, and it is ‘a heavy one,’ 2 WILLIAM F. PATRY COPYRIGHT LAW AND PRACTICE at 1175 (1994) quoted in *National Football League v. Prime Time 24 Joint Venture*, 131 F.Supp.2d 458, 476 (S.D.N.Y. 2001). “The defendant must prove that it did not know and should not have known that its conduct constituted infringement.” *Branch v. Ogilvy & Mather, Inc.*, 772 F.Supp 1359, 1364 (S.D.N.Y. 1991). Further, the infringer “must not only establish its good faith belief in the innocence of its conduct, [but] it must also show that it was reasonable in holding its belief.” *Peer International Corp. v. Pausa Records, Inc.* 909 F.2d 1332, 1336 (9th Cir. 1990) *cert denied* 498 U.S. 1109 (1991).

ii. The defendant did not take the protected content for the purposes of research or study, nor to comment on the content in any of his articles. He did not use it to expand or build on the concepts in his own publications. His use of the protected content did not constitute criticism, comment, news reporting, teaching, scholarship, and research on the subjects contained in my web site content. He took it to prove his political point opposing copyright protections for digital content, especially web site content. He didn’t care about the subject matter, he only cared about proving I had no claim to copyright protections for a web site.

iii. The defendant’s conduct was not innocent. The defendant knew of the terms on my web site, as his infringing acts were the result of his personal outrage at my countersuing Internet Archive for copyright infringement. The terms of use on my web site were well known to the defendant and he intended to violate them to prove a political point. His infringing conduct and inciting others to infringe was not only wilful, but highly public and well documented, intended to challenge the validity of copyright protection for digital content.

iv. The defendant’s conduct was not innocent. He committed all of his acts under

an alias, Ringo Kamens. He went to great lengths to keep his real identity, Alex D. Bryan, a secret. He even used his alias during his dealings with the general public, and acquaintances don't know his real identity. He bragged to me about his infringement and his inducements to others to infringe, and promised to provide me with his real name upon my request for the purposes of a lawsuit. He never provided this information upon my request as promised. I had to conduct an intensive investigation to ascertain his real identity and a location where he could be served. He knew that what he was doing incurred liability, and he took steps to shield himself from that liability.

v. The published terms on my web site allowed for viewing on a computer, but required express permission to save, print, copy or distribute. The defendant expressly refused to seek the requisite permission. His use was commercial use as defined in the Copyright Notice/Security Agreement. This mitigates against fair use.

vi. I market my intellectual property on the Internet through my web site www.profane-justice.org and aliases which direct to www.profane-justice.org. This web site is my store front . Anyone wishing to purchase a license to copy my intellectual property have the opportunity to view it before purchasing. The original digital property and any user generated copies of that property are my property pending permissive use. For example: In viewing my web site content, the user permissively acquires a copy of the content which is stored in temporary memory of the user's computer. This is permissive use of my web site content. However, anyone wishing to transfer that temporary copy on their computer to a permanent storage medium of any kind must purchase a license to do so. That temporary copy is my tangible property and is purged from the user's computer when the user stops viewing the content. The licensing and use of this property was set up under the honor system, wherein anyone wishing to copy or distribute the property are required to contact me for permission and/or pay the posted license fees before copying or distributing . Buyers would have to supply their own technology to obtain their digital copy or hard copy. License fees and terms are included on each web page, including on the

pages printed by the defendants. The Internet is my sole market for my online intellectual property, my web site is my sole storefront for marketing that property. The defendant abused the honor system, taking the subject tangible property, refusing to give consideration for consideration received, with the intent to deprive me of my rightful license fees, to which he believes I am not entitled.

vii. The published terms presented an offer, the defendant indicated his acceptance of the offer by the affirmative act of copying without seeking permission or a fee waiver/reduction. In order to copy, he had to circumvent copy protection code installed on the web site. He received the consideration offered, without tendering the reciprocal consideration. He then publicly dared me to sue him, knowing his act constituted wilful infringement. This mitigates against fair use.

viii. He admitted he copied my entire web site in his answer [#50] ¶112 “Alex Bryan admits downloading portions of publicly viewable portions of Plaintiffs website, copying those portions to various electronic mediums and printing them off all of which fall under the Fair Use Doctrine and do not constitute copyright infringement.” The defendant believes that a web site is not and/or should not be protected under copyright law because it is publicly viewable. There is no law supporting this position.

ix. There is no web site literary content exception to copyright protections and licensing use of intellectual property. This Intellectual Property licensing practice is already well established in practice and in law. The defendant has cited no authority under which my web site content should be treated any differently than other intellectual property.

2. Contributory Copyright Infringement.

a. Defendant states in his supporting brief [#112-2] “Plaintiff’s Complaint is manifestly devoid of a single fact to satisfy the element of *knowledge by Defendant Bryan* of alleged infringing activities of third parties. In the Complaint, Plaintiff states ‘[t]he defendants had knowledge of the aforementioned infringing activity, and induced, caused or materially

contributed to the infringing activity of another.’ There are no facts set forth in the Complaint to plausibly establish that Defendant Bryan had knowledge of allegedly infringing conduct by the other Defendants. In fact, with the exception of Defendant Wisemans, Defendant had no knowledge of or contact with the other defendants prior to the filing of Plaintiff’s Complaint. (See Answer at p. 10).” I disagree.

i. In support of the facts—*not conclusions*—referred to in this brief and as I averred in my complaint, I submit proof that the defendant not only knew, but solicited others to infringe. See Exhibits, document entitled “Suzanne Shell’s Blacklist” showing Ringo Kamens did have contact with the other defendants and they rallied to his cause. This document is still available online as I write this.

ii. I also submit his other communications and publications showing his efforts to incite others to infringe, as he had.

3. Vicarious Copyright Infringement.

a. I have made the prima facie case of copyright infringement. In view of the defendant’s direct and contributory infringements and his participation in the conspiracy by committing one or more overt acts in the furtherance of that conspiracy, he can be held liable for the acts of other con-conspirators.

b. *Morrison v. Goodspeed*, 100 Colo. 470, 68 P.2d 458 states: "The proof of a conspiracy in civil cases also determines who shall respond in damages. Action of an individual which would cause him to be liable for damages, if acquiesced in by two or more others, and in which they cooperated, imposes on all who participated the obligation to respond in damages resulting from the consummation of the common design." *McGlasson v. Barger*, 431 P.2d 778, 163 Colo. 438 (Colo. 09/05/1967).

4. Breach of Contract

a. **Element 1.** The defendant alleges I failed to cite facts identifying the existence of a contract.

i. The contract was identified quite clearly in ¶138. The following counts each represent an instance where the named defendant expressly and knowingly **entered into a contract with me, defined and published on my web site as “Copyright notice/security agreement”(security agreement). The security agreement contained an offer to copy or distribute any content on my web site profane-justice.org¹ in exchange for pre-payment of posted license fees equal to \$5,000.00 per printed page per copy²**. The named defendant(s) expressly accepted the posted offer and received the consideration³ offered when he or she affirmatively performed the act of circumventing copy protections and/or copying content published on my web site,⁴ profane-justice.org and republishing my copyrighted content verbatim on the location(s) named in the respective count, without permission and without prepayment of license fees in violation of the published contract terms.

b. Element 2. Defendant alleges I failed to set forth facts that the defendant failed to perform.

i. In my complaint I averred at ¶150. “Ringo Kamens advised me on May 30, 2007, that he had willfully circumvented my copy protections and copied⁵ my entire website onto his hard drive, then onto a removable USB drive, and then printed it out without my permission in violation of the terms⁶ printed on my web site.”

c. Element 3. Substantial performance by the plaintiff was described above, the defendants received the content offered by virtue of their copying the content. Furthermore, he

¹ The offer and consideration.

² The terms that the person accepting the offer had to perform.

³ I performed my end of the contract by providing the content offered.

⁴ The acts constituting the breach.

⁵ The affirmative act by the defendant indicating his acceptance of the contract terms, and his receipt of the content offered in the contract.

⁶ The breach.

admitted he received it in his Answer #50 ¶150 in response to the Breach of Contract claim, “Furthermore, viewing a publicly-available website and saving it to a hard drive or printing pages from it is clearly covered under the Fair Use Doctrine. A person does not need the explicit permission of the copyright holder to use their work for purposes that are allowed under the Fair Use Doctrine. Alex Bryan admits downloading portions of publicly viewable portions of Plaintiff’s website, copying those portions to various electronic mediums and printing them off all of which fall under the Fair Use Doctrine and do not constitute copyright infringement.” The defendant is wrong about not requiring permission to copy when there are express licensing terms mandating such.

d. Element 4. I averred I was harmed by non-payment, ¶138 “. . . without prepayment of license fees in violation of the published contract terms.” and ¶151 “As a proximate cause of these breaches of contract, I have suffered 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, lost profits and/or opportunities, theft of property, damage to my goodwill and reputation, 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, diversion of sales, and loss of income associated with each breach.”

Discussion

e. In an action based on a written contract, although a plaintiff need not plead the precise language of the contract, he or she must set forth the contract’s legal effect by stating the substance of its relevant terms. *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 199; see 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 479-480, pp. 572-573.

f. Most courts have held that the Copyright Act does not preempt the enforcement of contractual rights. See *Bowers*, 320 F.3d at 1324-25 (noting that “most courts to examine this

issue have found that the Copyright Act does not preempt contractual constraints on copyrighted articles”); *Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l*, 991 F.2d 426, 431 (8th Cir. 1993); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (noting that “courts usually read preemption clauses to leave private contracts unaffected”). A state law tort claim concerning the unauthorized use of the software's end-product is not within the rights protected by the federal Copyright Act, and the 9th Cir, affirmed the district court's ruling rejecting preemption. *Altera Corp. v. Clear Logic, Incorporated*, 424 F.3d 1079, 76 U.S.P.Q.2d 1265 (9th Cir. 09/15/2005). The logic of these cases is persuasive here.

g. In *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), a consumer purchased ProCD's software and used it in a manner contrary to the terms of the shrinkwrap license. The right at issue is not the reproduction of the content, but is more appropriately characterized as the use of the content, regardless that that use was copying because copying was the use sought to be licensed by the contract. Similarly, the Eighth Circuit distinguished between use and reproduction in *Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l*, 991 F.2d 426, 431 (8th Cir. 1993) (“National's use of the licensed programs constitutes an extra element in addition to the copyright rights making this cause of action qualitatively different from an action for copyright.”), specifically holding that use is a qualitatively different right.

h. Unlike the general rights “against the world” that the copyright law gives every creator, the court reasoned, contract rights require “generally affect only their parties” and require the “extra element” of the parties' mutual assent and consideration (the law's term for something of value exchanged). Indeed, more broadly, no contract right will ever be pre-empted, for every contract right has an extra element: the contract.

i. The intent of the parties is the governing notion of contract law. My intent is clear from the language of my license agreement: I sought to exploit license fees for copying my intellectual property. Defendant Bryan's intent is also objectively clear, he performed the act indicating its assent to the terms published on the pages when he printed and copied my web site

content.

j. A party cannot claim that the party never intended to be bound if it is shown that the party's conduct indicated acceptance of the agreement. Signing of a contract is one way a party may show assent. Alternatively, if there is an offer and an act of acceptance, that conduct implies the assent instead of a signed promise. The performance of the requested act, in this case the downloading of a copy, the copying of the web site content, indicates assent to the terms of the offer. Since the contractual agreement is implied by action, and it contains the elements of a binding agreement—offer, acceptance and consideration—it is, indeed, a binding contract.

5. Tortious Interference with Business Relationship and/or Business Contract

a. **Element 1.** The existence of a valid contract ¶158 “. . .There existed other contractual relationships as published on my web site described in Counts three through fourteen of the Breach of Contract cause of action.” Also [see above](#).

b. **Element 2.** Defendant had knowledge of the contract associated with my web site content. It formed the basis of his acts to infringe my web site content. Also see [here](#) and [here](#).

c. **Element 3.** Defendant intended to induce third parties to breach the contract. The inducement included the acts the defendant wanted others to commit described as, ¶158 “. . .copying my copyrighted content and refusing to abide by the terms of that contract by refusing to seek permission and refusing to pay license fees.”

d. **Element 4.** Defendant induced third parties to breach the contract ¶ 158 “. . .wherein the defendants induced others to breach that contract by copying my copyrighted content and refusing to abide by the terms of that contract by refusing to seek permission and refusing to pay license fees.” See attached Exhibits showing his published inducements to others to infringe my web site content and therefore, breach the contract.

e. **Element 5.** Damage. ¶153. “The defendants intentionally interfered with my existing or potential economic relations for an improper purpose and with improper means causing injury to

me.” ¶160. As a proximate cause of this tortious interference with business relationships or contracts, I have suffered 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, lost profits and/or opportunities, theft of property, damage to my goodwill and reputation, 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, diversion of sales, and loss of income associated with the breach.”

6. Racketeering or RICO

a. Burden of Proof. I disagree that I have to prove the defendant personally committed two predicate acts. I only have to aver two predicate acts within ten years which are attributable to the Enterprise. However, the defendant personally criminally infringed my copyright at least three times, and conspired with others to infringe.

b. Element 1. Predicate acts are sufficiently averred in ¶¶ 176-187.

c. Element 2. The enterprise was sufficiently pled at ¶¶167-175. The defendant was named as a conspirator within the meaning of 18 U.S.C. § 1962 (d) on multiple counts. I also stated he conducted, participated in, engaged in, conspired to engage in, or aided and abetted, the conduct of the affairs of the enterprise through a pattern of racketeering activity within the meaning of 18 U.S.C. §§ 1961(1), 1961(5) and 1962(c) and (d) in count six ¶211-214.

d. Element 3 and 4. Pattern of Racketeering activity was sufficiently pled at ¶¶ 189-190.

e. Discussion: See attached memorandum on RICO.

7. False and Misleading Advertising

a. In view of the defendant’s participation in the conspiracy by committing one or more overt acts in the furtherance of that conspiracy, and the attached publications showing his

participation in the conspiracy, he can be held liable for the acts of other con-conspirators.

b. *Morrison v. Goodspeed*, 100 Colo. 470, 68 P.2d 458 states: "The proof of a conspiracy in civil cases also determines who shall respond in damages. Action of an individual which would cause him to be liable for damages, if acquiesced in by two or more others, and in which they cooperated, imposes on all who participated the obligation to respond in damages resulting from the consummation of the common design." *McGlasson v. Barger*, 431 P.2d 778, 163 Colo. 438 (Colo. 09/05/1967).

8. Unfair or Deceptive Trade Practices.

a. In view of the defendant's participation in the conspiracy by committing one or more overt acts in the furtherance of that conspiracy, and the attached publications showing his participation in the conspiracy, he can be held liable for the acts of other con-conspirators.

b. *Morrison v. Goodspeed*, 100 Colo. 470, 68 P.2d 458 states: "The proof of a conspiracy in civil cases also determines who shall respond in damages. Action of an individual which would cause him to be liable for damages, if acquiesced in by two or more others, and in which they cooperated, imposes on all who participated the obligation to respond in damages resulting from the consummation of the common design." *McGlasson v. Barger*, 431 P.2d 778, 163 Colo. 438 (Colo. 09/05/1967).

9. Conspiracy

a. **Element 1.** I identified the combination of two or more persons at ¶330, naming Bryan (Kamens) as a party to the conspiracy.

b. **Element 2.** I set forth specific facts regarding the object(s) to be accomplished. At ¶336.

c. **Element 3.** Meeting of the minds was defined at 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:

i. ¶331 "The defendants knowingly entered into the conspiracy."

ii. ¶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.

iii. ¶335 “The defendants acted intentionally, purposefully and without lawful justification.”

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

d. 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 at the urging of defendant Bryan as shown in the exhibits. I refer to where some of the other defendants signed his “Blacklist” with their support for his exhorting others to infringe my web site copyright. Honestly, the conspiracy to commit the wrongful acts are so thoroughly and publicly documented that it shocks the conscience that a defendant would boldly deny his participation even in the face of publishing his participation in the conspiracy with other defendants on the Internet.

e. **Element 4.** Unlawful or overt acts were averred in ¶¶ 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.” and ¶338. “The defendants committed multiple overt acts in furtherance of the common design.”

f. **Element 5.** Damages were averred at ¶ 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 farreaching 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

g. 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).

10. Anti-Trust/Sherman Act

a. In view of the defendant’s participation in the conspiracy by committing one or more overt acts in the furtherance of that conspiracy, and the attached publications showing his participation in the conspiracy, he can be held liable for the acts of other con-conspirators.

b. *Morrison v. Goodspeed*, 100 Colo. 470, 68 P.2d 458 states: "The proof of a conspiracy in civil cases also determines who shall respond in damages. Action of an individual which would cause him to be liable for damages, if acquiesced in by two or more others, and in which they cooperated, imposes on all who participated the obligation to respond in damages resulting from the consummation of the common design." *McGlasson v. Barger*, 431 P.2d 778, 163 Colo. 438 (Colo. 09/05/1967).

Conclusion

Defendant has presented an unreasonably high pleading standard that he expects me to meet. 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 am willing to correct should that be necessary.

"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). *See attachments.*

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).

As the defendant alleges he was a minor and date of defendant Bryan’s eighteenth birthday is still undisclosed, we have no way of knowing which of his acts are attributable to his parents or adult supervisors under the theories detailed in my Memorandum on the Defendant Being a Minor at the Time of the Tortious Conduct (attached). Therefore, I ask the court to permit me to amend my complaint to include this new information and to properly designate nonparties at fault, and to include claims against his parents or those standing *in loco parentis* for negligent supervision and negligent entrustment as appropriate.

WHEREFORE, 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 August 6, 2009

/s/ Suzanne Shell

Suzanne Shell
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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the attached documents **PLAINTIFF'S RESPONSE TO DEFENDANT KAMEN'S (AKA ALEX BRYAN) MOTION FOR JUDGEMENT ON THE PLEADINGS [#211] filed on 7/7/2009** and attachments were placed in the United States Mail, first class mail, postage prepaid on August 7, 2009

National Association of Family Advocates
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/s/ Suzanne Shell August 6, 2009