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 WILLIAM WISEMAN dba WISEMAN STUDIOS' MOTION TO DISMISS AND QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION [#140] filed on 7/27/2009

COMES NOW Plaintiff Suzanne Shell, in response to the Defendants' Motion to Dismiss and Quash Service of Summons for Lack of personal Jurisdiction [#140].

I contend I have alleged sufficient facts in the Complaint to state claims for all causes of action in my complaint as to this defendant. I further point out that this defendant did not write this motion. He is not capable of understanding what he has submitted to this court.

"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).

I incorporate by reference documents and associated sub documents # 103, 110, 111, 117, 127, 142, 171, 174, 196, 234, 235, 252.

1. 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 has admitted to the conspiracy in document #6, wherein he states: ". . .in regards too my website there are about three writers that took part too tell the truth or edit my words and i was not allowed too post anything without permission and it was my website However im not good with words and people were looking out for my Best Interest. . ." and ". . .Aimee Dutkiewicz told me over the phone that shell and her gang stalked amy at her job[1] and she lost two

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[1] False statement that Ms. Dutkiewicz has advertised on the defendants's groups, forums and web sites, including defendant Wiseman's web site.

jobs[2] and shell told tom to get a devorce from amy Dutkiewicz[3] and it happend tom and amy divorced. . ."

i. 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.

ii. **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."

iii. **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

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[2] Ibid

[3] Ibid

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."

iv. **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) In addition to the defendant's own admission cited above, see *Exhibit Blackball* incorporated by reference in document #196 showing the publication of the conspiracy by the defendants.

v. **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.

vi. **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."

(2) The defendant has also demonstrated harm the defendants caused by the false publications in his document # 258 wherein he avers, "2. Ms shell threatened and stalked some of us since 2006 and some of the defendants before that. **A lot of people are scared of her**." This statement is averred as false in my complaint at ¶252 & 270 and has been widely advertised by the defendants, including Wiseman. If people are afraid of me, it has nothing to do with anything I did. I have no criminal history, no bona fide history of violence or threats of violence[4], or stalking or any other threatening conduct. The fear expressed by these defendants is solely based on the false information disseminated about me by the defendants. Defendant Wiseman and

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[4] This is in spite of the repeated false reports to various law enforcement agencies in their attempts to create a history of violence and threats. None of their false reports to law enforcement have resulted in any warrants being issues, arrest or charges being brought against me.

others have been masterfully manipulated to be afraid of me. This is a grievous injury to me.

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).

Affirmative Defenses

The defendant has asserted a laundry list of affirmative defenses and is seeking equitable remedies based on his 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).

2. **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.

b. **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.

3. **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.

a. 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 his concealment of his and his co-conspirator's misconduct.

b. **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).

c. **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 he relied on the unreasonable delay nor prejudiced by any unreasonable delay.

4. **The Plaintiff has Given Up All Rights To Sue.**

I have never waived any rights to seek legal remedies and the defendant has not proffered any evidence supporting such a waiver.

5. **Statue of Limitations**: **For brief on statutes of limitations, I incorporate by reference document #196-3.**

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.

6. **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)).

7. **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 an express written contract, then breached it and subsequently wishes to avoid having to fulfill his agreements or to be held liable for his breach.

Discussion

8. Defendant Wiseman has included in his multiple submissions to this court, numerous references to alleged conduct by me that he believes to be wrong. He includes my demands that he cease infringing my copyright and when he refused, he complains that I made complaints against his ISP and domain registrar. These complaints were fully within my rights as copyright owner.

9. His submissions containing the false advertisements that I have described in my complaint are designed to distract from the facts and issues by claiming his imagined victimhood as justification to commit his wrongs against me. I have asserted in my complaint that the statements about me that he raises in his submissions are false.

10. By virtue of the imagined wrongs, he appears to claim entitlement to infringe or misappropriate my property and violate the law. However, he does not cite any legal theory or supporting authority under which he has a legally recognized right to commit the wrongs against me as described in my complaint. To the best of my knowledge, there are no legal theories or authorities which permit any person to commit wrongs against another in return for feeling they've been unfairly excluded or subjectively "abused."

11. His beliefs, giving rise to his subsequent publications, about me are based entirely on the false statements told to him by the other defendants who he claims are "looking out for his best interests."

12. The defendant attaches as an exhibit to his motion to dismiss (Exhibit #3) a purported article written about me, but for which I was never interviewed. The article is full of errors and I do not validate the accuracy or authenticity of it. It is scandalous, immaterial and false. However, it does

demonstrate his lack of capacity to comprehend**.**

Personal Jurisdiction

13. **For brief on personal jurisdiction, I incorporate by reference document #235-2 with the following amendments:**

¶51 is amended to read: The copyrighted content which was published on thetruthistold web site, owned by defendant Wiseman dba Wiseman Studios, and on various online groups and forums owned by the defendants, including AFRA owned and operated groups and forums, by defendant Wiseman dba Wiseman Studios, and the proprietary content that he published on his web site and the groups was all protected by contract terms that included a forum selection clause. I incorporate by reference document #252 ¶6 and associated reference to forum selection clause on the bottom of every page on my web site at http://www.profane-justice.org which states in relevant part, "Anyone visiting this site consents to jurisdiction and venue remaining in El Paso County, Colorado."

a. I properly averred personal jurisdiction in my complaint at ¶38-41.

Regarding AFRA Agency

14. In Document #244, Defendant Henderson explains the issue of agents of AFRA by averring "When people volunteer for leadership roles in AFRA, they are perfectly free to create whatever title they wish." This is a judicial admission as to the extraordinarily broad degree of agency which AFRA grants to members. Most organizations would not be so expansive when granting anyone the authority to act on behalf of the organization, knowing that the actions of the agent bind the principle and incur corresponding liability to the principle. That AFRA does not limit the agency of its members is very generous, but does not absolve AFRA of the liability incurred by the actions of its agents. William Wiseman dba Wiseman Studios is one such agent of AFRA by virtue of his membership in AFRA, his membership and participation in AFRA groups and by virtue of Defendant Kiefer's(AFRA Board member) recruitment into the

conspiracy and by virtue of other AFRA member's exploitation of Mr. Wiseman in the furtherance of the conspiracy.

Conclusion.

This defendant relies on misapprehensions of the facts and misrepresentations in support of his motion to dismiss, which are the direct result of his being manipulated by the other defendants. 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 request the opportunity 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 August 17, 2009

/s/ 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 WILLIAM WISEMAN dba WISEMAN STUDIOS' MOTION TO DISMISS AND QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION [#140] filed on 7/27/2009** and attachments were placed in the United States Mail, first class mail, postage prepaid on August 18, 2009

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Court's ECF system

/s/ Suzanne Shell August 17, 2009