

**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 KIEFER'S MOTION TO DISMISS [#247]
FILED ON 8/05/2009**

COMES NOW Plaintiff Suzanne Shell, in opposition to the Defendants' Motion to Quash Service and Dismiss[#147]. 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.

“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 and 266.

1. On page two of his motion to dismiss, the defendant states, “*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 Plaintiffs allegations are nothing more than frivolous and malicious.*” I want the record to reflect that the defendants have attempted to redefine the issues in this case by virtue of their overreaching false claims and the irrelevant, redundant, immaterial, impertinent, and scandalous matters submitted to this Court in support of their claims. This case is about the claims in my complaint, and the defendants have strayed far beyond those issue and attempted to argue matters far outside the scope of this complaint, and even address the merits which is premature at this stage. "It is well-established . . . that in determining whether to grant a motion to dismiss, the district court, and consequently this court, are limited to assessing the legal sufficiency of the allegations contained within the four corners of the complaint." *Jojola v. Chavez*, 55 F.3d 488, 494 (10th Cir. 1995); see also *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984). This defendant’s challenges to the claims and elements are insufficient, and therefore he seeks to inappropriately influence the court with scandalous and immaterial claims.

a. I have disregarded the inappropriate content and focused on the issues and arguments that are relative to my complaint in the context of a proper motion to dismiss, trusting that the court’s duty at this stage is to do likewise. As the plaintiff, I define the issues in my complaint, and it is improper for the defendants to manhandle the court to consider any other issues. None of

the defendants's tendered documents are specifically referred to in the Complaint, and thus, the Court must disregard both the tendered exhibits and the factual averments in the defendants's briefs that depend upon them. Fed. R. Civ. P. 12(b) (court may disregard tendered evidentiary material).

b. As the Court must, when reviewing a complaint's allegations on a motion to dismiss, the Court treats these allegations as true. The defendant's arguments that my claims are false or frivolous are scandalous and immaterial.

2. The defendant's submissions to this court are designed to distract from the facts and issues by claiming his imagined victimhood as justification to commit his wrongs against me. By virtue of the purported 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."

3. In ¶49, the defendant states, *"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."* I submit that this is all that is required at this stage of the proceedings. The defendant appears to demand that I submit the evidence to refute his challenges. It is on this basis that he even challenges any elements of my claims, which is improper. I contend that his challenges are forwarded for improper purposes, and are not based on a good faith belief that my complaint is deficient.

4. Personal Jurisdiction - Personal jurisdiction over the defendant(s) is based on the following theories, Specific Jurisdiction, General Jurisdiction, Agency theory of personal jurisdiction,

Personal Jurisdiction Based on a Conspiracy, and personal jurisdiction pursuant to a contractual Forum Selection Clause. **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 various online groups and forums owned by the defendants, including AFRA owned and operated groups and forums, by defendant Kiefer who is a member of the AFRA Board of Directors (Complaint ¶8), and the proprietary trade secret content that he gained access to, and the contributory and vicarious infringement he is liable for by virtue of direct infringing content he (Complaint ¶111(b) & (m)) and others (Complaint ¶111 a-n) published on AFRA 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.

5. Regarding AFRA Agency see Document # 235-3 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.

a. Defendant Kiefer’s is an AFRA Board of Director member.

b. His recruitment of Defendant Wiseman dba Wiseman Studios into the conspiracy and by virtue of other AFRA member’s exploitation of Mr. Wiseman in the furtherance of the

conspiracy make this defendant liable for the conduct of Defendant Wiseman dba Wiseman Studios and other AFRA agents.

6. First Cause of Action (Misappropriation/Theft of Trade Secrets) For argument and supporting law, see aforementioned documents incorporated by reference. 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. The defendant is included in this cause of action unless expressly excluded.

a. As a board member of AFRA, he is liable for the acts of AFRA, AFRA agents and conduct on AFRA groups, forums and web sites.

b. AFRA has received the trade secret information without authorization ¶82, 85.

c. This defendant is the one responsible for bringing Defendant Wiseman dba Wiseman Studios into the conspiracy. I remind the court that Wiseman published my proprietary information on his web site ¶83.

d. See attached affidavit for more instances of AFRA's receipt of trade secret information on AFRA groups.

7. Second Cause of Action (Copyright Infringement) For argument and supporting law, see aforementioned documents incorporated by reference. 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.

a. Also see Complaint ¶ 111 m & n and ¶143 & ¶149.

b. This defendant is the one responsible for bringing Defendant Wiseman dba Wiseman Studios into the conspiracy. I remind the court that Wiseman circumvented copy protection code and copied content from my web site, and published it on his web site.

8. **Third Cause of Action (Contributory Copyright Infringement)** For argument and supporting law, see aforementioned documents incorporated by reference. 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. The defendant is included in this cause of action unless expressly excluded.

a. Direct infringement is averred above.

b. This defendant is the one responsible for bringing Defendant Wiseman dba Wiseman Studios into the conspiracy. I remind the court that Wiseman circumvented copy protection code and copied content from my web site, and published it on his web site.

c. As a board member of AFRA, he is liable for the acts of AFRA, AFRA agents and conduct on AFRA groups, forums and web sites.

9. **Fourth Cause of Action (Vicarious Copyright Infringement)** For argument and supporting law, see aforementioned documents incorporated by reference. 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. The defendant is included in this cause of action unless expressly excluded.

a. Direct infringement is averred above.

b. This defendant is the one responsible for bringing Defendant Wiseman dba Wiseman Studios into the conspiracy. I remind the court that Wiseman circumvented copy protection code and copied content from my web site, and published it on his web site.

c. As a board member of AFRA, he is liable for the acts of AFRA, AFRA agents and conduct on AFRA groups, forums and web sites.

10. **Fifth Cause of Action (Breach of Contract)** For argument and supporting law, see aforementioned documents incorporated by reference. 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.

a. This defendant breached the contract on my web site when he copied my web site content (¶143 & 149) and used it to promote himself, American Family Rights Association (AFRA) and Families at Risk Defense Alliance (FAR). This constituted commercial use as defined in the online contract.

11. Sixth Cause of Action (Tortious Interference with Business Relationship and/or Business Contract) For argument and supporting law, see aforementioned documents incorporated by reference. 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. The defendant is included in this cause of action unless expressly excluded.

a. This defendant is the one responsible for bringing Defendant Wiseman dba Wiseman Studios into the conspiracy. I remind the court that Wiseman circumvented copy protection code and copied content from my web site, and published it on his web site.

b. As a board member of AFRA, he is liable for the acts of AFRA, AFRA agents and conduct on AFRA groups, forums and web sites.

12. Seventh Cause of Action (Racketeering or RICO) For argument and supporting law, see aforementioned documents incorporated by reference. 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.

a. This defendant is named as RICO defendant in ¶165.

b. This defendant is identified as part of the enterprise in ¶168.

c. This defendant is named as violating section 1962(d) in that he knowingly furthered, advanced or participated in other defendants's 1962 violation within the meaning of 18 U.S.C. § 1962 (d) in ¶¶ 193, 201, 205, & 209.

d. This defendant is named in Count Two of the RICO Cause of Action as a person (¶195), who 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)(¶196).

13. **Eighth Cause of Action (False and Misleading Advertising)** For argument and supporting law, see aforementioned documents incorporated by reference. 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. The defendant is included in this cause of action unless expressly excluded.

a. As a board member of AFRA, he is liable for the acts of AFRA, AFRA agents and conduct on AFRA groups, forums and web sites.

b. This defendant has participated in the conduct described in my complaint.

14. **Ninth Cause of Action (Unfair or Deceptive Trade Practices and Unfair Methods of Competition)** For argument and supporting law, see aforementioned documents incorporated by reference. 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. The defendant is included in this cause of action unless expressly excluded.

a. As a board member of AFRA, he is liable for the acts of AFRA, AFRA agents and conduct on AFRA groups, forums and web sites.

b. This defendant has participated in the conduct described in my complaint.

15. **Tenth Cause of Action (Conspiracy)** For argument and supporting law, see aforementioned

documents incorporated by reference. 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.

a. This defendant is named as a co-conspirator in ¶330.

b. As a board member of AFRA, he is liable for the acts of AFRA, AFRA agents and conduct on AFRA groups, forums and web sites.

c. This defendant has participated in the conduct described in my complaint.

16. Eleventh Cause of Action (Antitrust /The Sherman Act) For argument and supporting law, see aforementioned documents incorporated by reference. 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.

a. This defendant is named as a co-conspirator in ¶330.

b. As a board member of AFRA, he is liable for the acts of AFRA, AFRA agents and conduct on AFRA groups, forums and web sites.

c. This defendant has participated in the conduct described in my complaint.

Conclusion.

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 requesting 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 *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 24, 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 KIEFER'S MOTION TO DISMISS [#247] FILED ON 8/05/2009** and attachments were placed in the United States Mail, first class mail, postage prepaid on August 25, 2009

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/s/ Suzanne Shell August 24, 2009