

**UNITED STATES DISTRICT COURT  
DISTRICT OF COLORADO**

09-CV-00309-MSK-KMT

SUZANNE SHELL,

Plaintiff,

v.

AMERICAN FAMILY RIGHTS ASSOCIATION, et. al.

Defendant.

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**DEFENDANT RINGO KAMENS' (A/K/A ALEX BRYAN) REPLY IN SUPPORT OF  
MOTION FOR JUDGMENT ON THE PLEADINGS**

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Defendant Ringo Kamens (a/k/a Alex Bryan) (“Defendant Bryan”), through undersigned counsel, respectfully submits the following Reply in Support of Partial Motion for Judgment on the Pleadings.

**I. INTRODUCTION**

As a threshold matter, it is important to note that Plaintiff Suzanne Shell’s (“Plaintiff” or “Ms. Shell”) Response to Defendant Kamen’s (a/k/a Alex Bryan) Motion for Judgment on the Pleadings [Doc. #248] (“Response”) is based not on what is contained in her Complaint, but rather on alleged facts created out of whole cloth by Plaintiff. Apparently recognizing the inadequacy of her Complaint, Plaintiff attempts to bolster it by improperly attaching several exhibits outside of the pleadings in support of her Response and Memorandum on Fair Use [Doc. # 248-2], Memorandum of Law RICO [Doc. # 248-3], and Memorandum on the Defendant Being a Minor at the Time of the Tortious Conduct [Doc. # 248-4]. As set forth in Defendant

Bryan's Memorandum of Law in Support of Motion for Judgment on the Pleadings ("Motion for Judgment") in reviewing a Motion for Judgment on the Pleadings pursuant to Fed. R. Civ. P. 12(c), a court looks at the Complaint, any Answers, and any documents attached thereto to determine whether the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 10(C). "Hence, under Rule 12(c), a court should consider only matters referred to or incorporated by reference in the pleadings or attached to the answer or complaint." *United States v. Ledford*, 2009 U.S. Dist. LEXIS 48441 (D. Colo. Feb. 9, 2009), citing *Park Univ. Enters., Inc. v. Am. Cas. Co.*, 442 F.3d 1239, 1244 (10th Cir. 2006). "[I]t is axiomatic that [a] complaint may not be amended by the briefs in opposition to a motion to dismiss."<sup>1</sup> *Hyden v. Ford Motor Credit Co.*, 2007 U.S. Dist. LEXIS 47046 (D. Colo. June 28, 2007).<sup>2</sup> Plaintiff's maneuvering in this regard highlights the issue that the Court must address in the instant motion – the sufficiency (or insufficiency) of Plaintiff's allegations in her complaint pursuant to Rules 9(b) and 12(c)<sup>3</sup>.

With respect to Plaintiff's exhibits, the following are not referenced in Plaintiff's Complaint, Defendant's Answer and Defendant's Amended Answer, and therefore should not be considered by the court: pages 4 – 12 of Doc. # 248-5<sup>4</sup>, consisting of emails and copies of web

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<sup>1</sup> In the Tenth Circuit, the standard by which a court must determine a Rule 12(c) motion for judgment on the pleadings is the same as the standard for the more familiar motion to dismiss under 12(b)(6). *Mock v. T.G. & Y Stores Co.*, 971 F.2d 522, 528-29 (10th Cir. 1992).

<sup>2</sup> See also *Mercury Mall Associates, Inc. v. Nick's Market, Inc.*, 342 F. Supp. 2d 515, 521 (E.D. Va. 2004) ("The court's consideration of a motion to dismiss is . . . limited by a narrow scope of review, which can extend no further than the information contained in the parties' pleadings."); *Davis v. Cole*, 999 F. Supp. 809, 813 (E.D. Va. 1998) ("The court may not consider additional allegations when ruling on a motion to dismiss . . . ."); *Henthorn v. Department of Navy*, 29 F.3d 682, 688 (D.C. Cir. 1994) (limiting review of motion to dismiss to only those factual allegations found in the "actual complaint" and disregarding "factual allegations made in legal memoranda, which form no part of the official record"); *Com. of Pa. ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3rd Cir. 1988) ("It is one thing to set forth theories in a brief; it is quite another to make proper allegations in a complaint. . . . [I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.")

<sup>3</sup> Furthermore, as demonstrated more fully below, Plaintiff's request that she be permitted to re-plead her frivolous and groundless Complaint would be futile.

<sup>4</sup> Plaintiff failed to identify her exhibits by exhibit numbers, therefore Defendant will reference the electronic page number set forth in the header of the ECF filing on Document No. 248-5.

pages; page 17 of Doc. # 248-5, consisting of a webpage; and pages 18 – 2e of Doc. # 248-5, consisting of a weblog titled “A structured rant.” The remaining exhibits provided by Plaintiff were referenced in the pleadings and include (1) the Copyright Notice/Security Agreement (hereinafter referred to as the “Copyright Notice”, at pages 1 – 2 of Doc. # 248-5, referenced in Plaintiff’s Complaint at ¶ 138; (2) email dated May 30, 2007 from Ringo Kamens (hereinafter referred to as “Kamens Email”), at page 3 of Doc. #248-5, referenced in Plaintiff’s Complaint at ¶¶ 111(o) and 150; and (3) an article titled “An interview takes you farther down the rabbit hole”, at pages 13 – 16 of Doc. #248-5, attached to Defendant Bryan’s Answer [Doc. # 50]. However, even though these documents are referenced in the pleadings, Plaintiff has improperly included type-written side comments that she has added to her exhibits. These comments should not be considered by the court and should be stricken. For purposes of clarity, Defendant Bryan attaches the Copyright Notice hereto as **Exhibit A**<sup>5</sup>, and the Kamens Email as **Exhibit B**<sup>6</sup>.

Finally, in her Response Plaintiff complains that “Defendant has presented an unreasonably high pleading standard that he expects me to meet.” (Response at Conclusion, at p. 16). While it is true that “a pro se litigant’s pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers,” *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10<sup>th</sup> Cir. 1991), pro se parties still must “follow the same rules of procedure that govern other litigants.” *Nielsen v. Price*, 17 F.3d 1276, 1277 (10<sup>th</sup> Cir. 1994). In addition, “the court cannot take on the responsibility of serving as the litigant’s attorney in constructing arguments and searching the record.” *Garrett v. Selby Connor Maddux v. Janer*, 425 F.3d 836,

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<sup>5</sup> Defendant Bryan does not possess a copy of the Copyright Notice and is therefore utilizing the copy provided by Plaintiff in her Response. Plaintiff included highlighted portions on Exhibit A, which Defendant Bryan was able to lighten.

<sup>6</sup> Defendant Bryan does not possess a copy of the email, and therefore is utilizing the copy provided by the Plaintiff in her Response. Defendant Bryan has removed Ms. Shell’s added comment from the email.

840 (10<sup>th</sup> Cir. 2005).<sup>7</sup> Even a liberal construction of Ms. Shell’s complaint demonstrates that she cannot overcome her numerous pleading deficiencies, and she therefore does not have any recognizable claims against Defendant Bryan. The claims, all of which should be dismissed, are: (1) Copyright Infringement; (2) Contributory Copyright Infringement; (3) Vicarious Copyright Infringement; (4) Breach of Contract; (5) Tortious Interference with Business Relationship and/or Business Contract; (6) Racketeering or RICO; (7) False and Misleading Advertising; (8) Unfair or Deceptive Trade Practices and Unfair Methods of Competition, C.R.S. § 6-1-105 and 5 U.S.C. §§ 1051; 15 U.S.C. § 1127; (9) Conspiracy; and (10) Antitrust/The Sherman Act, 15 U.S.C. § 2. Liberal construction of notice pleading under Rule 8 of the Federal Rules of Civil Procedure has its limits. Plaintiff cannot withstand a motion to dismiss by relying on unsupported conclusions. Accordingly, her Complaint must be dismissed.

## II. LEGAL ARGUMENT

### A. Plaintiff’s Claim for Copyright Infringement Is Barred by the Doctrine of Fair Use

As set forth in Defendant Bryan’s Memorandum of Law, the only allegation that Plaintiff has against Defendant Bryan for copyright infringement is that he allegedly advised Plaintiff that he had “circumvented [her] copy protections and copied [her] entire website onto his hard drive,

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<sup>7</sup> It should be noted that Ms. Shell is no stranger to litigation and is fully aware of her pleading obligations. This is Ms. Shell’s fourth time in front of the United States District Court for the District of Colorado. The following are lawsuits in which Ms. Shell has brought claims against other parties: *Suzanne Shell v. Rocco Meconi, et.al*, Case No. 03-CV-00743-REB-MJW (Case dismissed February 27, 2004 pursuant to Fed. R. Civ. P. 12(b)(6)); *Suzanne Shell v. Jolene DeVries*, Case No. 06-CV-00318-REB-BNB (case dismissed pursuant to Fed.R.Civ.P. 12(b)(6)); and *Internet Archive v. Suzanne Shell*, 06-CV-01726-LTB-CBS, wherein Plaintiff Internet Archive sought declaratory relief for non-infringement of copyright and Ms. Shell filed several counterclaims against Internet Archive. Thus, Ms. Shell cannot claim ignorance of the pleadings requirements under Fed. R. Civ. P. Rule 8, nor should she be allowed to “remedy the defects” in her Complaint based on her status as a *pro se* party. “[A] complaint cannot simply leave open the possibility that a plaintiff might later establish some “set of undisclosed facts” to support recovery. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007)

then onto a removable USB drive, and then printed it out without [her] permission.” (Complaint at ¶ 111(o)).

In support of her argument that Defendant Bryan’s use of the copied portions of her website does not constitute fair use, Plaintiff attaches the email sent by Defendant Bryan on May 30, 2007. (The email is attached hereto as Exhibit B). An examination of the email demonstrates that the enumerated fair use factors all favor Defendant Bryan. Plaintiff does not dispute that the Court can conduct a fair use analysis on a motion to dismiss. Thus, the Court can determine that the use of the portion of Plaintiff’s website is a protected fair use, and nothing in the Response fends off such a determination.

*a. Purpose and character of the use favors Defendant Bryan*

As set forth in Defendant Bryan’s Memorandum of Law, the use of copyrighted works for criticism and commentary is expressly contemplated by the Copyright Act. *See* 17 U.S.C. § 107; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (commentary and criticism “traditionally have had a claim to fair use protection.”). Plaintiff asserts that the “character and use” weighs in her favor because she is alleging appropriation without payment of the licensing fee. (Plaintiff’s Memorandum on Fair Use at p. 3, ¶ 12). Plaintiff misapprehends this legal principle.

Plaintiff’s reliance on *Faith Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997) is misplaced. In the *Ringgold* case, the plaintiff there was an artist and copyright owner of a work consisting of a painting. Plaintiff granted the High Museum of Art a non-exclusive license to reproduce the work in poster form. The Museum sold thousands of copies of the poster. A copy of the poster was used as set decoration for a television program

that was aired on a television network. Plaintiff sued for copyright infringement. Defendant moved for summary judgment on the grounds of, *inter alia*, fair use. The District Court granted Defendant's motion, finding that the undisputed facts established the defendants' fair use defense. The Court of Appeals for the Second Circuit reversed and remanded for further development of the record by the fact-finder of the fair use factors.

In the *Ringgold* case, the copyright owner's work was actually *displayed* by the defendant. In the present case, no such facts are even alleged. Plaintiff has set forth no facts, nor are there any, that Defendant Bryan displayed or even disseminated the copy of her website. The email sent by Defendant Bryan supports this finding because in it he only informed her that he copied her website on his personal hard drive; copied it *to his personal USB*, and printed out the copy. (See Exhibit B). In addition, as set forth in the email, Defendant Bryan's actions were done as criticism against certain actions of Plaintiff, and further done in support of the freedom of speech. (See Exhibit B). In *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163 (9th Cir. 2007) the Ninth Circuit held that making exact copies of a work "may be transformative so long as the copy serves a different function than the original work." *Id.* at 1165

Likewise, there are no facts to demonstrate that Defendant received any financial gain whatsoever from the copying. Plaintiff merely asserts that "the defendant profits from its use of my property." (Response at p. 3 at ¶ 14). In support of her proposition, Plaintiff relies upon the case of *Roy Export Co. Establishment v. Columbia Broadcasting System, Inc.*, 503 F.Supp. 1137 (S.D.N.Y. 1980) for the proposition that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user *stands to profit from*

*exploitation of the copyrighted material* without paying the customary price.” (Response at p. 4, ¶ 14) (emphasis supplied).

Plaintiff has not alleged, nor can she, that Defendant Bryan stands to profit from use of the copyrighted material. Nor are there any facts to demonstrate that the bare copying of a website to a personal computer -- a copy that was never disseminated and was used *solely* for purposes of criticism and comment -- caused any harm to Plaintiff’s so-called “market.” Indeed, Plaintiff’s emphasis on the fact that Defendant Bryan made the copies of her website “to make a political point” bolsters the conclusion that the first fair use factor strongly weighs in Defendant Bryan’s favor. (Plaintiff’s Memorandum on Fair Use at p. 8). Political speech is “at the core of what the First Amendment is designed to protect.” *Virginia v. Black*, 538 U.S. 343, 365 (2003); *see also Hustler Magazine, Inc. v. Moral Majority, Inc.*, 706 F.2d 1148 (9<sup>th</sup> Cir.) (Ninth circuit found the defendant’s use of copyrighted materials for political purposes to be fair use.)

*b. The nature of the alleged copyright work should be given limited weight*

Given Defendant Bryan’s unambiguous use of a limited portion of Plaintiff’s website for criticism, comment and a political point, and given the fact that he did not publish or disseminate any portion of her website, limited weight should be given to the second factor.

*c. The amount and substantiality of the portion used favors Defendant Bryan*

Plaintiff wrongly asserts, supposedly on the basis of the email, that Defendant Bryan advised her that he “copied 3 complete, unedited, untransformed versions of my entire online inventory without her authorization or knowledge.” (Response at p. 5, ¶ 21). However, nowhere in the email sent to Ms. Shell does Defendant Bryan inform her that he copied her “entire inventory.” (See Exhibit B). Again, even assuming *arguendo* that Defendant Bryan copied a

substantial portion of her website (and there are no facts alleged to support this), given the context and manner of any alleged copying by Defendant Bryan, i.e., for purposes of personal use, comment and criticism, limited weight should be afforded this factor. Importantly, Defendant Bryan did not publish or disseminate any alleged copies belonging to Plaintiff, nor can Plaintiff allege that he did.

*d. The effect of the use upon the potential market for or value of the alleged copyrighted work favors Defendant Bryan*

Plaintiff again urges an interpretation of the fourth fair use factor that is completely at odds with settled case law. Plaintiff again relies upon a “lost licensing fee” theory. Plaintiff states that “[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.” (Response at p. 6, ¶ 22), *citing Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (U.S. 1984)

The fourth factor focuses on the copyright law's condemnation of the “copier who attempts to usurp the demand for the original work.” *Consumer Union of United States, Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983). The copying at issue here cannot conceivably cause any harm to the market for the copyrighted work because there has been absolutely no publication or dissemination of the copy of any kind. “A use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create.” *See Sony*, 464 U.S. at 450. Here, the only “harm” that might be caused by Defendant’s copying of the website to his

personal computer is to Plaintiff's ego, and that is not an actionable harm under the Copyright Act<sup>8</sup>.

**B. Plaintiff Has Not Alleged A Valid Contributory Infringement Claim Against Defendant Bryan**

A claim for contributory copyright infringement requires plaintiffs to establish that any contributory defendants had knowledge of the infringing activity and that they "induced, caused or materially contributed to the infringing conduct." *A. & M, Records v. Napster, Inc.*, 239 F. 3d 1004, 1019 (9th Cir. 2001); *Gershwin Publ'g Corp. v. Columbia Artist Mgmt. Inc.*, 443 F. 2d 1159, 1162 (2d Cir. 1971). The knowledge necessary to support a contributory infringement claim is actual or constructive knowledge of the infringement itself. *See Marvullo v. Graner & Jahr*, 105 F. Supp. 2d 225 (S.D.N.Y. 2000) (dismissing contributory infringement allegation for failure to state a claim where plaintiff failed to allege that defendant had prior knowledge of infringing conduct); *Napster*, 239 F. 3d at 1020 (contributory infringement "requires that the secondary infringer know or have reason to know of direct infringement"); *Costar Group v. Loopnet, Inc.* 373 F. 3d 544, 550 (4th Cir. 2004). A complaint that alleges only that defendant supplied a third party with the means of infringing a copyright does not state a claim for contributory copyright infringement and cannot survive a motion to dismiss. *See Display Producers, Inc. v. Shulton, Inc.*, 525 F. Supp. 631, 633 (S.D.N.Y. 1981); *see also Newborn v. Yahoo!, Inc.*, 391 F. Supp. 2d 181, 186 (D.D.C. 2005) ("merely supplying the means to accomplish an infringing activity cannot give rise to the imposition of liability for contributory

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<sup>8</sup> Even if Defendant Bryan's copying is considered to have reduced Plaintiff's profits because it helped inform others of Plaintiff's actions, such conduct is not actionable under the Copyright Act. *See Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 1195, 1203 (N.D. Cal. 2004) ("[The fair user's] activity might have reduced [the copyright owner]'s profits because it helped inform potential customers of problems with [the owner's product]. However, copyright law is not designed to prevent such an outcome.").

copyright infringement.”) (citations omitted.) For example, the Supreme Court held in *Sony Corporation of America v. Universal Studios, Inc.*, 464 U.S. 417 (1984) that a manufacturer who provided equipment that was used to infringe copyrighted material was not liable because there existed non-infringing uses of the product, and knowledge that infringement would occur could not be imputed to manufacturer. Further, the second prong of the contributory infringement test - inducement by defendant - requires *substantial participation* in the infringement. *Marvullo*, 105 F. Supp. 2d at 230.

In her Response, Plaintiff attempts to overcome her failure to set forth facts that demonstrate that Defendant Bryan had knowledge of allegedly infringing conduct by the other Defendants. She does so by attaching a document that she claims is “proof” of knowledge. (Response at p. 6). The document that Plaintiff references is “Suzanne Shell’s Blacklist” [Doc. 248-5 at pp. 8 – 10]. Notwithstanding the fact that her “Blacklist” is not part of the pleadings, and is therefore not properly before the court, even her so-called new “facts” do not support a cause of action. There is nothing in her purported “Blacklist” that identifies any alleged infringing activity on the part of any named Defendants, nor is there anything to suggest that Defendant Bryan had knowledge of any alleged infringing activity of any other party. Even if it was properly before the court, the purported “Blacklist” does nothing to establish the requisite elements of a claim for contributory copyright infringement.

Application of this standard to Plaintiff’s Complaint demonstrates that she has not stated a claim for contributory copyright infringement against Defendant Bryan. She has failed to allege, as she must, that Defendant knew of the infringing activity. Plaintiff’s failure to allege that Defendant Bryan knew of the “infringing” activity is fatal to her claim. Plaintiff’s failure to

allege anything other than that Defendant Bryan purportedly played a role in inducing unnamed parties to infringe is also fatal to the “substantial participation” prong required to state a claim for contributory copyright infringement. Plaintiff’s allegations in paragraphs 118 -124 are nothing more than a formulaic recitation of the knowledge element for contributory infringement. The claim is legally insufficient to satisfy the pleading requirements to state a claim for contributory copyright infringement.

Plaintiff’s copyright infringement claim fails the fair use analysis. Accordingly, her claim should be dismissed as a matter of law.

**C. Plaintiff's Vicarious Copyright Infringement Claim Does Not Allege that Defendant Bryan Had a Direct Financial Benefit from the Alleged Infringement**

Plaintiff fails to address the incurable pleading defects, or the arguments raised in Defendant Bryan’s Memorandum of Law, with respect to her claim for Vicarious Infringement. Instead, Plaintiff merely states that “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 [sic].” (Response at p. 6). Plaintiff’s conclusory statement is wholly insufficient to withstand a Fed. R. Civ. P. 12(c) Motion.

Defendant Bryan moved to dismiss Plaintiff’s claim for vicarious copyright infringement because Plaintiff failed to plead facts to satisfy an essential element of this claim - that Defendant received an obvious and direct financial benefit from the infringing conduct. *Parker v. Google*, 242 Fed. Appx. 833, 837 (3d Cir. 2007). Defendant’s argument on this point is simple and concise. To establish that a party had a direct financial benefit from infringing conduct, courts today require a plaintiff to show that the customer was drawn to the material because it was

infringing, not simply for the material itself. *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004).; *Adobe Systems v. Canus Productions, Inc.*, 173 F. Supp. 2d 1044, 1050 (C.D. Cal. 2001). This standard developed over the past decade as courts recognized that, without it, there would be a limitless, and unintended expansion of vicarious liability for copyright infringement to defendants who should not be held responsible for the conduct of an unrelated third party. *Adobe*, 173 F. Supp. 2d at 1051. Plaintiff's Complaint does not (and cannot) plead this essential element. Plaintiff does not even dispute this point.

Thus, Plaintiff concedes that to state a claim against Defendant Bryan for vicarious copyright infringement, she must allege facts sufficient to establish that Defendant received a monetary benefit directly from the sale or provision of the infringing material. Plaintiff's Complaint indisputably fails to meet this test and the claim should be dismissed.

**D. Plaintiff's Claim for Breach of Contract Fails to State a Claim for Relief**

*1. Plaintiff has failed to establish the existence of a valid contract*

Plaintiff's breach of contract claim fails to state a claim upon which relief can be granted because she has not alleged the existence of a valid contract between her and Defendant Bryan. Plaintiff alleges that Defendant violated "the terms printed on my web site" (Complaint at ¶ 150). Merely posting terms of use on an Internet site does not create a contract. Plaintiff does not allege any facts from which the Court could conclude that a contract with Defendant Bryan has been formed, namely (1) a meeting of the minds on the terms of the alleged contract, (2) an intention of the parties to be bound, or (3) that the alleged contract was supported by consideration. *Western Distributing Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992). The

party alleging a breach of contract has the burden of proving the elements of breach of contract.

*Id.*

Plaintiff's so-called contract fails because there is no language set forth in the Copyright Notice that sets forth the terms. In her Response, Plaintiff argues that the "Copyright Notice" that is published on her website contains "an offer to copy or distribute any content on my website profane-justice.org in exchange for pre-payment of posted license fees equal to \$5,000.00 per printed page per copy." (Response at p. 7). As an initial matter, no where in the Copyright Notice attached to Plaintiff's Response is there any language regarding payment of a licensing fee. (See Exhibit A).

Plaintiff has not alleged facts demonstrating a proper offer to enter into a contract, that Defendant Bryan had knowledge of the so-called contract, or that he assented to any of her terms. Contracts may be formed, for example, by clicking "I agree" in order to manifest one's assent. *See, e.g., Caspi v. Microsoft Network, LLC*, 732 A.2d 528, 530 (N.J. Super. Ct. App. Div. 1999) (a membership agreement requiring a prospective subscriber to click on "I Agree" created a contract); *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 35 (2nd Cir. 2002) (Court determined that a website's terms of use unenforceable where a user had unimpeded access to the website contents and could only become aware of the terms of use by clicking on a separate icon located elsewhere on the website.)<sup>9</sup>

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<sup>9</sup> In addition, an examination of the Copyright Notice demonstrates that there are no terms enumerated in the "contract." Her Copyright Notice is not an invitation to enter into a contract, it is an invitation to be exposed to her penalties. Thus, her Copyright Notice is not a contract, it is a two-page penalty clause and invalid on its face. *See, e.g., Butler v. Lembeck*, 182 P.3d 1185, 1191 (Colo. Ct. App. 2007) (A contract provision for liquidated damages is invalid as a penalty if it is unreasonably large for the expected loss from a breach of contract.) citing *Klinger v. Adams County Sch. Dist. No. 50*, 130 P.3d 1027, 1034 (Colo. 2006).

In Plaintiff's pleading, she presents no allegations that would tend to show that Defendant Bryan had manifested his assent to any alleged contract. Instead, Plaintiff asserts without any legal support, that Defendant "accepted the posted offer and received the consideration offered when [he] affirmatively performed the act of circumventing copy projects and/or copying content published on my web site ..." (Response at p. 7). The mere act of copying a website does not equate to a valid and existing contract. In fact, Plaintiff herself concedes that there is no valid contract when she describe her so-called "contract" as an "honor system." (Response at pp. 4 – 5). In addition, she presents no allegations that would support a conclusion that Defendant Bryan manifested his assent to any terms on which there was a "meeting of the minds," or that Defendant Bryan intended to be bound contractually by Plaintiff's notice.

Plaintiff's Copyright Notice purports to be a "Self-executing Contract/Security Agreement." However, Plaintiff can point to no legal authority wherein a party becomes automatically bound to agreement based upon a self-serving declaration that the document is "self-executing." Plaintiff can only assert, in conclusory fashion, that "Defendant Bryan's intent is also objectively clear, he performed the act indicating its [sic] assent to the terms published on the pages when he printed and copied my web site content." (Response pp. 9 – 10). The Copyright Notice utilized by Plaintiff is from her website and not from any contract with Defendant Bryan.

Similarly, the Complaint does not allege any facts from which it can be found that the supposed agreement was supported by consideration. As set forth more fully below, the Copyright Notice unequivocally demonstrates that the agreement is not supported by consideration.

Because Plaintiff has failed to plead the existence of a valid contract, has failed to demonstrate that Defendant Bryan manifested his assent to the terms, and has failed to demonstrate the contract was supported by adequate consideration, Plaintiff's breach of contract claim should be dismissed.

2. *Plaintiff's "Copyright Notice/Security Agreement" is Unconscionable*

Even assuming *arguendo* the Copyright Notice under some rationale could result in a contract, that contract would be unconscionable. An examination of the terms of the Copyright Notice reveals that any individual utilizing the website [www.profane-justice](http://www.profane-justice) is exposed to the prospect of abject servitude to Ms. Shell. In Colorado, a finding of unconscionability requires "evidence of some overreaching on the part of one of the parties such as that which results from an inequality of bargaining power or under other circumstances in which there is an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to that party." *Davis v. M.L.G Corp.*, 712 P.2d 985, 991 (Colo. 1986).

Factors which have been found relevant to the unconscionability determination include:

a standardized agreement executed by parties of unequal bargaining strength, . . . lack of opportunity to read or become familiar with the document before signing it, . . . use of fine print in the portion of the contract containing the provision, . . . absence of evidence that the provision was commercially reasonable or should reasonably have been anticipated, the terms of the contract, including substantive unfairness, . . . the relationship of the parties, including factors of assent, unfair surprise and notice, . . . and all the circumstances surrounding the formation of the contract, including its commercial setting, purpose and effect.

*Id.* The lack of meaningful alternative choices refers to the contract offered and does not refer to alternative sources of supply for the product. *Davis v. O'Melveney & Mayers*, 485 F.3d 1066, 1073-75 (9<sup>th</sup> Cir. 2007).

A contract is procedurally unconscionable “where the inequality is so gross that one party's choice is effectively non-existent.” *Pennington v. Northrop Grumman Space & Mission Sys. Corp.*, 269 Fed. Appx. 812, 819 (10th Cir. 2008). A contract is substantively unconscionable only if the terms are “such as no man in his senses and not under delusion would make on the one hand, and no honest and fair man would accept on the other.” *Id.* (internal citations omitted).

The Copyright Notice is procedurally unconscionable as demonstrated by the fact that Plaintiff has much greater bargaining power than does any other individual person; and the “contract” offers no opportunity to bargain over the terms. Rather, Plaintiff forces the agreement upon unwitting victims who visit her site. (See, generally, Complaint).

The Copyright Notice is not only substantively unconscionable, it is patently absurd. Plaintiff’s so-called “self-executing contract” proclaims that a “User” who copies or distributes anything on the site enters into a contract, and the “User’s” act of copying allegedly signifies that the User:

(1) grants Plaintiff a security interest in all the User’s assets, land, and personal property, and all User’s interests in assets, land, and personal property, in the sum certain amount of \$250,000.00 per each occurrence of unauthorized use ... and imposes a penalty for failure to pre-pay posted license fees in the sum-certain amount of \$50,000.00 per each occurrence ...plus costs, plus triple damages;

(2) authenticates this Copyright Notice/Security Agreement ...where User pledges all of User’s assets, land, consumer goods, farm products, inventory, money, gold, silver, diamonds, investment property, commercial tort claims, letters of credit, letter-of-credit rights, chattel paper, instruments, deposit accounts, documents, and general intangibles, and all of User’s interest in all such foregoing property, now owned and hereinafter acquired, now existing and hereafter arising, and wherever located, as collateral for securing User’s contractual obligation in favor of Copyright owner ....

(3) consents and agrees to this Copyright owner's filing of a UCC Financing Statement ...and/or obtaining any other security interest, lien or attachment ...

(6) consents and agrees that any and all such filings ...are not, and may not be considered, bogus, and the User will not claim that any such filing is bogus, frivolous or vexatious;<sup>10</sup>

(8) Appoints Copyright owner as Authorized Representative of User ...granting Copyright owner full authority and power for engaging in any and all actions on behalf of User including ...in Copyright owner's sole discretion, deems appropriate, and as regards and deposit account of any kind maintained with any bank in/under the name of User, and likewise any deposit account maintained under Social Security Account Number/Employer Identification Number of User ...maintained with any bank...grants Copyright owner full authority and power for originating instructions for said deposit-account and directing the disposition of said funds in said deposit account by acting as signatory on said account without further consent of User and without liability ...and agrees that this appointment of Copyright owner ...is irrevocable.

(Exhibit A at p. 1). In addition, should the "User" default with respect to payment, and fail to cure, the so-called "contract" would authorize Plaintiff to obtain "immediate non-judicial strict foreclosure on any and all remaining property and interest in property, formally pledged as collateral by User ..." (Exhibit A at p. 2).

Thus, by its very terms, the Copyright Notice is manifestly unconscionable and unreasonable. In fact, it is ridiculous. Therefore, Plaintiff's claim for Breach of Contract should be dismissed.

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<sup>10</sup> Defendant Bryan contends that Plaintiff's Complaint is bogus, frivolous and vexatious.

**E. Defendant Bryan is Not Liable for Tortious Interference with Contract**

*1. Plaintiff has failed to establish the essential elements of her tortious interference claim*

Plaintiff has not provided any meaningful rejoinder in her Response to the legal arguments raised by Defendant in his Memorandum of Law regarding Plaintiff's claim for tortious interference. Plaintiff has failed to set forth a plausible basis for several essential elements of her claim for tortious interference with business relationship and/or business contract. Instead, Plaintiff continues to merely rely upon conclusory allegations and formulaic recitations of the elements of a tortious interference claim.

Plaintiff's allegations as to the business relationships and/or contracts that were allegedly harmed are also inconsistent. In the Complaint, the business relationship that she alleges was harmed was a relationship between two other of the Defendants. Plaintiff argues "[t]here existed an express contractual relationship between me and Durand and between me and Swallow as described in Counts One and Two of the Breach of Contract claim." (Complaint at ¶ 154). Yet, her Response brief now suggests that the harmed business relationships and/or contracts were with unknown and unnamed "third parties" – and not with Defendant Bryan. (Response at p. 10). Plaintiff now states, in conclusory fashion, that Defendant Bryan induced these other unknown "third parties" to "breach the contract." (Id.)

In short, in addition to her other numerous pleading deficiencies, Plaintiff has failed to set forth any facts to establish that there existed a valid contract between Plaintiff and an identifiable third party, a necessary element of a claim for tortious interference with contract. *R-G Denver, Ltd., v. First City Holdings of Colo.*, 789 F.2d 1469, 1474 (10<sup>th</sup> Cir. 1986); and *Postal Instant*

*Press v. Jackson*, 658 F. Supp. 739, 742 (D. Colo. 1987). Furthermore, as evidenced by her own exhibits, Plaintiff is totally unable to set forth any facts as to Defendant Bryan's *knowledge* of the alleged contract between Plaintiff and any party. Plaintiff merely states in a conclusory fashion that "Defendant had knowledge." This is insufficient and Plaintiff's Complaint should be dismissed.

2. *Plaintiff's claim for tortious interference fails as a matter of law, regardless of whether Defendant Bryan was a minor at the time*

In Plaintiff's Memorandum of the Defendant Being a Minor at the Time of the Tortious Conduct (referred to as "Memorandum on Tortious Conduct"), Plaintiff states that "Defendant has failed to provide his birthdate, therefore I am not inclined to presume he was a minor during the entire time of his participation in the acts described in my complaint." (Memorandum on Tortious Conduct at p. 1, ¶ 1). Contrary to her assertions, Plaintiff did presume he was a minor in her Proposed Scheduling Order [Doc. # 126] wherein she provided the following as an undisputed fact: "Ringo Kames, aka Alex D. Bryan was a minor at the times the acts alleged against him in the complaint were committed." (Proposed Scheduling Order at p. 7, ¶ 68); see also Defendant Bryan's Proposed Scheduling Order [Doc. # 128] at Section 4(b)). However, regardless of whether Defendant Bryan was a minor at the time, for the reasons set forth above, Plaintiff's claims fail as a matter of law and should be dismissed.

Plaintiff also proposes to amend her Complaint to add Defendant Bryan's parents as parties under the theories of negligent entrustment and the duty of parents to control and supervise their children. (See, generally, Memorandum on Tortious Conduct). Plaintiff's reliance upon cases involving negligent entrustment is misplaced. As an initial matter, the cases referenced by Plaintiff, as well as the comments to the Restatement provisions she cites, the type

of harm addressed is one in which the child has caused *physical* harm through his tortious act. *See, e.g., Horton v. Reaves*, 526 P.2d 304, 306 (Colo. 1947); *Mitchell v. Allstate Ins. Co.*, 534 P.2d 1235 (Colo. App. 1975); and Restatement (Second) of Torts, §§ 308, 316<sup>11</sup>, and 318. Additionally, Plaintiff is unable to allege any set of facts to support a claim against Defendant Bryan’s parents, *even if* the alleged harm here is the type contemplated by Colorado law and the relevant Restatement provisions. Plaintiff has failed to provide any legal support demonstrating (based upon the claims and facts set forth in her Complaint) that it be appropriate to include Defendant Bryan’s parents. Therefore, Plaintiff’s request for leave to amend her Complaint to include the parents would be futile. *See, e.g., Foman v. Davis*, 371 U.S. 178, 182 (1962); see also arguments set forth in Section K below.

**F. Plaintiff’s RICO Claim Fails To State A Claim Upon Which Relief Can Be Granted**

In Plaintiff’s Memorandum of Law RICO, Ms. Shell spends approximately five pages citing to law relating to RICO, but literally fails to address any of the substantive legal deficiencies raised in Defendant Bryan’s Memorandum of Law. Instead, Plaintiff does nothing more than parrot the conclusory allegations set forth in her Complaint.

1. *Plaintiff has failed to adequately allege the requisite predicate criminal acts.*

a. *Plaintiff’s mail and wire fraud claims are insufficient and lack particularity*

In support of her mail and wire fraud claims, Plaintiff asserts that her allegations were “pled with peculiarity [sic].” (Memorandum of Law RICO at p. 1, ¶ 2). Plaintiff ignores the

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<sup>11</sup> Pursuant to § 316 of the Restatement (Second of Torts), physical injury is an essential element:

A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an un-reasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.

requirement that where a plaintiff relies on mail and wire fraud as a basis for a RICO violation, the allegations of fraud must comply with Federal Rule of Civil Procedure 9(b), which requires that allegations of fraud be pled with specificity. *Garbade v. Great Divide Min. and Mill. Corp.*, 645 F.Supp. 808, 815 (D.Colo. 1986) (holding that complaint making only conclusory allegations of a scheme to defraud did not allege specific intent necessary to sustain a RICO claim); *Seidl v. Greentree Mortg. Co.*, 30 F. Supp. 2d 1292, 1304 (D. Colo. 1998) (Fed. R. Civ. P. Rule 9(b) requires a heightened standard of pleading for a RICO claim.). To satisfy Rule 9(b)'s particularity requirement as to the fraud "the complaint must adequately specify the statements it claims are false and misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state where and when the statements were made, and identify those responsible for the statements." *Cosmas v. Hasett*, 886 F. 2d 8, 11 (2d Cir. 1989).

Where multiple defendants are asked to respond to allegations of fraud, the complaint should inform each defendant of the nature of the alleged participation in the fraud. *Red Ball Interior Demolition Corp. v. Palmadessa*, 874 F. Supp. 576, (S.D.N.Y. 1995)("the complaint may not rely on blanket references to acts or omissions of all defendants, for each defendant named in the complaint is entitled to be apprised of the circumstances surrounding the fraudulent conduct with which he individually stands charged."); *see also Seidl v. Greentree Mortg. Co.*, 30 F. Supp. 2d 1292, 1304 (D. Colo. 1998) (Where there is more than one defendant, the RICO plaintiff's obligation under Rule 9(b) is to specify the particular acts of each defendant.)

Plaintiff Complaint falls far short of meeting the standard under Fed.R.Civ.P. 9(b), nor does her Response assist, and her RICO claim should be dismissed.

*b. Plaintiff's criminal copyright claim is insufficient*

Plaintiff asserts that her criminal copyright infringement is established by her allegations that “defendants reproduced or distributed, including by electronic means, during any 180-day period, of 1 or more copies of 1 or more of her copyrighted works, which have a total retail value of more than \$1,000.” (Memorandum of Law RICO at p. 2, ¶ 7). This is insufficient. Plaintiff is merely repeating the statutory language. Plaintiff has not, and cannot, allege that Defendant Bryan gained any pecuniary benefit from his alleged infringing activity. *See, e.g., United States v. La Maccia*, 871 F.Supp. 535, 540 (D. Mass. 1994) (Copyright must be undertaken to make money in order to be considered criminal.). Plaintiff’s only allegation against Defendant Bryan is that he allegedly told her that he copied her website and that he allegedly endorsed or encouraged others to do so as well. Such allegations are not actionable against Defendant and fail to state a predicate act of criminal copyright infringement for purposes of RICO.

*c. C.R.S. § 18-5.5-102(1)(a) and (d) does not constitute a proper predicate act under RICO*

Plaintiff did not address or respond to Defendant Bryan’s arguments that Section 1961(1)(A) of Title 18 identifies predicate acts that constitute “racketeering activity.” C.R.S. § 18-5.5-102(1)(a) and (d) are not predicate acts to RICO. Therefore Plaintiff apparently concedes that such a claim does not constitute a predicate act, and therefore the claim pursuant to those sections fails as a matter of law and should be dismissed.

*2. Plaintiff fails to allege the existence of pattern of racketeering*

Plaintiff’s Response does nothing to bolster the Complaint’s deficient pleading. In order to allege a pattern of racketeering activity under 18 U.S.C. § 1962(c), Plaintiffs must allege

continuity plus relationship. *Brooks v. Bank of Boulder*, 891 F. Supp. 1469, 1478 (D. Colo. 1995). “Continuity” means the predicate acts must pose a threat of continued criminal activity. *Id.* To satisfy the continuity element, the plaintiff must prove a series of related predicates enduring a substantial period of time. *Midwest Grinding Co.*, 976 F.2d at 1023. The duration and repetition of the criminal activity must carry an implicit threat of continued criminal activity into the future. *Id.* “[I]solated instances of criminal behavior, not presenting at least some threat of future harm, cannot meet § 1962(c)'s continuity element.” *Roger Whitmore's Auto Servs., Inc. v. Lake County*, 424 F.3d 659, 673-74 (7th Cir. 2005).

Plaintiff has failed to set forth any facts necessary to show a pattern of racketeering activity, which includes “the need for proof of a relationship between the predicate acts and the more difficult proof of a threat of continuing activity.” *Seidl*, 30 F.Supp. at 1304. Plaintiff has failed to advance any factual allegations which would even begin to approach the specificity needed to state a RICO claim. It is not enough to simply state “a pattern of illegal activity,” “otherwise a simple conclusory allegation would always show a pattern.” *Id.*

3. *Plaintiff fails to allege the existence of a racketeering enterprise*

In Defendant Bryan’s Memorandum of Law, it is explained that Plaintiff’s RICO claims must be dismissed because she failed to allege any organizational structure to the purported enterprises or enterprises separate and apart from the pattern of racketeering activity and the persons conducting its affairs. In response, Plaintiff concedes the governing principles of law relating to RICO enterprises, including the requirement that the enterprise must be separate from the pattern of racketeering activity and distinct from the person conducting the affairs of the

enterprise. (Memorandum of Law RICO at pp. 3-4, ¶¶ 15 – 16) However, Plaintiff fails to point to any allegations in the Complaint which would satisfy these RICO enterprise requirements.

The existence of an enterprise is an essential element of a Civil RICO claim. To demonstrate an enterprise, Plaintiff must plead that (1) there is an ongoing organization with a decision making framework or mechanism for controlling the group; (2) that various associates function as a continuing unit, and (3) that the enterprise is separate and apart from the pattern of racketeering activity.” *Kearney v. Dimanna*, 195 Fed. Appx. 717 (10<sup>th</sup> Cir. 2006).. Plaintiff must also allege *sufficient facts* to show that each person played some part in directing the enterprise's affairs. *Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 727 (7th Cir. 1998). Each enterprise member's alleged role requires more than merely engaging in predicate acts underlying the RICO claim. *Jennings v. Emry*, 910 F.2d 1434, 1440 (7th Cir. Ind. 1990). Further, the structure and goals of the enterprise must be separate from the predicate acts themselves. *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 645 (7th Cir. 1995). Therefore, Plaintiff cannot establish structure by defining the enterprise through what it allegedly does; the enterprise must be distinct, separate and apart from a pattern of racketeering activity. *Jennings*, 910 F.2d at 1440.

Plaintiff asserts that the “Enterprise alleged consists of an association in fact consisting of AFRA, AFRA Board of Directors, AFRA membership, CPS Watch, Inc., CPS Watch, Inc. board members and ancillary participants including Defendants Wiseman and Kamens/Bryan ...[a]s such it possesses an administrative hierarchy or command structure.” (Memorandum of Law RICO at p. 3, ¶ 11). She then asserts, without support, that the “enterprise is separate and distinct from the predicate acts because it contains an organizational pattern beyond what was

necessary to perpetrate the predicate crimes.” (Response at p. 3, ¶ 12) (internal quotations omitted). Finally, Plaintiff baldly asserts, in conclusory fashion, that the “alleged multiple predicate acts involving 14 separate and distinct but similarly executed incidents, and one separate and distinct unknown but significant number of incidents over 9 years, conducted by the same Enterprise is sufficient.” (Response at p. 4, ¶ 22).

Thus, while Plaintiff agrees that the purported enterprises have structure, neither her Complaint nor her Response provide any detail regarding how the members formed the enterprises, the hierarchy and organization of the purported enterprises, how decisions were made within the enterprises or how the defendants purportedly worked together to achieve a common goal. (See, generally, Complaint at ¶¶ 161 – 215) Similarly, neither the Complaint nor Plaintiff's Response articulate an enterprise separate and apart from the pattern of racketeering activity and the persons purportedly conducting the enterprises' affairs. Indeed, rather than detailing the organizational structure of the purported enterprise and explaining how the purported enterprises exist separately from the pattern of racketeering activity and its constituent members, Plaintiff instead simply rehashes over and over again conclusory allegations relating to the language of the statute.

In addition, Plaintiff has failed to satisfy RICO's “operation and management” test since the Complaint is silent as to the specific role each Defendant played in directing the purported enterprises' affairs or the manner in which this direction was effected. In addition, Plaintiff's 1962(b) claim must be dismissed since Plaintiff failed to describe the purported enterprises as legitimate businesses or how the pattern of racketeering activity permitted defendants to acquire or maintain control of the enterprises.

Plaintiff's Complaint falls far short of what is required to state a RICO enterprise since, at best, she alleges nothing more than a group of people who engaged in racketeering activity. Plaintiff's purported enterprise lacks an ongoing structure of persons joined in purpose and organized in a manner amenable to hierarchical decision-making. Plaintiff's enterprise also is one and the same as the alleged pattern of racketeering activity and the persons who conduct its affairs. Accordingly, Plaintiff's RICO claims must be dismissed for failure to state a proper RICO enterprise.

**G. Plaintiff's Claim for False and Misleading Advertising Should Be Dismissed**

Plaintiff again does not respond to Defendant Bryan's arguments relating to her eighth claim for relief, False and Misleading Advertising. Rather, she states, "[i]n 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 [sic]." (Response at pp. 11- 12). This does not satisfy the pleadings requirements necessary to establish a claim for false and misleading advertising.

As set forth in Defendant Bryan's Memorandum of Law, Plaintiff's claim fails because she has not alleged, nor can she, (1) that Defendant Bryan made material false or misleading representations of fact in connection with the commercial advertising or promotion of his product; (2) in commerce; (3) that are either likely to cause confusion or mistake as to (a) origin, association or approval of the product with or by another; or (b) the characteristics of the goods or services; and (4) that injure Plaintiff. *Sally Beauty Co. v. Beautyco, Inc.* 304 F.3d 964, 980 (10<sup>th</sup> Cir. 2002). Plaintiff's claim must therefore be dismissed.

**H. Plaintiff's Has Failed to Properly Plead a Claim for Unfair or Deceptive Trade Practices**

Plaintiff demonstrates that she cannot plead a claim for unfair or deceptive trade practices. Notably, Plaintiff again does not address Defendant Bryan's arguments in her Response because facts do not exist to fix the fatal defects in her pleading. Plaintiff states, yet again, that "[i]n 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 [sic]." (Response on p. 12). Thus, Plaintiff improperly attempts to impose liability on Defendant Bryan by bootstrapping her factually unsupported claim of unfair and deceptive trade practices onto her conspiracy claim, which is also facially defective.

Because Plaintiff makes no argument to the contrary, she therefore apparently concedes that she is required to show that (1) Defendant Bryan engaged in an unfair or deceptive trade practice; (2) that the challenged practice occurred in the course of Defendant's business, vocation, or occupation; (3) that it significantly impacts the public as actual or potential consumers of the Defendant's goods, services, or property; (4) that Plaintiff suffered injury in fact to a legally protected interest; and (5) that the challenged practice caused Plaintiff's injury. *Sewell v. Great N. Ins. Co.*, 535 F.3d 166, 1173 (10<sup>th</sup> Cir. 2008); *see also Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142 (Colo. 2003). Plaintiff failed to identify any facts (because there are no facts) relating to Defendant Bryan in her Complaint in support of any of the elements of her claim. Plaintiff offers nothing to support the viability of that claim, and therefore the claim should be dismissed.

**I. Plaintiff Has Failed to Properly Plead a Claim for Conspiracy**

In her Response, Plaintiff simply echoes the conclusory allegations contained in her Complaint relating to her claim for conspiracy. Realizing that such allegations are insufficient, Plaintiff again tries to overcome her pleading deficiencies by referring to documents and “facts” that are not part of the pleadings. In particular, Plaintiff asserts “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 show in the exhibits.” (Response at p. 13). Notwithstanding the fact that such exhibits are not properly before the court and should be stricken<sup>12</sup>, there is nothing contained in the documents to sufficiently demonstrate an understanding or agreement between Defendant Bryan and any other individual. The requisite meeting of the minds is simply not present in any scenario that Plaintiff proffers to the Court. *World Wide Ass’n of Specialty Programs v. Pure, Inc.*, 450 F.3d 1132, 1141 (10<sup>th</sup> Cir. 2006); *see also Powell Prods. v. Marks*, 948 F. Supp. 1469, 1480 (D. Colo. 1996) (plaintiff cannot succeed on its claims for civil conspiracy without showing that each defendant agreed to do something in furtherance of the conspiracy, knowing of its improper purpose.). As set forth in Defendant Bryan’s Answer, with the exception of Defendant Wiseman, Defendant Bryan had no knowledge of or contact with the other defendants prior to the filing of Plaintiff’s Complaint. (See Answer [Doc. #50] at p. 10).

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<sup>12</sup> As set forth above, the new factual allegations in Plaintiff’s Response must be disregarded because the Court may not take into account additional facts asserted in a memorandum opposing the motion to dismiss, because such memoranda do not constitute pleadings under Rule 7(a).

Plaintiff misses the point of the very cases she cites in her Response. Plaintiff relies upon several cases for the proposition that it is not necessary to provide direct evidence of a formal agreement to demonstrate a meeting of the minds. (Response at pp. 14 – 15). However, in the cases upon which Plaintiff relies (as opposed to the case at bar), the factual circumstances provided comprehensive evidence of a conspiracy. *See, e.g., Schneider v. Midtown Motor Co.*, 854 P.2d 1322, 1327 (Colo. Ct. App. 1992) (Based on the agent of defendant's actions of repeatedly selling cars to the unlicensed motorist, believing him to be a "crazy driver," who "drove the wheels off a car," and the fact that defendant took less profit to encourage repeat business combined with the unlicensed driver's frequent purchases from defendant without a driver's license and despite his recklessness with cars. The Court found requisite nexus that would establish a tacit agreement between defendant and its agents.); *Loughridge v. Goodyear Tire & Rubber Co.*, 192 F. Supp. 2d 1175, 1186 (D. Colo. 2002) (Evidence of conspiracy found from the decision by Goodyear and Heatway company to jointly market a hose, share funding and jointly attend marketing show.); *Glasser v. United States*, 315 U.S. 60, 81 (U.S. 1942) (Evidence of a participation in a criminal conspiracy to defraud the United States by accepting payoffs in exchange for dismissing criminal charges against certain defendants found through evidence of statements made by defendant to another party that "he should get a lawyer and prepare to defend himself when the case could not be 'fixed.'"); and *United States v. Peveto*, 881 F.2d 844, 847 (10th Cir. Okla. 1989) (Evidence in support of conviction of defendants on conspiracy charges included purchasing of laboratory equipment, along with evidence of conversations about whether the equipment met the defendants' expectations, and other

conversations regarding purchase of apartment buildings “for dope houses and stated that ownership of the properties could be concealed.”)

Unlike the above cases on which Plaintiff relies, in this case Plaintiff has utterly failed to set forth a claim for conspiracy against Defendant Bryan, through direct or circumstantial evidence. Instead, she makes conclusory allegations involving an undifferentiated mass of “Defendants.” That does not state a claim for civil conspiracy, and Plaintiff’s conspiracy claim should be dismissed.

**J. Plaintiff Has Failed to Properly Assert a Claim for Relief Under The Sherman Act**

Plaintiff also fails to advance a single argument to counter the legal authority presented by Defendant Bryan that Plaintiff has failed to properly assert a claim for relief under § 2 of the Sherman Act. Ms. Shell again merely states “[i]n 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 [sic].” (Response at p. 15). Plaintiff’s argument is wholly insufficient to survive a motion to dismiss or for judgment on the pleadings in an antitrust case.

Specific to antitrust cases, the Supreme Court has recognized that district courts “retain the power to *insist upon some specificity in pleading* before allowing a potentially massive [antitrust] controversy to proceed.” *Assoc. Gen. Contr., Inc. v. Cal. State Council of Carpenters*, 549 U.S. 519, 528 n.17 (1983) (emphasis supplied). As set forth in Defendant Bryan’s Memorandum of Law, Plaintiff’s Complaint not only lacks the requisite specificity, she has not (nor can she) pled the requisite antitrust injury. *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (a party claiming federal antitrust violations must plead and

prove “more than injury causally linked to an illegal presence in the market.”); *Mizlou Television Network, Inc. v. National Broadcasting Co.*, 603 F. Supp. 677, 683 (D.D.C. 1984); *Association of Retail Travel Agents, Ltd. v. Air Transport Ass'n of America*, 635 F. Supp. 534, 537 (D.D.C. 1986) (Without any “factually supported allegations of anticompetitive effect,” plaintiff’s antitrust claims must be dismissed.)

Accordingly, Plaintiff has not adequately pled a claim for violation of § 2 of the Sherman Act and therefore her Eleventh Claim for Relief must be dismissed.

**K. Amendment Would Be Futile**

Plaintiff’s request, in the alternative, that she be permitted to “amend or correct any errors or deficiencies in the complaint” is frivolous, fundamentally unfair to Defendant Bryan, and a waste of judicial resources. Essentially, Plaintiff is asking the Court to grade her paper and give her a “do over” to correct any and all deficiencies. This broad, “save all” request for leave to amend should not be granted because any such amendment would be futile.

Rule 15 of the Federal Rules of Civil Procedure governs the amendment of pleadings. Pursuant to this rule, a party may amend without leave of court in certain circumstances. However, where a responsive pleading has been filed, Rule 15(a) requires a party to obtain leave of court or written consent of the adverse party in order to amend. Although the rule states that leave to amend is to be freely given when justice requires, a party’s right to amend its pleadings is not absolute. In *Foman v. Davis*, the United States Supreme Court identified several reasons for denying a party’s motion to amend: (1) undue delay; (2) bad faith or dilatory motive; (3) repeated failure to cure deficiencies with prior amendments; (4) undue prejudice to the opposing party; and (5) futility of the amendment. 371 U.S. 178, 182 (1962). Futility may be found where

the complaint, if amended, would nevertheless fail to withstand a motion to dismiss. *Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 521 F.3d 1278, 1288 (10th Cir. 2008).

As amply demonstrated above and in Defendant Bryan's Memorandum of Law in Support of Motion for Judgment on the Pleadings, Plaintiff's Complaint is legally insufficient under any set of facts and no additional allegations can eradicate the deficiencies. It is apparent that she can prove no set of facts that would entitle her to relief. *Ledbetter v. City of Topeka*, 318 F.3d 1183, 1187 (10th Cir. 2003). An amendment to Plaintiff's Complaint simply cannot be supported by the record. Furthermore, given the total lack of any supporting facts for her claims, it is apparent that Plaintiff has brought her case in bad faith and not for any legally supportable grievance. Moreover, a second amended complaint will lead to another motion to dismiss on the same grounds which, in turn, will require additional consideration by this Court. Neither the Defendants nor this Court should be required to expend the additional time and resources to address the legal insufficiencies of Plaintiff's pleading. Plaintiff's request to amend must therefore be denied and her Complaint dismissed with Prejudice.

### **CONCLUSION**

For the foregoing reasons, the Complaint as against Defendant Bryan should be dismissed in its entirety, with prejudice, an award of attorneys fees, and for any further relief the Court deems appropriate.

Dated this 31st day of August, 2009.

*s/Jennifer E. Schlatter*

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Patrick D. Vellone

Jennifer E. Schlatter

ALLEN & VELLONE, P.C.

1600 Stout Street, Suite 1100

Denver, CO 80202

Telephone: (303) 534-4499

[pvellone@allen-vellone.com](mailto:pvellone@allen-vellone.com)

[jschlatter@allen-vellone.com](mailto:jschlatter@allen-vellone.com)

Attorneys for Defendant Ringo Kames a/k/a Alex Bryan

## CERTIFICATE OF MAILING

I hereby certify that on the 31st day of August, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses, and via U.S. Mail, postage pre-paid to:

Suzanne Shell  
14053 Eastonville Rd.  
Elbert, CO 80106  
Email: [dsshell@gmail.com](mailto:dsshell@gmail.com)  
*Plaintiff – Pro Se*

William Wiseman  
WILLIAM WISEMAN STUDIOS  
P.O. Box 1017  
Tulelake, CA 96134  
*Defendant – Pro Se*

Susan Adams Jackson  
40 Orlando Avenue  
Winthrop, MA 02152-2248  
*Defendant – Pro Se*

Leonard Henderson  
4773 Salmon River Highway  
Otis, OR 97368  
*Defendant – Pro Se*

Cletus Kiefer  
292 East Avenue, #114  
St. Louis, MO 63119-1702  
*Defendant – Pro Se*

Aimee Dutkiewicz  
P.O. Box 3022  
Bristol, CT 06011-3022  
*Defendant – Pro Se*

Dee Contreras  
10571 Colorado Boulevard  
Apartment B-101  
Thornton, CO 80233  
*Defendant – Pro Se*

NATIONAL ASSOCIATION OF FAMILY ADVOCATES  
Dorothy Kernaghan-Baez  
811 Aumond Place East  
Augusta, GA 30909  
*Defendant – Pro Se*

Daniel Bernard Slater  
LAW OFFICES OF DAN SLATER  
1415 Main Street, #A  
Canon City, CO 81212  
Email: [dan@danslaterlaw.com](mailto:dan@danslaterlaw.com)  
*Attorney for Defendants Cheryl Barnes,  
CPS Watch, Inc. & Sarah Thompson*

AMERICAN FAMILY RIGHTS ASSOCIATION  
William O. Tower  
Ann Tower  
7334 Chivalry Way  
Citrus Heights, CA 95621  
*Defendants – Pro Se*

Brenda Swallow  
815 Hilltop Road  
Mary Esther, FL 32569  
*Defendant – Pro Se*

Thomas Dutkiewicz  
P.O. Box 3005  
Bristol, CT 06011-3005  
*Defendant – Pro Se*

*s/ Elizabeth E. Deak*

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Elizabeth E. Deak