

**THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
CIVIL ACTION NO. 1:19-CV-00403**

DAVID SILER,	)
DISTINCTIVE HUMAN RESOURCES, INC.	)
	)
Plaintiffs,	)
	)
v.	)
	)
ELGA LEJARZA AKA ELGA LEJARZA PENN	)
MICHAEL PENN, LEJARZA COMPLIANCE	)
TRAININGS, LLC and LEJARZA HR	)
CONSULTING, LLC	)
	)
Defendants.	)

**PLAINTIFFS’ MEMORANDUM IN OPPOSITION TO DEFENDANTS’ MOTION  
TO DISMISS PURSUANT TO RULE 12(B)(6) OF THE FEDERAL RULES OF CIVIL  
PROCEDURE**

**TABLE OF CONTENTS**

INTRODUCTION ..... 1

FACTS ..... 1

QUESTIONS PRESENTED BY DEFENDANTS ..... 1

STANDARD OF REVIEW ..... 2

ARGUMENT ..... 3

    I.    WHETHER PLAINTIFFS’ CLAIM FOR BREACH OF CONTRACT IS PREEMPTED  
    BY THE COPYRIGHT ACT. .... 3

    II.   PLAINTIFFS’ COMMON LAW COPYRIGHT INFRINGEMENT CLAIM IS NOT  
    PREEMPTED BY THE COPYRIGHT ACT. .... 3

    III.  PLAINTIFFS’ CLAIM FOR UNFAIR COMPETITION UNDER 15 U.S.C. § 1125  
    SHOULD NOT BE DISMISSED. .... 4

    IV.  PLAINTIFFS’ UNFAIR AND DECEPTIVE TRADE PRACTICES ACT CLAIM IS  
    NOT PREEMPTED BY THE COPYRIGHT ACT AND IS PROPERLY PLED TO  
    WITHSTAND A MOTION TO DISMISS. .... 6

    V.   PLAINTIFFS HAVE NOT PLED VEIL PIERCING AGAINST ELGA LEJARZA NOR  
    MIKE PENN. .... 7

CERTIFICATE OF WORD COUNT ..... 9

CERTIFICATE OF SERVICE ..... 10

**TABLE OF AUTHORITIES**

**Cases**

Ashcroft v. Iqbal, 556 U.S. at 663, 129 S.Ct. 1937 (2009) ..... 2,4

Bell Atlantic Corp. v. Twombly, 550 U.S. at 555, 127 S.Ct. 1955 (2007) .....2-4

Lexmark Int’l, Inc. v. Static Control Components, Inc., 188 L.Ed.2d 392, 134 S.Ct. 1377 (2014).....5-6

Rutledge v. High Point Reg’l Health Sys., 558 F.Supp.2d 611 (M.D.N.C. 2008).....6-7

**Statutes**

15 U.S.C. § 1125 .....4-6

17 U.S.C. § 106 .....3-4

17 U.S.C. § 501 .....3-4

**Rules**

Fed. R. Civ. P. 8(d)(2) ..... 3

Fed. R. Civ. P. 8(d)(3) .....3-4

Fed. R. Civ. P. Rule 12(b)(6)..... 2,6

NOW COMES David Siler (“Siler”) and Distinctive Human Resources, Inc. (“DHR”) (collectively “Plaintiffs”) respectfully submitting this memorandum in opposition to Defendants’ Motion to Dismiss (the “Motion”).

## **INTRODUCTION**

This lawsuit arises primarily out of numerous infringements on Plaintiffs’ copyrights and as well as Defendants’ continuous usage of Plaintiffs’ copyrighted content as their own. The lawsuit is against two individuals and two companies.

## **FACTS**

Plaintiffs were first aware of Defendants’ actions when a mutual connection between the two notified Plaintiffs that Defendants were using Plaintiffs’ content in their courses. Defendants never had permission to use the copyrighted content in the manner in which Defendants were using it. With subsequent research, Plaintiffs discovered that Defendants were giving away Plaintiffs’ audio CDs through their workshops and accessing Plaintiffs’ digital content more than fifty times as much as any other user of Plaintiffs’, with some days exceeding twenty-two hours of online access time.

## **QUESTIONS PRESENTED BY DEFENDANTS**

- I. WHETHER PLAINTIFFS’ CLAIM FOR BREACH OF CONTRACT IS PREEMPTED BY THE COPYRIGHT ACT.
- II. WHETHER PLAINTIFFS’ COMMON LAW COPYRIGHT INFRINGEMENT CLAIM IS EXPRESSLY PREEMPTED BY THE COPYRIGHT ACT.

- III. WHETHER PLAINTIFFS' CLAIM FOR UNFAIR COMPETITION UNDER 15 U.S.C. § 1125 IS DUPLICATIVE OF PLAINTIFFS' COPYRIGHT CLAIM.
- IV. WHETHER PLAINTIFFS' UDTPA CLAIM FAILS AS TO ALL DEFENDANTS WHERE IT IS PRE-EMPTED BY THE COPYRIGHT ACT AND NOT PROPERLY PLED TO WITHSTAND A MOTION TO DISMISS.
- V. WHETHER PLAINTIFFS HAVE PROPERLY PLED VEIL PIERCING CLAIMS AGAINST ELGA LEJARZA AND MIKE PENN.

### **STANDARD OF REVIEW**

“While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations... .a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555, 127 S.Ct. at 1964-65 (Internal quotes and brackets removed). Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact). *Id.*

“Detailed factual allegations are not required, but the Rule does call for sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. at 663, 129 S.Ct. 1937 (2009) quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. “A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “Two working principles underlie *Twombly*. First, the tenet that a court must accept a complaint’s allegations as true is inapplicable to threadbare recitals of a cause of action’s elements, supported by mere conclusory statements. Second, determining whether a complaint states a plausible claim

is context specific, requiring the reviewing court to draw on its experience and common sense.” *Id.* at 663-64.

## **ARGUMENT**

### **I. WHETHER PLAINTIFFS’ CLAIM FOR BREACH OF CONTRACT IS PREEMPTED BY THE COPYRIGHT ACT.**

Beyond what is stated in Plaintiffs’ Complaint, Plaintiffs make no argument towards whether or not Plaintiffs’ claim for Breach of Contract is preempted by the Copyright Act.

### **II. PLAINTIFFS’ COMMON LAW COPYRIGHT INFRINGEMENT CLAIM IS NOT PREEMPTED BY THE COPYRIGHT ACT.**

“A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.” Fed. R. Civ. P. 8(d)(2). “A party may state as many separate claims or defenses as it has, regardless of consistency.” Fed. R. Civ. P. 8(d)(3).

Plaintiffs do not concede “that if Plaintiff’s first cause of action survives the Defendants’ Motion, then the fourth cause of action should be dismissed” as the Defendants have argued in their memorandum. Plaintiffs are alleging exactly that which is stated in their Complaint under Count IV: “Should the Court determine there is no copyright infringement under 17 U.S.C. § 106 and 501 for some or all of the content of

the Test Prep Materials, Plaintiffs plead the following, in the alternative specifically for the content and acts not found to be infringed under 17 U.S.C. § 106 and 501:”. Compl. Count IV. Therefore, only if this Court finds in favor of Plaintiffs for the first cause of action for all portions of the Test Prep Materials would Plaintiffs concede the fourth cause of action should be dismissed. See Fed. R. Civ. P. 8(d)(3).

The sole determination of whether a cause of action should be dismissed on this Motion is whether or not, if taken as true, the allegations in the Complaint satisfy the requirements of *Iqbal* and *Twombly* to survive a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6). *Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009), *Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007). Under this requirement, Plaintiffs’ Common Law Copyright claim should not be dismissed.

**III. PLAINTIFFS’ CLAIM FOR UNFAIR COMPETITION UNDER 15 U.S.C. § 1125 SHOULD NOT BE DISMISSED.**

Defendants argue that “Plaintiffs’ claim for unfair competition under 15 U.S.C. § 1125 is nothing more than a copyright claim in disguise”. However, a plain reading of Plaintiffs’ Complaint will show that the elements alleged are distinct from that of the Copyright Infringement claim. Compl. ¶¶ 193-204.

Section 1125(a) provides: “(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which (A) is

likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act." 15 U.S.C. § 1125.

The Supreme Court, in *Lexmark Int'l, Inc. v. Static Control Components, Inc.* laid out the elements for establishing an Unfair Competition claim under Section 1125. The Court must apply the zone-of-interests test and the proximate cause requirement to determine who may sue under an Unfair Competition cause of action. *Lexmark Int'l*, 188 L.Ed.2d 392, 134 S.Ct. 1377 (2014). "We thus hold that to come within the zone of interests in a suit for false advertising under § 1125(a), a plaintiff must allege an injury to a commercial interest in reputation or sales." *Id.* In Plaintiffs' Complaint, Plaintiffs have alleged that "Defendants' unauthorized usage of the Test Prep Materials belonging to Plaintiffs has caused and continues to cause Plaintiffs harm when potential customers choose to not purchase Plaintiffs' products because the potential customer can obtain the Test Prep Materials or a product that includes the Test Prep Materials through Defendants' Workshops." Compl. ¶¶ 202. Therefore, Plaintiffs meet the first prong of the test set in *Lexmark Int'l*.



The second test is the proximate cause test. “We thus hold that a plaintiff suing under § 1125(a) ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant’s advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff.” *Lexmark Int’l*, 134 S.Ct. 1377 (2014). “Put differently, the proximate-cause requirement generally bars suits for alleged harm that is ‘too remote’ from the defendant’s unlawful conduct.” *Id.*

In Plaintiffs’ Complaint, Plaintiffs allege a direct causation between the harm and Defendants’ intentional action. Compl. ¶¶ 193-202. Therefore, Plaintiffs’ claim for Unfair Competition should not be dismissed under Defendants’ Motion to Dismiss under Fed. R. Civ. P. 12(b)(6).

**IV. PLAINTIFFS’ UNFAIR AND DECEPTIVE TRADE PRACTICES ACT CLAIM IS NOT PREEMPTED BY THE COPYRIGHT ACT AND IS PROPERLY PLED TO WITHSTAND A MOTION TO DISMISS.**

Defendants argue that Plaintiffs’ Unfair and Deceptive Trade Practices Act claim is “nothing more than a copyright claim in disguise”. However, relying on the case Defendants relied on, *Rutledge v. High Point Reg’l Health Sys.*, 558 F.Supp.2d 611 (M.D.N.C. 2008), it is evident that Plaintiffs’ Complaint satisfies the extra element test.

Plaintiffs do not dispute that the work is within the subject matter of copyright, the first element of *Rutledge*. However, Plaintiffs dispute that there are equivalent rights between their Copyright Infringement claim and their UDTPA claim. “Common

examples of extra elements in unfair competition claims that typically avoid preemption include ‘breach of fiduciary duty, breach of a confidential relationship, and palming off of the defendant’s products as those of the plaintiffs.’” *Rutledge*, 558 F.Supp.2d 611 at 617 (M.D.N.C., 2008). In this case, Plaintiffs have alleged that Defendants are palming off the Plaintiffs’ products as those of the Defendants. Compl. ¶¶ 96, 108, 111-115, 119, 121, 124, 127, 128, 130, 131, 141, 156, 193-204, & 213-222.

Therefore, when the allegations are taken as true, Plaintiffs’ claim for Defendants’ violation of the Unfair and Deceptive Trade Practices Act of North Carolina should not be dismissed under Defendants’ Motion as it meets the extra element test in *Rutledge*.

Plaintiffs have never alleged that a breach of contract was a consideration for the establishment of a claim for Unfair and Deceptive Trade Practices, so Plaintiff does not need to address Part IV, b of Defendants’ Memorandum.

**V. PLAINTIFFS HAVE NOT PLED VEIL PIERCING AGAINST ELGA LEJARZA NOR MIKE PENN.**

Plaintiffs have made no claim for veil piercing against Elga Lejarza nor Mike Penn in their Complaint; however, the claims against the individual Defendants should not be dismissed. Piercing the LLC or Corporate Veil is not the only way an individual can be liable in a lawsuit. Plaintiffs made numerous claims against Elga Lejarza individually throughout the Complaint. Compl. ¶¶ 166-222. Plaintiffs made numerous claims against Mike Penn individually throughout the Complaint. Compl. ¶¶ 166-181, 193-222.

Respectfully submitted this the 30<sup>th</sup> day of July, 2019.

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## CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d), the undersigned certifies that the Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss does not exceed 6,250 words and is in compliance with this Rule. The total word count is 1,708. The undersigned relied on the word count feature on the software utilized to draft this memorandum, and the word count includes the body of the brief, headings, and footnotes. The word count does not include the caption, signature lines, certificate of service, and any cover page or index.

Respectfully submitted this the 30<sup>th</sup> day of July, 2019.

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**CERTIFICATE OF SERVICE**

The undersigned certifies the foregoing **MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** has been filed with the Clerk of Court for the United States District Court, Eastern District of North Carolina, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented to accept service by electronic means.

This the 30 day of July, 2019.

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