IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

JOHN PRICE, Plaintiff, v. MOODY INDEPENDENT SCHOOL DISTRICT, MOODY ATHLETIC BOOSTER CLUB, ANDREW MILLER, AND BRANDY HIPSHER COX, Defendants.	§ § § § § § § § § § § §	Case No. 6:23-CV-845-ADA-DTG

DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFF'S ORIGINAL COMPLAINT

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Defendants Moody Independent School District ("Moody ISD"), the Moody Athletic Booster Club (the "Booster Club"), Andrew Miller, Superintendent of Moody ISD, and Brandy Hipsher Cox, President of the Booster Club, jointly file this Motion to Dismiss Plaintiff's Original Complaint for failure to state a claim pursuant to Fed. R. of Civ. Pro. 12(b)(6).[1]

INTRODUCTION

The Complaint[2] filed by Plaintiff John Price ("Plaintiff" or "Price") should be dismissed in its entirety. Plaintiff's copyright infringement claims are barred by the applicable statute of limitations and otherwise fail given Plaintiff's scant allegations against Defendants. On December 10, 2023, Plaintiff filed suit against Moody ISD, the Booster Club, Mr. Miller, and Mrs. Cox asserting claims arising from Moody ISD's and the Booster Club's alleged use of an M with a claw (the "MCLAW DESIGN") of which he was aware as long ago as October 2011. While Plaintiff lodges sweeping accusations against all Defendants' purported "countless unauthorized uses" dating back over a decade of which Price was fully aware, Plaintiff's Complaint is conspicuously light on specific, well-pleaded facts supporting his vague assertions of copyright infringement. ¶¶ 12-13.[3] Plaintiff pleads just *two paragraphs* of substantive allegations to support his copyright infringement claims against four defendants for alleged conduct occurring over at least twelve years. *Id.* Price's claims under the Digital Millennium Copyright Act ("DMCA") are

[1] Plaintiff's caption and pleadings reference "Moody Athletic Booster Club" and "Brandy Hipsher Cox." The correct names of these Defendants are Bearcat Athletic Booster Club and Brandy C'ne Cox. For this Motion, these defects are immaterial, as Plaintiff's allegations are time barred and otherwise fail to state a claim. It is assumed that the misnomer/misidentification can be corrected in the unlikely event this case proceeds past the motion to dismiss stage.

[2] The allegations set forth herein are taken from the Complaint and are recited solely to give context for this Motion. Defendants do not concede that the allegations are true and accurate, and further, do not waive their right to deny and/or contest any of the allegations in the Complaint.

[3] Citations to " ¶ " or " ¶¶ " refer to the paragraphs of the Original Complaint (Dkt. 1). Unless otherwise noted, all emphasis is added, and all internal quotations and citations are omitted.

similarly deficient. The Complaint represents a textbook example of a conclusory "the-defendant-unlawfully-harmed-me" pleading that does not suffice to state a claim under *Twombly* and *Iqbal*'s plausibility standard.

Plaintiff's Complaint fails to plead necessary elements for multiple claims, impermissibly lumps together defendants, resorts to bare assertions "upon information and belief," and lacks the factual specificity required to support any of its claims. Plaintiff's claims for statutory damages and attorneys' fees under 17 U.S.C. §§ 504 and 505 also fail as a matter of law under controlling Fifth Circuit authority. As for Plaintiff's DMCA claim, Price confuses Moody ISD's claim of *trademark* ownership for a false representation of "copyright management information," fails to show that claim was false, and fails to plausibly allege the statute's exacting dual scienter requirement. Plaintiff's Complaint should be dismissed.

FACTUAL ALLEGATIONS

Plaintiff claims he is a graphic artist and the owner of Stampede Screen Graphics in Moody, Texas. ¶ 10. Plaintiff, who lives in Moody, alleges that he created the graphic at issue in 2009, which he printed on t-shirts for his sons, then attending schools within Moody ISD. *Id.* According to Plaintiff, he is "the sole author and creator of each and every element of the MCLAW DESIGN" and intended for it to be "used and licensed" throughout the country by schools with clawed mascots. ¶¶ 10-11.

Plaintiff "first became aware of" "the Defendants'" alleged "unauthorized use" of the MCLAW DESIGN in October 2011 when he "spotted hoodies" bearing the design at a football game. ¶ 12. Plaintiff alleges, without detail, that he "immediately protested" the alleged "counterfeit hoodies." *Id.* Plaintiff alleges on "information and belief" that the hoodies were manufactured by a "third-party screen printer" commissioned by the Booster Club. *Id.*

Then, Plaintiff alleges that in October 2014, the Booster Club "again printed" the MCLAW DESIGN on a hoodie, he "protested," and the Booster Club "recklessly ignored" his complaints. ¶ 13. Plaintiff asserts that Defendants Moody ISD and the Booster Club, "over the course of the following 8 years," made "countless unauthorized uses of the MCLAW DESIGN, including dozens of counterfeit products sold on the [Booster Club] merchandise page" and "prominent use of the design on the [Moody ISD] Football field, water tower, flags" and Moody ISD website. *Id.*

Without elaboration, Plaintiff claims he "protested all of these uses" and that Moody ISD "maliciously retaliated" by "black balling him," *i.e.*, "refusing to acknowledge him as author" and giving Stampede Screen Graphics no further business from Defendants. *Id.* Plaintiff further states without explanation that Mr. Miller and Mrs. Cox "participated" or were the "dominant influences" who "determined the policies that resulted in the infringement." ¶¶ 19, 24.

On August 17, 2022, Plaintiff filed an application for copyright registration of the alleged design with the U.S. Copyright Office and was issued certificate of registration number VA 2-319-465 on September 21, 2022. ¶ 14.[4] Plaintiff alleges that Moody ISD filed an application for trademark registration of the MCLAW DESIGN with the U.S. Patent and Trademark Office on August 23, 2022 and that Mr. Miller "fraudulently identified" Moody ISD as the owner of the MCLAW DESIGN mark. ¶ 15.

LEGAL STANDARD

Rule 12(b)(6) motions should be granted if the plaintiff fails to plead "enough facts to state a claim to relief that is plausible on its face" and "raise a right to relief above the speculative level."

[4] Plaintiff does not (and cannot) claim *prima facie* evidence of the validity of a copyright, as he registered the copyright more than five years after the design's alleged "first publication" on April 2, 2009. 17 U.S.C. § 410(c); *see Choyce v. SF Bay Area Indep. Media Ctr.*, 2014 WL 5597274, at *2 (N.D. Cal. Nov. 3, 2014) (plaintiff cannot "avail himself of th[e] *prima facie* presumption").

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007). "[T]hreadbare recitals of a cause of action's elements, supported by mere conclusory statements" do not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). A court is not to "strain to find inferences favorable to the plaintiff[]" and is not to accept "conclusory allegations, unwarranted deductions, or legal conclusions." *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005).

ARGUMENT

I. The Court should dismiss Plaintiff's copyright infringement claims.

Plaintiff's copyright infringement claims are barred by the Copyright Act's statute of limitations, which requires claims to be brought within three years of accrual. Because Plaintiff's claim is an ownership claim that accrued more than three years before his Complaint, all of his claims for infringement are barred. Alternatively, Plaintiff's copyright infringement claims fail for the additional reason that he fails to state a plausible claim for relief.

A. The statute of limitations bars Plaintiff's copyright claims, in whole or in part.

Copyright claims must be brought within three years of accruing, 17 U.S.C. § 507(b), and Plaintiff "first became aware of" "the Defendants'" alleged "unauthorized use" of the MCLAW DESIGN in October 2011 when he "spotted hoodies" bearing the design at a football game. ¶ 12. Dismissal under the statute of limitations is appropriate "where it is evident from the plaintiff's pleadings" that the claims are time barred and "the pleadings fail to raise some basis for tolling or the like," such as where it is "apparent from the [] complaint" that the plaintiff was "fully aware" of his claims. *See Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003).

A copyright claim "accrues," and the three-year clock starts running, when the plaintiff "discover[s]" the alleged infringement. *Martinelli v. Hearst Newspapers, L.L.C.*, 65 F.4th 231, 235 (5th Cir. 2023). Under the "separate accrual" rule, each act of infringement gives rise to a

separate independent claim, meaning that "each infringing act starts a new limitations period." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 671 (2014).[5] However, courts considering the issue have held that "[a] claim involving a dispute over *copyright ownership* accrues when a plaintiff knows or has reason to know of the injury upon which the claim is premised." *See, e.g.*, *Ortiz v. Guitian Bros. Music Inc.*, 2008 WL 4449314, at *3 (S.D.N.Y. Sept. 29, 2008) (granting summary judgment for defendants where plaintiff's infringement claim accrued when defendants repudiated plaintiff's copyright ownership more than three years prior to complaint). "When a plaintiff's underlying *ownership* claim is time-barred, *all infringement claims* related to that claim of copyright ownership are *also time-barred*, even if based on allegedly infringing actions occurring within the three-year limitations period." *Roberts v. BroadwayHD LLC*, 518 F. Supp. 3d 719, 733 (S.D.N.Y. 2021) (dismissing infringement claim based on limitations because claim accrued when defendants repudiated plaintiff's copyright by licensing out and using the work).[6]

A plaintiff places "ownership of the copyright squarely at issue" by alleging that he "is the sole owner of the copyrights" underlying the action. *Ortiz*, 2008 WL 4449314, at *3. An ownership claim *accrues* when a defendant repudiates the plaintiff's copyright, which may be done "by conspicuously exploiting the copyright without paying royalties." *Wilson v. Dynatone Publ'g Co.*, 892 F.3d 112, 118 (2d Cir. 2018). A defendant who openly and notoriously sells an alleged owner's work without providing payment has clearly repudiated a plaintiff's ownership claim. *Guajardo*, 2015 WL 7738075, at *7 ("The clearest example of repudiation of ownership occurs

[5] *See also id.* at 672, 677 ("Thus, when a defendant has engaged … in a series of discrete infringing acts, the copyright holder's suit ordinarily will be timely … with respect to more recent acts of infringement (*i.e.*, acts within the three-year window), but untimely with respect to prior acts of the same or similar kind.… No recovery may be had for infringement in earlier years.").

[6] *See also Guajardo v. Freddie Records, Inc.*, 2015 WL 7738075, at *7 (S.D. Tex. Dec. 1, 2015) (denying declaratory relief because statute of limitations had run, noting ownership claim "accrues only once, and if an action is not brought within three years of accrual, it is forever barred").

when a defendant openly, and quite notoriously, sold [plaintiff]'s records without providing payment to him.").[7]

Plaintiff places his ownership of the copyright at issue by alleging that he "is and always has been the sole author and creator of each and every element of the MCLAW DESIGN." ¶ 11. His ownership claim accrued, as pleaded, when Defendants repudiated his alleged copyright ownership via "dozens of counterfeit products sold on the [Booster Club] merchandise page" and "prominent use of the design on the [Moody ISD] Football field, water tower, flags and on the [Moody ISD] website." ¶ 13. Plaintiff alleges that these sales and prominent uses occurred "countless" times between October 2014 and the following eight years. *Id*. And even before that, Plaintiff alleges prominent use of the design at a football game in 2011. ¶ 12. Plaintiff does not allege that he has received payment from Defendants, but rather that they "refus[e] to acknowledge him as author of the design." ¶ 13.

Defendants' allegedly open, notorious, and remunerative uses of the MCLAW DESIGN repudiated Plaintiff's alleged copyright ownership. *See, e.g.*, *Sanchez*, 2014 WL 7366678, at *7 (barring claims in infringement suit because copyright ownership dispute accrued when plaintiff knew of public sale of work). Plaintiff's Complaint—filed on December 10, 2023—was filed more than three years after the first alleged open and notorious or remunerative use. As such,

[7] *See also Sanchez v. Hacienda Records & Recording Studio, Inc.*, 2014 WL 7366678, at *7 (S.D. Tex. Dec. 24, 2014) (citing *Santa-Rosa v. Combo Records*, 471 F.3d 224, 228 (1st Cir. 2006)) (denying motion to amend summary judgment against copyright infringement claim, reasoning that the statute of limitations barred a claim that accrued when the plaintiff learned that the defendant was selling his work without paying him royalties; "[c]ourts view open selling of records without paying the asserted copyright owner as a plain and express repudiation of the asserted copyright ownership."); *Ortiz*, 2008 WL 4449314, at *5 (ownership claim accrued when plaintiff knew of defendants' repudiating acts, such as public distribution of work); *Pritchett v. Pound*, 2005 WL 8160965, at *1 (E.D. Tex. Feb. 1, 2005) (publishing book without listing copyright claimant as author was repudiation for limitations purposes), *aff'd*, 473 F.3d 217 (5th Cir. 2006).

Plaintiff's ownership and infringement claims are time barred. *See, e.g.*, *Guajardo*, 2015 WL 7738075, at *7 (ownership claim accrues only once).

Several circuit courts, and courts in this circuit, have adopted the ownership rule, and courts distinguish the Supreme Court's decision in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014) by noting it was not an ownership case. *E.g.*, *Webster v. Dean Guitars*, 955 F.3d 1270, 1276 (11th Cir. 2020) (adopting ownership rule, noting *Petrella* "did not concern a copyright ownership claim"). The Fifth Circuit has indicated a likelihood to apply the ownership rule, too, albeit before *Petrella*. *See Pritchett*, 473 F.3d at 220 (holding that an alleged copyright co-owner's "declaratory judgment rights accrued when it knew or had reason to know of the injury upon which the claim is based"). The Court should apply the ownership rule here and dismiss Price's claims.

Beyond the ownership rule, the statute of limitations mandates dismissal of Plaintiff's claims that are based on alleged infringement that occurred before December 10, 2020. *See Petrella*, 572 U.S. at 672 (infringement suit is untimely for infringing acts predating complaint by three years); *see also, e.g.*, *Cael Techs. (Pvt.) Ltd. v. Precise Voting, LLC*, 996 F. Supp. 2d 216, 220 (E.D.N.Y. 2014) ("[A]ny claim of copyright infringement based on acts allegedly taken by Defendants prior to March 20, 2010 is time-barred and hereby dismissed."); *Goldberg v. Cameron*, 482 F. Supp. 2d 1136, 1152 (N.D. Cal. 2007) ("Plaintiff's copyright infringement claims prior to August 31, 2002 are dismissed as time-barred."). Here, the vast majority of the alleged infringement is indisputably barred by limitations. On its face, the Complaint alleges infringing acts spanning more than a decade and asserts (without factual support) that Plaintiff "protested *all* of these uses," but provides no details. *See* ¶¶ 12-13. The Complaint thus alleges acts of infringement stretching back twelve years—well outside the three-year limitations period—and *concedes* that Plaintiff was aware of the alleged infringement. *Id.* The claims should be barred.

B. Plaintiff fails to state plausible claims for copyright infringement.

Even if Plaintiff's claims were not altogether barred, Plaintiff does not sufficiently allege facts to state any infringement claim in the three years preceding his Complaint, fails to allege facts to permit proceeding against Mr. Miller and Mrs. Cox individually, and fails to meet the prerequisites for statutory damages and attorneys' fees under 17 U.S.C. § 412.

i. Plaintiff has not stated a claim for direct copyright infringement.

A direct copyright infringement claim has two elements: "(1) ownership of a valid copyright and (2) actionable copying." *Bridgmon v. Array Sys. Corp.*, 325 F.3d 572, 576 (5th Cir. 2003). "In applying Rule 8(a)(2) to copyright infringement claims, most courts hold that a properly pled copyright infringement claim must allege: (1) which specific original works are the subject of the claim, (2) that the plaintiff owns the copyright, (3) that the works have been registered in compliance with the copyright laws, and (4) by what acts and during what time the defendant has infringed the copyright." *Am. Plastic Equip., Inc. v. Toytrackerz, LLC*, 2008 WL 917507, at *2 (D. Kan. Mar. 31, 2008); *see also Sefton v. Jew*, 201 F. Supp. 2d 730, 747 (W.D. Tex. 2001) (citing *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 36 (S.D.N.Y. 1992), *aff'd*, 23 F.3d 398 (2d Cir. 1994)) (same).[8] To survive dismissal, the complaint must allege "*specific* acts of infringement by each defendant." *Taylor v. IBM*, 54 F. App'x 794 (5th Cir. 2002).

There are no allegations in the Complaint that plausibly plead infringement within three years of the Complaint. The incidents alleged in October 2011 and October 2014, ¶¶ 12-13, are

[8] Even courts that do not interpret Rule 8 as requiring the standard set forth above still require the plaintiff to plead sufficient details to support his copyright claims. *See Marshall v. McConnell*, 2006 WL 740081, at *4 & n.4 (N.D. Tex. Mar. 23, 2006) ("Plaintiffs' bare-bones allegations of copyright infringement do not satisfy the pleading requirements of Rule 8(a).").

plainly time barred.[9] *Supra* § I.A. To tiptoe around limitations, Plaintiff hinges his direct infringement claims on a single, vague assertion that "over the course of the following 8 years," the Booster Club and Moody ISD made "countless unauthorized uses of the MCLAW DESIGN, including dozens of counterfeit products sold on the [Booster Club's] merchandise page" and "prominent use of the design on the [Moody ISD] Football field, water tower, flags and on the [Moody ISD] website." ¶ 13. This one-sentence allegation fails to state a claim.

In *Patrick v. Wal-Mart, Inc.-Store No. 155*, for example, the Fifth Circuit affirmed dismissal of a complaint for failure to satisfy the plausibility requirement where much of the allegations were time barred, but the plaintiff argued others were timely. 681 F.3d 614, 623 (5th Cir. 2012) (one-sentence allegation of continuing conduct within the limitations period did not state a claim under *Iqbal*); *see also Jaso v. The Coca Cola Co.*, 435 F. App'x 346, 353 (5th Cir. 2011) (copyright claims that just "barely" allege "*some*" acts of infringement within the limitations period must still satisfy *Iqbal*'s plausibility requirement).

Plaintiff does not plead what "specific acts" "each defendant" committed, *Taylor*, 54 F. App'x 794, and *when* each defendant allegedly committed them. *See Mahnke v. Munchkin Prod., Inc.*, 2001 WL 637378, at **4-5 (S.D.N.Y. June 7, 2001) (dismissing claim where plaintiff alleged that defendant manufactured infringing toy "beginning some time in 1993" because it "[could] not

[9] These allegations are also conclusory. Plaintiff does not connect Moody ISD or the individual Defendants to these incidents at all, and he pleads only "upon information and belief" that the Booster Club commissioned the hoodies. *See Salermo v. Hughes Watters & Askanase LLP*, 516 F. Supp. 3d 696, 710 (S.D. Tex. 2021) ("What's plainly impermissible is to make a flat assertion of liability and ask that it be accepted as true. But that appears to be the type of assertion that [plaintiff] makes here *upon information and belief* …. To the contrary, the plaintiff must still allege enough facts to state a claim to relief that is plausible on its face."). That the Booster Club "printed" the MCLAW DESIGN on hoodies is a mere recital of the "copying" element of the cause of action, supported by mere conclusory statements. *Cf. Lixenberg v. Complex Media, Inc.*, 2023 WL 144663, at *3 (S.D.N.Y. Jan. 10, 2023) (allegations that the defendants published an infringing article on affiliate "social media sites" were "threadbare recitals").

be discerned" whether toy was still in production within limitations period). Price's one-sentence laundry list of purported "unauthorized uses" across an amorphous time frame of 8 years, ¶ 13, renders it impossible for Defendants to discern who allegedly infringed within the three-year limitations period (assuming his claims are not wholly time barred). Such details are necessary to determine whether the "unauthorized uses" were *actionable* copying at all, *Bridgmon*, 325 F.3d at 576, because infringement is actionable only within the limitations period, 17 U.S.C. § 507(b).

Moreover, Plaintiff fails to sufficiently allege which specific Defendant(s) is allegedly responsible for which "unauthorized uses." *See* ¶¶ 13, 19 (collectively referring to "Defendants" and "[the Booster Club] and the District" as making "countless" uses at unspecified points over 8 years). And in some cases, Price's allegations on their face do not even suggest any connection to any Defendant at all. *See* ¶ 13 (alleging use of the design on the "water tower" and on "flags," with no supporting facts demonstrating that any Defendant had anything to do with the Moody water tower and unidentified flags). The Complaint is similar to the complaint the court dismissed in *Dell*, where the plaintiff alleged "without factual specifics" that "[d]efendants made prominent and repeated use of Dell's name, marks and graphics in their advertisements and on their website." *Dell, Inc. v. This Old Store, Inc.*, 2007 WL 1958609, at **2-3 (S.D. Tex. July 2, 2007). As in *Dell*, Price has merely "set[] forth broad, conclusory statements" that are "inadequate under *Twombly*" and fails to "distinguish among" Defendants, as is "necessary" to state claims against each. *Id.* (Plaintiff "must allege factual information of some specificity as to each Defendant.").

ii. Plaintiff failed to state a claim for contributory copyright infringement.

Plaintiff's contributory claims also fail to allege facts that could make contributory infringement plausible. Plaintiff complains that Defendants have, "*inter alia*, retain[ed] one or more screen printers and manufacturers to create merchandise featuring the MCLAW DESIGN."

¶ 24; *see also* ¶ 12 (alleging Booster Club hired screen printer in 2011 to make hoodies). But a claim for contributory infringement cannot lie on a bare allegation that a defendant instructed a third party to utilize and copy a copyrighted work. *See Donaldson Grp. Architects v. Polo Club of Boca Raton*, 2014 WL 12514896, at *3 (S.D. Fla. Feb. 7, 2014) (dismissing case where plaintiff alleged defendant provided drawings to third-party designers with instructions to copy them).

Contributory infringement, as a derivative claim, cannot exist without direct infringement by a third party. *See, e.g.*, *id.* ("Plaintiff has failed to identify any third party that actually copied and executed its work. Therefore, Plaintiff's contributory infringement allegation fails to provide enough factual content to reach the plausible level."); *Advanta-Star Auto. Rsch. Corp. of Am. v. Reynolds Ford, Inc.*, 2020 WL 5823537, at *3 (W.D. Okla. Sept. 30, 2020) (requiring adequate allegations of "predicate third-party direct infringement"); *DBW Partners, LLC v. Mkt. Sec., LLC*, 2023 WL 2610498, at *4 (D.D.C. Mar. 23, 2023) (granting dismissal due to lack of "supporting factual allegations that, if true, would establish [plaintiff's] entitlement to relief for direct copyright infringement against the third parties"). Much as Plaintiff has failed to state a claim for direct infringement by Defendants (*see* § I.B.i, incorporated here), Plaintiff has not set forth allegations that, if true, would support a claim for direct copyright infringement against the "one or more screen printers and manufacturers" Defendants supposedly retained. As such, this count fails.

iii. Plaintiff has not stated a claim for vicarious copyright infringement.

Plaintiff similarly fails to adequately plead vicarious infringement, which "allows imposition of liability" where "the defendant profits *directly*" from another's direct infringement and has the "right and ability to supervise the direct infringer." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 n.9 (2005). In collective, conclusory fashion, Plaintiff alleges that Moody ISD and the Booster Club "committed vicarious infringement because the

MCLAW DESIGN was copied, manufactured and/or distributed by independent contractors" working under their supervision and control, and because Defendants had a "direct financial interest" in those infringing activities in the form of "revenues from the sale" of "counterfeit items" and the "saved costs of licensing fees." ¶ 29.

Plaintiff's vicarious claims fail for reasons similar to his contributory claims. "[T]here are no facts supporting the existence of any third parties, as both [contributory and vicarious] theories clearly require." *Lixenberg*, 2023 WL 144663, at *3. Plaintiff's boilerplate allegations of "independent contractors," ¶ 29, are speculative and lack any well-pleaded factual bases. *See French W., Inc. v. Soft Surroundings, Inc.*, 2018 WL 4944421, at *4 (C.D. Cal. Feb. 15, 2018) ("The legal conclusion—that [defendant] had a financial interest and the right and ability to supervise [manufacturers or retail stores]—has no factual support in the Complaint whatsoever.").

Conjecture aside, Plaintiff's allegations that Moody ISD and the Booster Club supervised and controlled the "independent contractors," ¶ 29, are "conclusory recitals of the elements of the claim," *Klauber Bros., Inc. v. URBN US Retail LLC*, 2023 WL 1818472, at *8 (S.D.N.Y. Feb. 8, 2023). As in *Klauber*, Plaintiff has only baldly asserted that Defendants had the right to supervise and control unspecified contractors who "manufactured and/or distributed the MCLAW DESIGN," ¶ 29. *See* 2023 WL 1818472, at *8 (dismissing claim that the defendants "direct[ed] the manufacture of … the Infringing Products" with the "ability and right to supervise, direct, cancel, or otherwise modify its orders for the manufacture or purchase of the Infringing Products").

Nor has Plaintiff come close to pleading that Defendants enjoyed a "direct" financial benefit from the contractors' alleged infringement. Courts that have directly confronted the issue of "saved costs of licensing fees," ¶ 19, hold "as a matter of law" that avoided fees do not constitute a direct financial benefit. *See Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 830 (9th Cir. 2019)

(analyzing avoidance of fees as question of "first impression" and noting "[n]o other circuit" has addressed it). In *Erickson*, the plaintiff argued that the defendant wealth manager was vicariously liable for the infringement committed by a website developer he hired to revamp his business's website. *Id.* at 826. The website developer used copyrighted photos without paying licensing fees to the copyright owner. *Id.* at 827. The Ninth Circuit held that *the defendant* (the alleged vicarious infringer) did not receive a "direct" financial benefit from the *website developer*'s (the alleged direct infringer's) avoidance of fees. *Id.* at 830. "Otherwise, the requirement of a direct financial benefit would be rendered meaningless, since … a direct infringer necessarily saves money by failing to obtain a license." *Id.* Here, Defendants likewise cannot financially benefit in a "direct" sense from the unnamed contractors' failure to pay Plaintiff licensing fees. *Id.*; ¶ 29.

As for "revenues from the sale of the counterfeit items," ¶ 29, Plaintiff's allegations do not even suggest that Moody ISD played any part in the sale of any such items, and his vague reference to "products sold on the [Booster Club] merchandise page," ¶ 13, is a bare-bones allegation insufficient to plead that any Defendant profited from the purported *contractors'* activity.[10]

iv. Plaintiff's claims against Mr. Miller and Mrs. Cox should be dismissed.

Plaintiff's claims against these individuals fail for all of the foregoing reasons. Additionally, these claims are defective as to Mr. Miller and Mrs. Cox, specifically, because Plaintiff has not pleaded *any* facts alleging *any* conduct attributable to Mr. Miller or Mrs. Cox, but merely notes their respective positions as the Superintendent of Moody ISD and president of the Booster Club, respectively. ¶¶ 4-5. Plaintiff's lone assertion that these individuals are personally liable for Moody ISD's and the Booster Club's alleged infringement because they "participated"

[10] *See Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963) (department store could be held vicariously liable for the infringing sales of pirated records sold by its retail concessionaire where department store received a percentage of the concessionaire's gross sales).

or were the "dominant influences" behind the organizational policies resulting in infringement, ¶¶ 19, 24, is unsupported by a single fact, let alone sufficient facts to reach the "plausible" level. *See Iqbal*, 556 U.S. at 678 (it is insufficient to "tender[] naked assertions devoid of further factual enhancement"). Plaintiff's conclusory claims against Mr. Miller and Mrs. Cox amount to no more than a "threadbare" recitation, *id.* at 663, of joint and several liability, warranting dismissal. *See Lixenberg*, 2023 WL 144663, at *3 (conclusory allegations that the defendants "knowingly [] participated in" and "supervise[d] the infringing conduct" were "threadbare recitals of a cause of action's elements" that "cannot sustain a claim").

On top of the conclusory nature of the allegations, Plaintiff's Complaint misstates the legal test for joint and several liability. In the case Plaintiff's Complaint cites, ¶¶ 19, 24, the court did not apply a "dominant influence" test, but instead applied the correct test and held that the individual defendant's position as president of the corporate defendant "does not automatically establish" joint and several liability. *See Broad. Music, Inc. v. Tex Border Mgmt., Inc.*, 11 F. Supp. 3d 689, 696 (N.D. Tex. 2014) (granting judgment to the individual defendant after bench trial).

"The test of whether [an] officer is jointly and severally liable with the [organization] for copyright infringement is whether the officer has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." *Broad. Music, Inc. v. Hobi, Inc.*, 20 F.3d 1171 (5th Cir. 1994). Courts routinely dismiss copyright claims against individuals where, as here, they are premised only upon unadorned allegations of the individual's positions within the organization.[11] Here, Mr. Miller's and Mrs. Cox's positions as leaders within Moody ISD and the

[11] *See, e.g.*, *Yesh Music v. Lakewood Church*, 2012 WL 524187, at *7 (S.D. Tex. Feb. 14, 2012) (dismissing claims against individuals where the plaintiff merely alleged they were the directors of the co-defendant church); *Netbula, LLC v. Chordiant Software, Inc.*, 2009 WL 750201, at *2 (N.D. Cal. March 20, 2009) (dismissing claims and explaining that "[a]t the pleading stage, however, bare allegations that an individual was a corporate officer or a member of a company's

Booster Club, respectively, likewise cannot state a claim of joint and several liability for all actions undertaken by the organizations. Plaintiff has not even attempted to plead the requisite facts regarding Mr. Miller's and Mrs. Cox's supervision of Moody ISD's and the Booster Club's alleged infringing activities. *See Netbula*, *LLC*, 2009 WL 750201, at **3-4 (holding that plaintiffs cannot merely assert that individuals possessed supervisory power within the organization generally, but must allege specific facts supporting their supervisory power over "the infringing conduct itself"). Nor has Plaintiff attempted to plead (and cannot plead) any financial gain or interest from the alleged infringement. *See Yesh Music*, 2012 WL 524187, at *7 (plaintiffs must plead that the individuals had a *personal* "financial stake" in the infringing activity). The Court should dismiss Plaintiff's copyright claims against these individuals as wholly without support or merit.[12]

v. Section 412 of the Copyright Act bars Plaintiff's request for statutory damages and attorneys' fees.

Plaintiff is not entitled to statutory damages or attorneys' fees as a matter of law, and his claims for such relief should be dismissed. *See* ¶¶ 21, 26, 31 (pleading entitlement to statutory damages and attorneys' fees under 17 U.S.C. §§ 504 and 505). The Copyright Act states that "no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for" any infringement a defendant commenced "before the effective date of [copyright] registration." 17 U.S.C. § 412; *see also Leland Med. Centers, Inc. v. Weiss*, 2007 WL 2900597,

board of directors are insufficient"); *UIRC-GSA Holdings Inc. v. William Blair & Co., L.L.C.*, 2017 WL 1163864, at *6 (N.D. Ill. Mar. 29, 2017) ("Plaintiff's allegations fail because they do not allege or even support an inference that [company manager] had a direct financial interest in or received any personal financial benefit from the alleged infringing activity.").

[12] Price's "official capacity" claims against Mr. Miller, ¶ 4, are duplicative and should be dismissed. *See, e.g.*, *Eltalawy v. Lubbock Indep. Sch. Dist.*, 816 Fed. App'x 958, 962-63 (5th Cir. 2020) (claims against school employee are redundant of claims against school district). The "official capacity" claims against Mrs. Cox, ¶ 5, are "not cognizable because [Booster Club] is a private entity" and, even if they were cognizable, would be redundant of the claims against the Booster Club. *Culbreth v. Primecare Med. Inc.*, 2023 WL 8845310, at *2 (E.D. Pa. Dec. 21, 2023).

at *2 (E.D. Tex. Sept. 28, 2007) (dismissing claims for statutory damages and attorneys' fees under § 412 where defendants' alleged infringement occurred before plaintiff registered the copyrights).

Further, the Fifth Circuit has held that Section 412 bars statutory damages and attorneys' fees even in connection with a defendant's post-registration infringement if infringement also occurred before registration. *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 144 (5th Cir. 1992) ("We thus conclude that a plaintiff may not recover an award of statutory damages and attorney's fees for infringements that commenced after registration if the same defendant commenced an infringement of the same work prior to registration."); *see also S. Credentialing Support Servs., L.L.C. v. Hammond Surgical Hosp., L.L.C.*, 946 F.3d 780, 787 (5th Cir. 2020) ("Congress prohibited statutory damages when 'any infringement' precedes registration."). Stated differently, where the first alleged infringement occurred prior to copyright registration, statutory damages and attorneys' fees are barred not only for the initial infringement, but also for all infringements occurring after registration. *Id.*

Plaintiff admits that he did not register the copyright until August 2022 and that Defendants' alleged infringement began many years before that. *See* ¶¶ 12-14. Under Section 412 and controlling Fifth Circuit authority, Plaintiff cannot recover statutory damages and attorneys' fees in connection with any of the infringing activity alleged in the Complaint—whether before or after Plaintiff's copyright registration. *Mason*, 967 F.2d at 144. The Court should dismiss Plaintiff's claims for statutory damages and attorneys' fees for failure to state a claim, *Bertuccelli v. Universal City Studios LLC*, 2020 WL 1493483, at *3 (E.D. La. Jan. 29, 2020) ("Plaintiffs' proposed attorneys' fees claim … is futile because it fails to state a claim upon which relief can be granted as a matter of law."), and dismissal should extend to his claims for willfulness damages,

¶¶ 20, 25, 30, because they are enhancements to statutory damages only, which are unavailable.[13]

II. Plaintiff's DMCA claims against Moody ISD and Mr. Miller should be dismissed.

Plaintiff fails to state a claim against Moody ISD or Mr. Miller (the "DMCA Defendants") for violation of § 1202(a) of the DMCA, and the Court should dismiss his fourth count, including his request for statutory damages and attorneys' fees.[14] Plaintiff's claim is based on a *trademark* application stating that Moody ISD owns the *trademark* for the MCLAW DESIGN; Plaintiff wholly ignores the differences between trademark and copyright rights and wrongly assumes that a claim of mark ownership is copyright management information ("CMI"). Nor does the claim allege any facts to dispute that Moody ISD *is* the mark owner—let alone that it *knows* otherwise and *lied* in its trademark application so that it could continue infringing Plaintiff's copyright.

To state a claim under § 1202(a), a plaintiff must allege four elements: "(1) the provision or distribution of CMI; (2) that the CMI was false; (3) that the defendant knew the CMI was false; and (4) that the Defendant acted with the intent to cause or conceal copyright infringement." *Niehuss v. Colossal Biosciences, Inc.*, 2023 WL 8191905, at *3 (W.D. Tex. Nov. 27, 2023). Elements three and four require "double scienter": "a plaintiff must plausibly allege that a

[13] *Compare* 17 U.S.C. § 504(b) (actual damages statute containing no willfulness enhancement), *with* 17 U.S.C. § 504(c)(2) (statutory damages statute containing willfulness enhancement); *see also, e.g.*, *Norrell v. Does*, 2023 WL 5803706, at *6 (W.D. Tex. Sept. 6, 2023) (noting "[i]f a plaintiff chooses statutory damages" instead of actual damages, the court may award enhanced damages for willfulness); *Custom Direct, LLC v. Wynwyn, Inc.*, 2010 WL 1794248, at *2 (D. Md. May 4, 2010) ("An owner of a copyright is not entitled to enhanced or punitive damages for willful infringement unless it also is entitled to statutory damages.").

[14] Courts have held that § 412, *supra* § I.B.v, also bars statutory damages and attorneys' fees requested under § 1203, ¶ 35. *Granger v. Assocs. Abstract, LLC*, 2010 WL 11692440, at *5 (D.N.J. Apr. 6, 2010) ("Because Section 412 applies to 'any action' under Title 17, Plaintiff's ability to seek statutory damages for alleged [DMCA] violations … is generally limited by Section 412[.]") (citing *EsNtion Recs., Inc. v. TritonTM, Inc.*, 2009 WL 3805827, at *6 (N.D. Tex. Nov. 13, 2009)).

defendant both (1) knowingly provided false copyright information, and (2) did so with the intent to induce, enable, facilitate, or conceal an infringement." *Id*. Plaintiff's claim fails each element.

Element 1: Plaintiff has not alleged that the DMCA Defendants provided CMI *at all*. Plaintiff's sole allegation that the DMCA Defendants provided false CMI is that they attempted to register the MCLAW DESIGN with the USPTO. ¶ 34. More specifically, Plaintiff alleges that, on a *trademark* application, the DMCA Defendants "fraudulently identified [Moody ISD] as the 'owner' of the MCLAW DESIGN." ¶ 15. This identification of *mark* ownership is not CMI.

CMI is defined as eight types of information about a work. 17 U.S.C. § 1202(c). Plaintiff does not identify which type of CMI pertains to a claim of trademark ownership, ¶ 34, and none of the statute's categories clearly embrace this information. The inclusion of trademark and branding information *on* a copyrighted work may constitute CMI if it "is used to signal authorship of a copyrighted work." *GC2 Inc. v. Int'l Game Tech. PLC*, 255 F. Supp. 3d 812, 822 (N.D. Ill. 2017). But failure to allege that a defendant signals authorship or copyright ownership is "particularly fatal" to a DMCA claim because the "point of CMI is to inform the public that something is copyrighted[.]" *Laser Kitten, LLC v. Marc Jacobs Int'l, LLC*, 2018 WL 4830091, at *4 (S.D.N.Y. Oct. 4, 2018) (granting motion to dismiss).

Plaintiff's allegations do not allow a plausible inference that the DMCA Defendants signaled authorship or copyright ownership by identifying Moody ISD as the owner of a mark in a trademark application, and his DMCA claim therefore fails. "Ownership of trademarks is established by use, not by registration." *Union Nat. Bank of Tex., Laredo, Tex. v. Union Nat. Bank of Tex., Austin, Tex.*, 909 F.2d 839, 842 (5th Cir. 1990). So identifying Moody ISD as the mark owner merely conveys to the USPTO that Moody ISD believes its use of the mark establishes its ownership; indeed, Moody ISD has used the mark M in another form since at least as early as

1889. Dkt. 1 at 29. That another person has a copyright to the same material as the mark does not negate mark ownership or registration entitlement. *See, e.g.*, *Carano v. Vina Concha y Toro S.A.*, 2003 WL 21353890, at *3, 67 U.S.P.Q.2d 1149 (T.T.A.B. 2003) (dismissing trademark opposition and noting that "an allegation of copyright infringement alone does not constitute the necessary statutory ground which negates the [applicant's] right to the subject registration"). "Questions of copyright" are not within the USPTO's jurisdiction, and "the statutory schemes set out in the Copyright Act and the Trademark Act are entirely separate and independent, and protect different rights even when those rights arise from the same words and/or designs." *Id.* So a claim of mark ownership (*i.e.*, a claim of *use* of a mark) to the USPTO (a body with no copyright jurisdiction) does not convey any information about who created or owns the copyright to the material. *See Thomas v. Chi. Basketball League Corp.*, 2019 WL 2371857, at *7 (T.T.A.B. May 1, 2019) (dismissing trademark opposition by copyright owner because she had not met burden of proving applicant was not owner of mark which, unlike copyright owner, applicant had used in commerce).

Element 2: Plaintiff's DMCA claim also fails because he has not alleged facts permitting an inference that the DMCA Defendants' claim was false. Moody ISD *is* the owner of the mark, and Plaintiff does not allege facts otherwise. The Complaint alone shows as much: Plaintiff does not allege that he ever put the MCLAW DESIGN to commercial use or dispute that Moody ISD was the first to use the mark. ¶¶ 10, 12. And Plaintiff's supposed *copyright* ownership cannot negate Moody ISD's *mark* ownership, as mere copyright ownership is insufficient evidence to demonstrate that a party is not the owner of a trademark that may bear resemblance to the copyrighted work. *See Clamage Indus. Ltd. v. Glendinning Cos., Inc.*, 175 U.S.P.Q. 362, 363 (T.T.A.B. 1972) (dismissing petition to cancel trademark registration, notwithstanding argument that registered mark infringed petitioner's copyright, noting "ownership of a copyright confers no

trademark rights on the copyright owner"); *Kesa Inc. v. Rojo*, 2023 WL 3918267, at *9 (T.T.A.B. May 31, 2023) (alleged copyright ownership could not support mark ownership claim).

Element 3: Nor does Plaintiff allege facts that the DMCA Defendants *knew* that Moody ISD was not the mark owner. Plaintiff's perjury allegation, ¶ 15, distorts the unique context of a trademark application. A declaration in a trademark application is made on "belief" or "information and belief" and thus "are couched in such a manner as to preclude a definitive statement by the affiant that could be ordinarily used to support a charge of fraud." *Intellimedia Sports, Inc. v. Intellimedia Corp.*, 1997 WL 398344 at *3, 43 U.S.P.Q.2d 1206 (T.T.A.B. 1997) (dismissing fraud claim). The DMCA Defendants represented in good faith that Moody ISD is entitled to trademark registration, including because of their belief that it is the mark owner. Lacking plausible allegations that these Defendants *knew* otherwise, Plaintiff's claim fails.

Element 4: And, finally, Plaintiff does not sufficiently allege that the DMCA Defendants identified Moody ISD as the mark owner "with the intent to induce, enable, facilitate, or conceal an infringement." Plaintiff characterizes the trademark application as "a brazen effort to strip Price of his ownership rights," ¶ 15, but this allegation is conclusory. Applying for a trademark is not an attempt to strip someone of their purported copyright ownership rights.

Plaintiff alleges: "Upon information and belief, Defendants' actions were committed knowingly, and with the intent to induce, enable, facilitate and/or conceal infringement." ¶ 34. This conclusory statement is not supported by allegations that would allow this Court to connect the dots from Moody ISD's claim of mark ownership to any infringement campaign by the DMCA Defendants. *See R2*, 401 F.3d at 642 (5th Cir. 2005) (courts do not "strain to find inferences").

CONCLUSION

For these reasons, the Court should dismiss the Complaint with prejudice.

Dated: February 8, 2024

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[15] The correct names of these Defendants are Bearcat Athletic Booster Club and Brandy C'ne Cox. *See supra* n. 1.

CERTIFICATE OF SERVICE

On February 8, 2024, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Western District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

JOHN PRICE, Plaintiff, v. MOODY INDEPENDENT SCHOOL DISTRICT, MOODY ATHLETIC BOOSTER CLUB, ANDREW MILLER, AND BRANDY HIPSHER COX, Defendants.	§ § § § § § § § § § § §	Case No. 6:23-CV-845-ADA-DTG

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S ORIGINAL COMPLAINT

On this day, the Court considered Defendants' Motion to Dismiss of Plaintiff's Original Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). After considering the motion, pleadings and other documents on file in this case, and the arguments of the parties, the Court finds Plaintiff cannot maintain his claims against Defendants. As such, the Court is of the opinion that Defendants' Motion to Dismiss Plaintiff's Original Complaint is well taken and should be GRANTED.

It is therefore ORDERED, ADJUDGED AND DECREED that Plaintiff's Original Complaint and the claims asserted therein against Defendants are hereby DISMISSED in full and with prejudice.

Signed on this _____ day of _____, 2024.

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE