

KYLE J. KAISER (13924)  
Assistant Utah Attorney General  
SEAN D. REYES (7969)  
Utah Attorney General  
160 East 300 South, Sixth Floor  
PO BOX 140856  
Salt Lake City, Utah 84114-0856  
Telephone: (801) 366-0100  
E-mail: [kkaiser@utah.gov](mailto:kkaiser@utah.gov)

*Attorneys for Defendants*

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IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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<p>ESTHER ISRAEL,  Plaintiff,  v.  UNIVERSITY OF UTAH DONALD STEVEN STRASSBERG JORDAN ELIZABETH RULLO JULIA MACKARONIS KELLY KINNISH MICHAEL MINER  Defendants.</p>	<p><b>UNIVERSITY OF UTAH ANSWER TO PLAINTIFF'S COMPLAINT</b>  <b><u>JURY TRIAL REQUESTED</u></b>  Case No. 2:15-CV-00741-EJF  Judge Brooke C. Wells</p>
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Defendant University of Utah, by and through its counsel, Kyle J. Kaiser, Assistant Utah Attorney General, responds to Plaintiff's Complaint as follows:

**JURISDICTION AND VENUE**

1. As to the allegations in paragraph 1 of Plaintiff's Complaint, Defendant University admits the Court has subject-matter jurisdiction under [17 U.S.C. § 501](#) and [28 U.S.C.](#)

§§ 1331 (federal question) and 1338 (a) (copyright actions) but affirmatively asserts that the Eleventh Amendment to the United States Constitution deprives the Court of jurisdiction in this matter. Defendant University denies the allegations contained in paragraph 1 that Plaintiff has stated an action for copyright infringement and denies any further allegations in paragraph 1.

2. Defendant University admits that Venue is proper in this District under 28 U.S.C. §§ 1400 because Defendant University resides in the District and because a substantial part of the actions occurred within the District. Defendant University denies any additional allegations in paragraph 2.

3. Defendant University denies the allegations in paragraph 3 of Plaintiff's Complaint.

### **PARTIES**

4. Defendant University admits the allegations contained in paragraph 4 of Plaintiff's Complaint.

5. Defendant University admits Plaintiff Esther Israel is a resident of Utah and in 2002 she moved from New York to attend a clinical psychology doctoral program at the University of Utah to be mentored in research by Strassberg. Defendant University lacks information sufficient to form a belief as to the truth of the remaining allegations in paragraph 5, therefore denies the same.

6. Plaintiff omitted paragraph 6 in the Complaint.

### **INTRODUCTION**

7. Defendant University admits the allegations contained in the first, second, and last sentences of paragraph 7 of Plaintiff's Complaint. As to the allegations in the third sentence of

paragraph 7, Defendant University denies that Plaintiff selected the pictures and arranged the order of the pictures and affirmatively asserts that Defendant Strassberg and another student were involved in the selection, along with Plaintiff. Defendant University lacks sufficient knowledge to truthfully admit or deny whether Plaintiff paid for the printing of the pictures, and therefore denies the same.

8. Defendant University admits the allegations contained in the first four sentences of paragraph 8 of Plaintiff's Complaint. Defendant University denies that Plaintiff selected and arranged a new set of pictures for her masters thesis study. Defendant University denies the allegations in the fifth sentence to the extent the sentence alleges that Plaintiff was the sole selector of the images and affirmatively alleges that Professor Strassberg advised Plaintiff on the selection of the images. Defendant University denies the allegations in the sixth sentence of the paragraph. Defendant University lacks knowledge sufficient to form a belief regarding the truth of the allegations in the seventh sentence of paragraph 8, and therefore denies the same.

9. Plaintiff omitted paragraph 9 in the Complaint.

10. Defendant University admits the allegations in the first two sentences of paragraph 10 of Plaintiff's Complaint. Defendant University lacks knowledge sufficient to form a belief regarding the truth of the allegations in the third sentence of paragraph 10 of Plaintiff's Complaint and therefore denies the same. Defendant University denies the allegations contained in the fourth sentence of paragraph 10.

11. Defendant University denies the allegations contained in paragraph 11 of Plaintiff's Complaint.

12. Defendant University admits that Israel, along with Professor Strassberg, received

permission from the IRB to collect the data for Israel's masters study. Defendant University denies any additional allegations in paragraph 12 of Plaintiff's Complaint.

13. Defendant University lacks knowledge sufficient to form a belief regarding the truth of the allegations in the first sentence of paragraph 13 of Plaintiff's Complaint and therefore denies the same. Because Plaintiff did not provide any exhibits either to the Court upon filing her Complaint or to Defendant University upon service of the Complaint, Defendant University lacks information sufficient to form a belief as to the truthfulness of the allegations in the second sentence of paragraph 13 and therefore denies the same. Defendant University affirmatively asserts that none of the material contained within Plaintiff's definition of "Original Material" is "Original" to Plaintiff for purposes of the Copyright Act, and further denies that Plaintiff is the sole creator of any of the "Original Material." Because Plaintiff refers to "Original Material" throughout the Complaint, and because Defendant University has not had the opportunity to view the alleged material nor believes that any such material is "original" to Plaintiff, and that Professor Strassberg is a joint author of all such material, to preserve all objections and defenses, Defendant University will refer to this material as "Alleged Material." Subject to the Redefinition of Original Material as Alleged Material above, Defendant University admits the allegations of the third sentence of paragraph 13. Defendant University admits the allegations of the final sentence of paragraph 13.

14. Defendant University admits that Plaintiff participated in recruiting and running participants from the Psychology Department Pool. Defendant University lacks knowledge sufficient to form a belief regarding the truth of the allegations in the second sentence of paragraph 14 and therefore denies the same. Because Plaintiff did not provide any exhibits either

to the Court upon filing her Complaint or to Defendant University upon service of the Complaint, Defendant University lacks sufficient knowledge to truthfully admit or deny the allegations in the third sentence of paragraph 14 and therefore denies the same. Defendant University affirmatively asserts that Plaintiff is not the sole author of her 2006 masters thesis.

15. Defendant University denies the allegations in the first and second sentences of paragraph 15 of Plaintiff's Complaint. Defendant University denies that the Institutional Review Board (IRB) application and approval were Israel's, and affirmatively alleges that the IRB application and approval were Professor Strassberg's, as the Principal Investigator for the Study, along with Israel as a participant, but subject to this allegation, admits the remaining allegations in the third and fourth sentences of paragraph 15 of Plaintiff's Complaint, and affirmatively asserts that the materials were used with Plaintiff's permission and that Israel was an active participant in Defendant Rullo's research.

16. Defendant University admits the allegations contained in paragraph 16 of Plaintiff's Complaint and affirmatively alleges that Defendant Strassberg was, in fact, a second author of the published thesis.

17. Defendant University admits the allegations contained in paragraph 17 of Plaintiff's Complaint but denies any implication that Defendant Strassberg took the action arbitrarily or without reasonable cause.

18. Defendant University denies the allegations contained in the first sentence of paragraph 18 of Plaintiff's Complaint. Defendant University admits that Defendant Rullo gave a presentation entitled "Category-Specificity in Sexual Arousal/Interest as a Complex Function of Sex and Sexual Orientation," on which Plaintiff was third author, and that Defendant Rullo

compared the conclusions in Plaintiff's research with Rullo's. Defendant University lacks sufficient knowledge to truthfully admit or deny the allegations in the third sentence of paragraph 18 of Plaintiff's Complaint and therefore denies the same.

19. Subject to the definition contained in Paragraph 13 of Defendant University's Answer, Defendant University denies the allegations contained in the first and second sentences of paragraph 19 of Plaintiff's Complaint and affirmatively asserts that Rullo utilized information from Plaintiff's masters thesis that was publicly available or that was explicitly allowed by Plaintiff. Defendant University denies the allegations in the third sentence of paragraph 19.

20. Subject to the definition contained in Paragraph 13 of Defendant University's Answer, Defendant University denies the allegations contained in paragraph 20 of Plaintiff's Complaint and affirmatively asserts that Strassberg and Rullo utilized information from Plaintiff's masters thesis that was publicly available, or of which Professor Strassberg was a joint author, or that was explicitly allowed by Plaintiff.

21. Subject to the definition contained in Paragraph 13 of Defendant University's Answer, Defendant University denies the allegations contained in paragraph 21 of Plaintiff's Complaint and affirmatively asserts that Rullo utilized information from Plaintiff's masters thesis that was publicly available, or of which Professor Strassberg was a joint author, or that was explicitly allowed by Plaintiff.

22. Defendant University denies the allegations in the first sentence of paragraph 22 of Plaintiff's complaint and affirmatively asserts that any works published by Mackaronis and Strassberg utilize only publicly available information from Plaintiff's masters thesis or of which Professor Strassberg was a joint author. Defendant University admits the allegations in the

remaining sentences of paragraph 22, but deny that said presentations contained any unpublished masters thesis data.

23. Subject to the definition contained in Paragraph 13 of Defendant University's Answer, Defendant University denies the allegations contained in paragraph 23 of Plaintiff's Complaint.

### **Suspected Infringement of Plaintiff's Research Publications**

24. Defendant University lacks sufficient knowledge to truthfully admit or deny the allegations in the first sentence of paragraph 24 and therefore denies the same. Because Plaintiff did not provide any exhibits either to the Court upon filing her Complaint or to Defendant University upon service of the Complaint, Defendant University lacks sufficient knowledge to truthfully admit or deny the allegations in the second sentence (in parentheses) of paragraph 24 and therefore denies the same. Defendant University denies the allegations in the third sentence of paragraph 24.

25. Defendant University lacks sufficient knowledge to truthfully admit or deny the allegations contained in paragraph 25 of the Plaintiff's Complaint and therefore denies the same.

26. Defendant University admits that paragraph 26 contains a quotation from the current University Policy 7-003. Defendant University denies that the quotation is a complete statement of copyright policy, or that this policy has legal significance in this case.

27. Defendant University lacks sufficient knowledge to truthfully admit or deny the allegations contained in paragraph 27 of the Plaintiff's Complaint and therefore denies the same.

28. The allegations in paragraph 28 of Plaintiff's Complaint are vague as to time and topic and therefore Defendant University cannot adequately respond to the allegations in the

paragraph. To the extent a response is required, Defendant University admits that, in general, the Office of General Counsel of the University of Utah does not represent graduate students enrolled at the University of Utah to prosecute their personal claims of intellectual property infringement. Defendant University lacks sufficient knowledge to truthfully admit or deny any remaining allegations contained in paragraph 28 of the Plaintiff's Complaint and therefore denies the same.

29. Plaintiff University lacks sufficient knowledge to truthfully admit or deny the allegations in paragraph 29 and further states that subject to the definition of "Alleged Material" in paragraph 13 of Defendant University's answer to Plaintiff's complaint, Defendant University denies the allegations contained in paragraph 29 of the Plaintiff's Complaint.

30. Plaintiff University lacks sufficient knowledge to truthfully admit or deny the allegations in paragraph 30 of Plaintiffs' Complaint. Defendant University affirmatively asserts that no plagiarism existed in Rullo's masters thesis.

31. Defendant University lacks sufficient knowledge to truthfully admit or deny the allegations contained in paragraph 31 of the Plaintiff's Complaint and therefore denies the same. Defendant University affirmatively asserts that no plagiarism existed in Rullo's masters thesis.

32. The allegations in the first sentence of paragraph 32 are merely conclusions to which no response is necessary. To the extent a response is necessary, Defendant University denies any factual allegations and denies that Plaintiff is entitled to any relief. Because Plaintiff did not provide any exhibits either to the Court upon filing her Complaint or to Defendant University upon service of the Complaint, Defendant University lacks sufficient knowledge to truthfully admit or deny the remaining allegations in paragraph 32 and therefore denies the same.



Defendant University admits to the existence of a letter dated April 27, 2011 and affirmatively asserts that the contents of the document are plain from its totality and object to any mischaracterization in paragraph 32.

33. The allegations in the first sentence of paragraph 33 are merely conclusions to which no response is necessary. To the extent a response is necessary, Defendant University denies any factual allegations and denies that Plaintiff is entitled to any relief. Because Plaintiff did not provide any exhibits either to the Court upon filing her Complaint or to Defendant University upon service of the Complaint, Defendant University lacks sufficient knowledge to truthfully admit or deny the remaining allegations in paragraph 33 and therefore denies the same. Defendant University affirmatively asserts that there have been no “known copyright infringements.”

## **FIRST CLAIM**

### **Infringing Publication and Discovery**

34. As to the allegations in paragraph 34, Defendant University admits the article was published and that it is based on Rullo’s dissertation. Defendant University lacks knowledge sufficient to form a belief about the truth of the remaining allegations contained in paragraph 34 of Plaintiff’s Complaint, and therefore denies the same.

### **Infringing Nature of the Publication**

35. Subject to the definition of “Alleged Material” in Defendant University’s answer to paragraph 13, Defendant University denies the allegations contained in paragraph 35 of Plaintiff’s Complaint. Defendant University further denies that there is any “Infringing Material.” Because Plaintiff did not provide any exhibits either to the Court upon filing her

Complaint or to Defendant University upon service of the Complaint, Defendant University lacks sufficient knowledge to truthfully admit or deny the remaining allegations in paragraph 35 and therefore denies the same.

36. Defendant University denies that any allegedly “Infringing Material” exists. Because Plaintiff did not provide any exhibits either to the Court upon filing her Complaint or to Defendant University upon service of the Complaint, Defendant University lacks sufficient knowledge to truthfully admit or deny the remaining allegations in paragraph 36 and therefore denies the same.

**University of Utah Actor in Infringement**

37. Subject to the answers contained in paragraph 13 and paragraph 35, Defendant University denies the allegations contained in the first sentence of paragraph 37 of Plaintiff’s Complaint. Because Plaintiff did not provide any exhibits either to the Court upon filing her Complaint or to Defendant University upon service of the Complaint, Defendant University lacks sufficient knowledge to truthfully admit or deny the remaining allegations in paragraph 37 and therefore denies the same.

38. Paragraph 38 of Plaintiff’s Complaint contains a legal conclusion to which no response is necessary. To the extent a response is necessary, Defendant University denies the allegations in paragraph 38 and affirmatively asserts that the Alleged Material is not subject to copyright, or, in the alternative, that Plaintiff is not the sole author of the Alleged Material.

39. Subject to the definitions contained in Defendant University’s answers to paragraphs 15 and 35, Defendant University denies the allegations contained in paragraph 39 of Plaintiff’s Complaint.

**Access to Original Material**

40. Subject to the definition of “Alleged Material” in Defendant University’s answer to paragraph 13, Defendant University denies the allegation contained in paragraph 40.

**No License of Permission to Reproduce Material Subject to Copyright**

41. Subject to the definition of “Alleged Material” in Defendant Rullo’s answer to paragraph 13, Defendant University denies the allegations contained in paragraph 41 of Plaintiff’s Complaint.

**SECOND CLAIM**

**False Endorsement Federal Lanham Act 15 USC 1125**

42. Defendant University denies the allegations contained in paragraph 42 of Plaintiff’s Complaint.

43. Defendant University denies the allegations contained in paragraph 43 of Plaintiff’s Complaint.

44. Defendant University denies the allegations contained in paragraph 44 of Plaintiff’s Complaint.

45. As to the allegations of paragraph 45 of Plaintiff’s Complaint, the words “academic papers” is not defined, and thus a response is impossible. Defendant University therefore denies the allegations in paragraph 45.

46. Defendant University denies the allegations contained in paragraph 46 of Plaintiff’s Complaint.

**THIRD CLAIM**

**False Endorsement Utah Code Ann. § 13-11a-3**

47. Defendant University reincorporates its answers to paragraphs 1 through 46 of Plaintiff's Complaint. Paragraph 47 is a quotation of a statute, to which no response is required. To the extent a response is required, Defendant University admits that the quoted language is contained in [Utah Code section 13-11A-3](#), but denies any remaining allegations, including that Plaintiff is entitled to any relief.

48. Defendant University denies the allegations contained in paragraph 48 of Plaintiff's Complaint.

49. Defendant University denies the allegations contained in paragraph 49 of Plaintiff's Complaint.

#### **FOURTH CLAIM**

##### **Failure to Endorse – Federal Lanham Act 15 USC 1125**

50. Defendant University reincorporates its answers to paragraphs 42 through 49 of Plaintiff's Complaint.

51. Defendant University denies the allegations contained in paragraph 51 of Plaintiff's Complaint.

52. Defendant University denies the allegations contained in paragraph 52 of Plaintiff's Complaint.

53. Defendant University denies the allegations contained in paragraph 53 of Plaintiff's Complaint.

#### **FIFTH CLAIM**

##### **Additional Copyright Infringements**

54. Because Plaintiff did not provide any exhibits either to the Court upon filing her

Complaint or to Defendant University upon service of the Complaint, Defendant University lacks sufficient knowledge to truthfully admit or deny the allegations in the last sentence of paragraph 54 of Plaintiff's Complaint and therefore denies the same. Defendant University denies all remaining allegations in paragraph 54.

55. Defendant University denies the allegations contained in paragraph 55 of the Plaintiff's Complaint.

**REQUESTS FOR RELIEF, DAMAGES, AND INJUNCTION**

56. Defendant University denies the allegations contained in paragraph 56 of the Plaintiff's Complaint.

57. Defendant University denies the allegations contained in paragraph 57 of the Plaintiff's Complaint.

58. Defendant University denies the allegations contained in paragraph 58 of the Plaintiff's Complaint.

59. Defendant University denies the allegations contained in paragraph 59 of the Plaintiff's Complaint.

Paragraphs A-E under the heading "WHEREFORE" constitute requests for relief to which no response is required. To the extent a response is required, Defendant University denies that Plaintiff is entitled to any relief.

**AFFIRMATIVE DEFENSES**

**FIRST AFFIRMATIVE DEFENSE**

Plaintiff's Complaint fails to state a claim for which relief may be granted.

**SECOND AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by the applicable statute of limitations.

**THIRD AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by the doctrines of waiver, laches, or estoppel.

**FOURTH AFFIRMATIVE DEFENSE**

Plaintiff's trademark and unfair competition claims are barred because Defendant University has not "used" any mark "in commerce."

**FIFTH AFFIRMATIVE DEFENSE**

Plaintiff's trademark and unfair competition claims are barred because Plaintiff does not have a valid trademark protected by the Lanham Act or Utah law.

**SIXTH AFFIRMATIVE DEFENSE**

Plaintiff's copyright claims are barred because Plaintiff's Alleged Material is not sufficiently creative to warrant copyright protection.

**SEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's copyright claims are barred because Defendant Strassberg was a joint author of any protectable works.

**EIGHTH AFFIRMATIVE DEFENSE**

Plaintiff's copyright claims are barred because any use of any protectable work by

Defendant University constituted a fair use as defined by [17 U.S.C. § 107](#).

**NINTH AFFIRMATIVE DEFENSE**

Plaintiff's copyright claims are barred because Defendant University had an actual or implied license to use any protectable work.

**TENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims against Defendant University are barred by Eleventh Amendment Immunity.

**ELEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by sovereign immunity or the Governmental Immunity Act of Utah.

**TWELFTH AFFIRMATIVE DEFENSE**

Any and all injuries and damages Plaintiff alleges resulted from Plaintiff's own actions or omissions, or from the actions or omissions of third parties over whom Defendant University had no authority or control.

**THIRTEENTH AFFIRMATIVE DEFENSE**

Defendant University preserves and does not waive any of the affirmative defenses set forth in [Rule 8\(c\) of the Federal Rules of Civil Procedure](#), as discovery may reveal to be applicable, or any other matter constituting an avoidance or affirmative defense as they may become known in the future.

**PRAYER**

Defendant University respectfully requests that the Court enter judgment in his favor,

dismiss Plaintiff Israel's complaint, with prejudice, award costs and attorney's fees to Defendant, and award all other relief as the Court deems just and proper.

**JURY DEMAND**

Pursuant to [Rule 38 of the Federal Rules of Civil Procedure](#), Defendant University demands a jury trial in this matter on all issues triable by right by a jury.

DATED: March 7, 2016

SEAN D. REYES  
Utah Attorney General

/s/ Kyle J. Kaiser  
KYLE J. KAISER  
Assistant Utah Attorney General  
Attorneys for State Defendants



**CERTIFICATE OF SERVICE**

Pursuant to Utah R. Civ. P 5(b)(1)(A)(i), I certify that on March 7, 2016 I electronically filed the foregoing **UNIVERSITY OF UTAH ANSWER TO PLAINTIFF'S COMPLAINT**, using the Court's electronic filing system and caused to be served by U.S. mail, postage pre-paid, a true and correct copy of the foregoing to:

[REDACTED]  
[REDACTED]  
[REDACTED]

/s/ Collett Litchard