

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

SHERILYN KENYON,)	
)	
Plaintiff,)	
v.)	Civil Action No. 3:16-cv-0191
)	Chief Judge Sharp
CASSANDRA CLARE, a/k/a JUDITH)	Magistrate Judge Knowles
RUMELT, a/k/a JUDITH LEWIS)	
)	
and)	
)	
DOES 1 through 50, inclusive,)	
)	
Defendants.)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendant Cassandra Clare (“Defendant” or “Clare”) respectfully submits this memorandum in support of her motion, pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6), to dismiss the Complaint of Plaintiff Sherrilyn Kenyon (“Plaintiff” or “Kenyon”) (ECF Doc. No 1) in its entirety.

I. PRELIMINARY STATEMENT

This lawsuit is another example of an unfortunate and all-too-common blight on the creative fields: a successful author (or songwriter, film producer, etc.) is sued by a disgruntled would-be competitor on trumped-up claims for the purpose of cashing in on the success of that author.

Tens of millions of Clare’s books—fantasy derived principally by the Judeo-Christian narrative (*e.g.*, young heroes who are the progeny of angels) aimed at teenagers and young adults—have been sold over a decade and been turned into a major motion picture, titled *The Mortal Instruments: City of Bones* (the “Movie”) and a television series, titled *Shadowhunters: The Mortal Instruments* (the “Television Series”). Kenyon, who has been in print since the

1990's and first enjoyed some success (albeit not of the magnitude of Clare) with self-described “sexy” adult novels featuring adult heroes drawn from Greek mythology who engage in explicitly adult activities.¹ Aware of Clare’s use of the term “Shadowhunters” since at least 2007, Kenyon admittedly did not allege that Clare had infringed on her “Dark-Hunter” adult book series before bringing suit in February 2016.

Kenyon’s own young adult series was not launched until years *after* Clare’s. Kenyon’s allegations that Clare copied ideas from Kenyon’s later-published young adults are thus more than frivolous: Clare could not copy ideas in Kenyon books that were not published at the time she published her own.

Timed to coincide with heavily marketed launch of Clare’s latest best-seller *Lady Midnight* and the renewal of a successful television series based on Clare’s earlier books, the motivations for Kenyon’s well-publicized lawsuit are not hard to divine. Kenyon has already garnered a great deal of attention simply by filing her lawsuit and appears to be banking on the general reluctance of courts to dismiss complaints at the pleading stage to keep her claims in public view. This motion demonstrates that Kenyon’s gambit is misplaced. Whatever general reluctance there may be, courts do not—and should not—hesitate to dismiss claims of copyright and trademark/trade dress infringement pursuant to Rule 12(b)(6) when, as here, the claims are baseless.

It is a basic tenet of copyright law that ideas cannot be copyrighted. Even accepting all of Kenyon’s allegations that Clare copied her ideas about various myths as true does not give rise to a claim. As one author commented in reaction to the media blitz that followed Kenyon’s filing of

¹ THE NEW YORK TIMES (June 18, 2006, “Inside the List”) quotes this “bit of dialogue” from one of Kenyon’s books (which include *Night Pleasures*, *Fantasy Lover*, etc.), “Give me 6 orgasms within one hour and you can have 10. I swear it on the river Styx.” http://www.nytimes.com/2006/06/18/books/review/18tbr.html?_r=0

the Complaint, “Sherrilyn Kenyon did not invent the idea of a group of humans fighting the Supernatural.” <https://cdanews.com/2016/02/sherrilyn-kenyon-sues-shadowhunters-author-cassandra-clare-for-plagiarism/>. Courts routinely filter out ideas, *scènes à faire* and allegedly infringing content that demonstrably pre-date the allegedly infringed content as Clare’s does here. Moreover, in reviewing a motion to dismiss a copyright complaint, the works themselves, rather than the plaintiff’s descriptions of those works, are what must govern.

Likewise, courts regularly dismiss trademark/trade dress infringement claims where it is readily apparent that there can be no likelihood of confusion (*e.g.*, where, as here, the prominent display of the author’s name eliminates any confusion concerning the source of the works) and that the plaintiff is guilty of laches. Each of those issues is sufficient, standing alone, to warrant outright dismissal of the trademark claims.

Other grounds for dismissal are detailed below, but one in particular invites the Court’s primary attention: there is no personal jurisdiction in Tennessee over Clare, a Massachusetts resident. The Complaint does not allege a single purposeful act that would provide a basis for the assertion of jurisdiction over Clare such that the case should be dismissed without need for any review of the Complaint’s other claims.

II. FACTUAL BACKGROUND

A. Allegations Concerning Personal Jurisdiction

Clare, a Massachusetts resident, is the only named defendant. The Complaint nominally includes 50 Doe defendants, which clearly include the publisher of Clare’s books (Simon & Schuster), and the corporate parties that created, produced, distributed and aired the Movie and Television Series derived from Clare’s literary works. The sole allegation concerning personal jurisdiction in Tennessee (Complaint ¶ 7) is a classic example of a formulaic legal conclusion

devoid of factual substance: “[t]his Court has personal jurisdiction over the DEFENDANTS because, among other things, the DEFENDANTS conduct and solicit business in this jurisdiction and distribute the infringing products that are the subject matter of this Complaint in this jurisdiction.”² It is devoid of any allegations that Clare herself took any actions of jurisdictional significance. On the contrary, in the absence of any factual allegations concerning Clare, the only plausible conclusion is that any solicitation of business and distribution of products was undertaken by the parties that normally conduct such activities in this context—the corporate publishers, producers, etc.

B. Allegations Concerning Copyright Infringement

Kenyon’s allegations of purported copyright infringement in the Complaint have no more substance than her allegations of personal jurisdiction. They consist entirely of references to Clare’s alleged copying of ideas, such as humans who “can be ‘turned’ by various demonic beasts into like creatures or servants when bitten or fed blood.” (Complaint Ex. 3 at p.1 *see also* Complaint ¶ 31.)

Such broad and generic descriptions apply equally to literary and audiovisual works beginning no later than Bram Stoker’s *Dracula* in 1897, and could include (but are certainly not limited to) the *Lord of the Rings* books and movies, the *Harry Potter* books and movies, *Buffy the Vampire Slayer*, the *Twilight* books and movies, and the *Chronicle of Narnia* books and movies. As addressed in detail below, such common themes are generally described for purpose of copyright analysis as *scènes à faire*, and cannot be claimed exclusively by Kenyon, Clare, J.K. Rowling or anyone else.

² Arguably, the allegations in Paragraph 8, while directed to venue, are also applicable to personal jurisdiction. However, as with the allegations concerning personal jurisdiction, they are nothing more than a recitation of formulaic legal phrases such as “purposely availed” and “substantial enough connection with the district” without identifying the factual acts or actors to which they purportedly apply.

The Complaint states (§ 32) that a “non-exhaustive list of the substantial similarities in plot, setting, characters, and scenes as between the Dark-Hunter Series and the Shadowhunter series is included in Exhibit 3.” That exhibit, which was prepared by or on behalf of Kenyon for the purposes of this litigation cannot properly be the basis for assessing the allegations in the Complaint. Rather, as detailed below at pp. 12-13, in a complaint alleging copyright infringement, the works themselves are incorporated by reference, and supersede any of the plaintiff’s self-serving interpretations, even on a motion to dismiss.

The alleged infringements listed in the Complaint’s Exhibit 3 consist either of ideas and *scènes à faire* or concepts that were used by Clare before Kenyon, *e.g.*:

- The assertion that Ms. Clare’s “Luke” was modelled on Ms. Kenyon’s “Big Bubba” is belied by the fact that “Luke” appeared in publication before “Big Bubba.”
- The assertion that a “Darkhunter” rune was copied by Ms. Clare’s “Angelic Rune” is belied by the fact that the “Angelic Rune” was posted in June 2008, before any apparent publication of the alleged “Darkhunter” rune.

See Exhibit A to Clare’s Notice of Filing (consisting of a point-by-point rebuttal to the items in the Complaint’s Exhibit 3). (Clare respectfully requests that, in the event that the Court considers the latter, it consider the former as well.) Moreover, all of the materials referenced in the Complaint – Kenyon’s books, Clare’s books, the Movie and Television Series – are properly before this Court on this motion. *See, e.g., Bowen v. Paisley*, No. 3:13-cv-0404, 2013 WL 6237469, *6 (M.D. Tenn. Dec. 3, 2013) (acknowledging that it is proper for courts to dismiss copyright claims at the Rule 12 stage in appropriate circumstances by comparing the parties’ works).³

³ Contemporaneous with the filing of this Motion, Clare is filing an unopposed motion for a protective order to file a copy of her books (in searchable PDF format) and the Movie under seal (to prevent unlawful dissemination). Because of the large size of her books and the format of the Movie, Clare is also seeking permission to manually file

C. Allegations Concerning Trademark Infringement

The Complaint alleges (¶ 12) that:

In 2006, PLAINTIFF was alerted by some of her distressed fans of the potential publication by CLARE of a work that incorporated PLAINTIFF's Dark-Hunter Marks. PLAINTIFF demanded that the term "darkhunter" and the Dark-Hunter Marks be removed from CLARE's work. CLARE removed the term "darkhunter" and the Dark-Hunter Marks from her work, substituting instead the term "shadowhunters" for her protagonist, but removing any reference to "hunter" (whether "shadow" or "dark") from the title; the book was published in 2007 as "The Mortal Instruments, City of Bones."⁴

In other words, Kenyon freely acknowledges that she has been aware of Clare's purported use of the allegedly infringing mark "Shadowhunters" for a decade and yet took no action to prevent it until filing this lawsuit in February 2016.

The quoted text also demonstrates that Kenyon's self-identified "global fan base" who "immerse themselves in the detailed fictional universe . . . and are known to complain loudly about any inconsistencies they perceive within the fictional universe." (Complaint ¶ 11.) This passionate fan base is clearly not confused into thinking that Clare is the source of works authored by Kenyon. Not surprisingly, therefore, Kenyon utterly fails to allege the basis for a likelihood of confusion, let alone actual confusion. Moreover, it is virtually inconceivable that there can be any confusion here when that the name "Sherrilyn Kenyon" dominates the cover of every book Kenyon has authored, and the name "Cassandra Clare" is displayed prominently on the cover of every book Clare has authored. (*Compare* Complaint Ex. 4 *with id.* Ex 5.)

these items with the Clerk rather than via ECF. Undersigned counsel asked Kenyon's counsel to furnish electronic copies of her books, but her counsel refused, as explained in more detail in the accompanying Declaration of Stephen J. Zralek. (Additionally, Clare's Television Series does not yet exist in a form that can be filed, but many, if not all, of the existing episodes can be viewed at <http://freeform.go.com/>, which Clare respectfully incorporates by reference.)

⁴ Although Clare emphatically denies that there were any communications between Kenyon and her in 2006 (or at any other time), let alone the ones alleged in the Complaint about a ministerial printing error, the inaccuracy of these allegations is immaterial to the resolution of this motion.

Kenyon's allegations concerning purported trade dress infringement are as generic and conclusory as her copyright and trademark allegations. The only specific example she even arguably provides is in Paragraph 18: "For example, the Shadowhunters symbol used by CLARE on book covers and promotional materials is essentially a simplified version of version of PLAINTIFF's Dark-Hunter symbol." The Complaint, however, fails utterly to provide a factual basis for the conclusion that the image displayed after Paragraph 18 is Kenyon's "Dark-Hunter symbol. On the contrary, it is clear (by omission from Exhibit 2 to the Complaint) that Kenyon lacks a trademark or copyright registration in it. Even more telling, *it does not appear on the cover of any of her books*. The only examples Kenyon provides (on the first page of Exhibit 4) are not tied to any product sold in interstate commerce.

In reality, Clare is the owner of a copyright registration, by written assignment from the artist, in that exact symbol (to be precise, a "rune"), which is titled "Angelic Power." (*See* Clare's Notice of Filing, Exhibit B.) Thus, to the limited extent that Kenyon has used the "Angelic Power" rune, *she* is liable to *Clare* for copyright infringement.⁵

III. LEGAL STANDARD

A. Rule 12(b)(2)

A plaintiff has the burden of establishing that the court has jurisdiction over the defendant. *Neogen Corp. v. Neo Gen Screening, Inc.*, 262 F.3d 883, 887 (6th Cir. 2002). Where, as here, the plaintiff is invoking the exercise of long-arm jurisdiction over a defendant who

⁵ The entities responsible for the marketing of the books, Movie and Television Series are the ones responsible for the visual design of the relevant materials. It is not surprising that they have used the "Angelic Power" rune several times, given its association with Clare's works. That said, it cannot be overlooked that Kenyon's prime example of Clare's allegedly infringing use of the rune was created by one of Clare's fans without her knowledge or participation. (Complaint Ex. 5 at p. 1.)

indisputably resides elsewhere, the complaint must make a *prima facie* showing “by ‘establishing with reasonable particularity sufficient contacts between [the defendant] and the forum state to support jurisdiction.’” *Id.* (quoting *Provident Nat'l Bank v. California Fed. Savings Loan Ass'n*, 819 F.2d 434, 437 (3d Cir. 1987)). In accordance with the test set forth in *Southern Mach. Co. v. Mohasco Indus., Inc.*, the plaintiff, first and foremost, must establish “purposeful availment” by demonstrating that the “defendant's contacts with the forum state ‘proximately result from actions by the defendant *himself* that create a substantial connection with the forum State.’” *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1263 (6th Cir. 1996) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474–75 (1985) (emphasis in original)).

B. Rule 12(b)(6)

In deciding a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the court will “construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.” *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). The complaint’s factual allegations, however, “must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although *Twombly* does not “require heightened fact pleading of specifics,” a complaint must include “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. If the factual allegations do “not nudge [the pleaded] claims across the line from conceivable to plausible, [the] complaint must be dismissed.” *Id.* “Determining whether a complaint states a plausible claim for relief will . . . be *a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.*” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (emphasis added); accord *16630 Southfield L.P. v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 504 (6th Cir. 2013).

To establish the “facial plausibility” required to “unlock the doors of discovery,” the *plaintiff cannot rely on “legal conclusions” or “[threadbare] recitals of the elements* of a cause of action,” but, instead, the plaintiff must plead “*factual content* that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 678 (emphasis added). “In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are *no more than conclusions*, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they *must be supported by factual allegations*.” *Id.* at 679 (emphasis added). As this Court has explained, “The pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Patel v. Hughes*, No. 3:13-cv-0701, 2014 WL 4655285, at *1 (M.D. Tenn. Sept. 16, 2014) (Sharp, J.) (quoting *Iqbal*, 556 U.S. at 678 and *Twombly*, 550 U.S. at 555)).

The standard articulated in *Twombly* is not limited to any particular type of litigation, but rather governs the pleading standard “in all civil actions.” *Id.* at 684. Further, to the extent Kenyon asserts that she should be entitled to take discovery to flesh out her claims, as she does here, the Supreme Court has explained that discovery is not a fair substitute for failing to state a claim. “It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.” *Id.* at 685 (quoting *Twombly*, 550 U.S. at 559). The plaintiff must show a basis for relief, not merely assert a claim for it. *E.g., id.*

As the Sixth Circuit has cautioned, “[c]opyright infringement, like anti-trust actions, lends itself readily to abusive litigation, since the high cost of trying such a case can force a

defendant who might otherwise be successful in trial to settle in order to avoid the time and expenditure of a resource intensive case.” *National Bus. Dev. Servs., Inc. v. Am. Credit Educ.*, 299 Fed. Appx. 509, 512 (6th Cir. 2008). When drafting a copyright infringement complaint, “greater particularity in pleading, through showing ‘plausible grounds,’ is required.” *Id.*

IV. ARGUMENT

A. This Court Lacks Personal Jurisdiction Over the Defendant

The Complaint acknowledges Clare that does not reside in Tennessee (thereby implicitly acknowledging that there is no general jurisdiction over her)⁶ and that her books are produced, marketed and distributed by a third-party publisher and that the Movie and Television Series are similarly created, produced, marketed and distributed by third-parties. The relevant section of the Complaint (¶¶ 7-8) does not ascribe a single jurisdictional act to Clare herself, but rather ascribes every single alleged act to an amorphous group of “DEFENDANTS,” who, other than Clare, are in reality not even defendants. *See, e.g., Bufalino v. Michigan Bell Tel. Co.*, 404 F.2d 1023, 1028 (6th Cir. 1968) (“The action was never commenced as to the ‘Does’ because they were not identified nor served with process.”). Respectfully, because of the Complaint’s complete disregard for establishing jurisdiction over Clare, the Court has no choice but to dismiss on this basis.

If Kenyon is suggesting that Clare is subject to jurisdiction merely because she authored works that are sold by others in Tennessee, she is mistaken as a matter of law, as demonstrated by the recent opinion in *Skidmore v. Led Zeppelin*, 106 F. Supp. 3d 581 (E.D. Pa. 2015). That case held that the individual members of Led Zeppelin (in particular, Jimmy Page, the creator of

⁶ “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile”
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the song “Stairway to Heaven” that allegedly infringed the plaintiff’s copyrighted work) were not subject to jurisdiction in Pennsylvania simply because the recordings of the song were widely available for purchase there. As a threshold matter, the Court correctly noted that, because copyright infringement claims are subject to a strict three-year statute of limitations, activity that occurred more than three years before the filing of the complaint is irrelevant. *Id.* at 587. Then, after engaging in the same due process analysis that a federal court in Tennessee does,⁷ the Court held that such sales were not acts attributable to Page or the other band members:

As to the fact that copies of “Stairway to Heaven” and Page’s book are sold in stores located in the District, Plaintiff has failed to plead facts establishing that these sales are acts by the individual Defendants purposefully directed at the forum. Again, there is no evidence, and Plaintiff has not alleged, the individual Defendants have any control over where the song (or book) is distributed.

Id. at 588. The Complaint here has the same defects and likewise warrants dismissal of the claims against Clare.

B. The Claims of Copyright Infringement Are Barred As a Matter of Law

To prevail on a claim of copyright infringement, a plaintiff must show (1) ownership of a valid copyright, and (2) copying by the defendant of protected components of the copyrighted material. *See Feist. Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991); *Kohus v. Mariol*, 328 F.3d 848, 853 (6th Cir. 2003). Even if existence of the first element is assumed for purposes of this motion, Kenyon’s copyright claims are nevertheless subject to dismissal because she has failed to establish the second element.

Goodyear Dunlop Tires Operations, S.A. v. Brown, ___ U.S. ___, 131 S. Ct. 2846, 2853 (2011).

⁷ Both Tennessee and Pennsylvania permit the exercise of jurisdiction to the full extent permitted by the Due Process Clause. *Compare Skidmore*, 106 F. Supp. at 585, with *Bridgeport Music, Inc. v. Still N The Water Publ’g*, 327 F.3d 472, 477 (6th Cir. 2003) (citation omitted) (“As ‘[t]he Tennessee long-arm statute has been interpreted as coterminous with the limits on personal jurisdiction imposed by the due process clause,’ we address only whether exercising personal jurisdiction over Appellees is consistent with federal due process requirements.”).

Any contention by Kenyon that this motion should be decided based on her allegations in the Complaint and accompanying exhibits would be incorrect. “In copyright actions, ‘the works themselves supersede and control contrary descriptions of them,’ including ‘any contrary allegations, conclusions or descriptions of the works contained in the pleadings.’” *Peter F. Gaito Arch., LLC v. Simone Devel. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010) (quoting *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 52 (2d Cir. 1986) and 3-12 Nimmer on Copyright § 12.10).⁸ *Accord*, *Davis v. American Broadcasting Cos.*, No. 1:10-CV-167, 2010 WL 2998476, *5 (W.D. Mich. Jull. 28, 2010 (citing *Greenberg v. Life Ins. Co. of Va.*, 177 F.3d 507, 514 (6th Cir. 1999) (“The Court may consider the works without converting the motion to one for summary judgment, even if the plaintiff did not attach the copyrighted works to his complaint, if the complaint refers to the document, the document is central to the claims, and the defendant provides the Court with an authentic copy.”)). In accordance with this principle, Courts in the Sixth Circuit routinely review and rule as a matter of law on the content of creative works with respect to copyright infringement. *See, e.g., Stromback v. New Line Cinema*, 384 F.3d 283, 296-99 (6th Cir. 2004); *Murray Hill Pubs., Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 323-26 (6th Cir. 2003); *Davis*, 2010 WL 2998476 at *7-10; *Brainard v. Vassar*, 625 F. Supp. 2d 608, 613-14 (M.D. Tenn. 2009); *Johnson v. Foxx*, 502 F. Supp. 2d 620, 623-24 (E.D. Mich. 2007); *Winfield Collection Ltd. v. Gemmy Indus. Corp.*, 311 F. Supp. 2d 611, 616-17 (E.D. Mich. 2004).⁹

⁸ The *Gaito* Court further noted that that principle has been explicitly adopted by the Courts of Appeals in the Fifth, Eighth, Ninth, and Tenth Circuits. 602 F.3d at 65. In addition, the holding in *Gaito* was explicitly adopted by the Third Circuit in *Tanikumi v. Walt Disney Co.*, 616 Fed. Appx. 515, 518 (3d Cir 2015).

⁹ As noted, Kenyon’s counsel has refused to supply her books in a searchable PDF format that would aid the Court’s review. That lack of cooperation is inexplicable, in view of the fact that the contents of the book are publicly available and that the filing would be under seal to prevent unauthorized copying, except as an effort to hinder the Court’s review. Accordingly, Clare respectfully requests that the Court direct Kenyon to (1) submit searchable PDFs of her books no later than the date this motion is fully submitted; or (2) be precluded from relying on their contents. *See Chilcutt v. United States*, 4 F.3d 1313, 1324 (5th Cir. 1993) (quoting *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322, 351 (1909) (noting that when parties “intentionally withhold properly requested

The Sixth Circuit employs the following two-part test to determine substantial similarity:

First, we “identify and eliminate those elements [of a work] that are unoriginal and therefore unprotected.” Next, we determine “whether the allegedly infringing work is substantially similar to protect[a]ble elements of the original.” “It is axiomatic . . . that mere abstract ideas are not protect[a]ble, but the expression of an idea is.” When the work at issue is functional, rather than creative, “it is necessary to eliminate those elements dictated by efficiency.”

Automated Solutions Corp. v. Paragon Data Systems, Inc., 756 F.3d 504, 519 (6th Cir. 2014) (quoting *Kohus v. Mariol*, 328 F.3d 848, 853-56 (6th Cir. 2003)); *see also Tiseo Architects, Inc. v. B & B Pools Serv. & Supply Co.*, 495 F.3d 344, 348 (6th Cir. 2007).

Where the plaintiff over-claims protection and fails to identify which elements of its work are original, and thus subject to copyright protection, the court is “‘hamstrung’ and unable to engage in the necessary first step of the substantial similarity analysis.” *Id.* at 519. In *Automated Solutions*, although the plaintiff “argued its *conclusion*” that the defendant’s work was substantially similar to the plaintiff’s, “it offered no evidence [] by which a jury could arrive at that conclusion.” *Id.* Accordingly, the Sixth Circuit affirmed summary judgment for the defendant. *Id.* at 520-21.

The Sixth Circuit reached the same conclusion in *R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262 (6th Cir. 2010), affirming summary judgment for the defendant where the plaintiff over-claimed protection. “All of the evidence offered by Olmstead clearly lacks the abstraction and filtration elements.” *Id.* at 275. Elaborating, the Sixth Circuit explained: “Olmstead has not attempted to identify those elements of its software that are original; thus its substantial similarity analysis does not filter elements that would be expected to be common to any credit union software, those dictated by the particular business practices.” *Id.* Accordingly,

information, courts have the authority to presume that the party's refusal to produce the information is ‘an admission of the want of merit in the asserted defense.’”).

the Court concluded that the plaintiff had failed to create a triable issue of fact as to whether the defendant had copied *original* elements of the plaintiff's work. *Id.* at 276.

Here, dismissal is appropriate because Kenyon has failed to identify which elements of her works are original. Similar to the plaintiffs in the above cases, Kenyon claims that "all features" are protectable. In so doing, she has hamstrung the Court, making it impossible to filter out the unoriginal, functional elements of her works. As such, she has failed to sufficiently plead which elements of her works, if any, are original and thus entitled to copyright protection.

The claim is not only defectively pleaded, however. The works themselves demonstrate that Kenyon has no claim. The first step in the Court's review of the materials, before reviewing the alleged substantial similarity of the works, is to filter out the elements in the plaintiff's work that, although the defendant allegedly copied are not subject to copyright protection. *Kohus v. Mariol*, 328 F.3d 848, 855 (6th Cir. 2003). The category of unprotectable elements that is most applicable in this case are generally described as *scènes à faire*, which "are those 'incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.'" *Murray Hill*, 361 F.3d at 319 (quoting *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1295 (D.C. Cir. 2002)).

The analysis by Courts in other cases addressing alleged in fantasy fiction is highly instructive. In *DiTocco v. Riordan*, 815 F. Supp. 2d 655 (S.D.N.Y. 2011), the authors of two books sued the author and distributor of the *Percy Jackson* book series and related movie. Based on its comprehensive review of the materials, the Court granted the defendants' Rule 12(b)(6) motion to dismiss. Among the elements the Court determined were *scènes à faire* or otherwise unprotectable as a matter of law were:

- Young male heroes who must cope with missing parents and display their strength in battles with otherworldly forces. *Id.* at 668.

- The use of “Percy” as the name of the protagonist. *Id.*
- Love interests consisting of “blond females who like to watch baseball and tease the protagonist.” *Id.*
- Stepfathers. *Id.* at 669.
- Use of Greek gods who speak in modern English. *Id.*
- Activities of the Greek gods that have physical consequences in the modern world. *Id.*
- The same central plot element of “modern-day young heroes who must prevent destruction of the world by forces from Greek mythology.” *Id.* at 670.
- The use of magic weapons. *Id.*
- The common plot element of “a quest to get Zeus his lightning bolt.” *Id.*
- Both protagonists battle the Greek Titans Atlas and Kronos. *Id.* at 671.

In *Allen v. Scholastic Inc.*, 739 F. Supp. 2d 642 (S.D.N.Y. 2011), the heirs of the author of *Adventures of Willy the Wizard—No 1 Livid Land* sued the publisher of *Harry Potter and the Goblet of Fire*. Based on its comprehensive review of the materials, the Court granted the defendant’s Rule 12(b)(6) motion to dismiss. Among the elements the Court determined were *scènes à faire* or otherwise unprotectable as a matter of law were:

- “In both books, the competition is announced in a castle, and in both cases it is in the “Great Hall” of that castle.” *Id.* at 662.
- “[B]oth Willy and Harry are in the bath when they learn information central to the task at hand.” *Id.* at 663.
- The competitions are both scored on a scale of one thousand and involve the rescue of hostages. *Id.*
- Both books portray “magical worlds based in Europe, wizard hospitals that treat mental illness, wizard colleges, and secret wizard communities.” *Id.* at 664.
- Both books refer “to apprentices who protested their working conditions.” *Id.*
- Both books involve “travel using magical versions of real-world transportation or special powder.” *Id.*

In *Wild v. NBC Universal, Inc.*, 788 F. Supp. 2d 1083 (C.D. Cal. 2011), the creator of a graphic novel titled *Carnival of Souls* sued based on claimed infringement in the fourth season of the television series *Heroes*, which also had a carnival setting with supernatural elements. Based on its comprehensive review of the materials, the Court granted the defendant’s Rule 12(b)(6)

motion to dismiss. Among the elements the Court determined were *scènes à faire* or otherwise unprotectable as a matter of law were:

- A traveling carnival that can magically appear and disappear to collect its protagonists. *Id.* at 1097.
- A main character/ “dark leader” who leads a carnival of outcasts and lost souls, and who seeks to make his carnival more powerful by recruiting new members with special abilities. *Id.*
- A young boy who enters the carnival, receives a prophecy that changes his life, and develops special abilities that then leads to the very same carnival seeking them out, approximately 14 or 15 years later. *Id.*
- A sequence in which either a Carney or Hero, suspected of having committed a murder, runs through a remote wooded area while being chased by an angry mob and finding refuge in the carnival which disappears before the mob locates the fleeing suspect. *Id.*
- A hall of mirrors scene in which a protagonist is forced to reveal secrets about himself. *Id.*
- A Jamaican voodoo witchdoctor with dreadlocks. *Id.*
- A carnival appearing in nightmarish visions where a Carney or Hero awakes in a panicked state. *Id.*
- A fortune-teller warning that a hunter is coming to attack the carnival. *Id.*
- Hunters attacking the carnival in an attempt to undermine its power. *Id.*
- The presence of a hunter's daughter during the attack. *Id.*

Finally, in *Hogan v. DC Comics*, 48 F. Supp. 2d 298 (S.D.N.Y. 1999), the authors of a comic book titled *Matchsticks* featuring a half-man/half-vampire sued the creators and distributors of a “painted graphic novel” titled *Dhampire: Stillborn*, also featuring a half-man/half-vampire. Based on its comprehensive review of the materials, the Court granted the defendant’s motion for summary judgment. Among the elements the Court determined were *scènes à faire* or otherwise unprotectable as a matter of law were that:

- Both works contain a half-human, half-vampire main character named Nicholas Gaunt, who is a young white male with “pale skin, a medium build, dark and tired eyes, dark hair that is scraggly, short and unkempt.” *Id.* at 310
- Both characters seek to uncover the truth about their origins and both learn about their origins through flashbacks or memories. *Id.*
- Both characters are faced with the choice of pursuing good or evil. *Id.*
- Both characters are indoctrinated into the forces of evil by killing. *Id.*
- Both characters have a “sinister genealogy.” *Id.*

- Both characters have a developing romance. *Id.*
- Both works use similar imagery, such as religious symbolism, biblical allusions and the use of doors to see into the past. *Id.*
- Both works have a “macabre” feel, including scary characters and dark, haunted scenes. *Id.*

Kenyon’s recitations in Paragraph 31 of her Complaint and the first two pages of her Exhibit 3 consist of nothing more than general standard story lines that, if anything, are even more generic than those rejected by the Courts above. Pages 1-6 of Defendant’s Exhibit A offers specific rebuttals and responses to each one. Clare respectfully submits that, with or without reliance on the rebuttal, it is obvious that all of the recitations consist of *scènes à faire*.

One additional category of elements must also be filtered by the Court: “independently-created elements.” *Murray Hill*, 361 F.3d at 326. “Therefore, where an element occurs in both the defendant’s prior work and the plaintiff’s prior work, no inference of copying can be shown.” *Id.* The vast majority of the laundry list of elements in Kenyon’s Exhibit 3 demonstrably created by Clare before they were used by Kenyon.¹⁰

- All of the allegedly common elements between Kenyon’s character “Nick Gautier” and Clare’s character “Clary Frey.”
- All of the allegedly common elements between Kenyon’s character “Adarian Malachi” and Clare’s character “Valentine Morgenstern.”
- All of the allegedly common elements between Kenyon’s character “Nick Gautier” and Clare’s character “Clary Frey.”
- All of the allegedly common elements between Kenyon’s character “Cherise Gautier” and Clare’s character “Jocelyn Frey.”
- All but two of the allegedly common elements between Kenyon’s character “Uriah/Galan” and Clare’s character “Jonathan Morgenstern.”¹¹
- All of the allegedly common elements between Kenyon’s character “Menyara Chartier” and Clare’s character “Madame Dorothea.”

¹⁰ In addition, a large number of the descriptions of Clare’s allegedly infringing elements (in addition to consisting of unprotectable *scènes à faire*) are demonstrably incorrect. These are addressed element-by element Exhibit A to Clare’s Notice of Filing.

¹¹ One of the exceptions, that Jonathan “is brought back to life by the hero who puts his mark on him to control him,” is simply a misstatement (*See* Ex. A to Clare’s Notice of Filing at 13.). The other, that both characters are villains “who can be charming when they want” would accurately describe virtually every fictional villain ever created.

- All of the allegedly common elements between Kenyon’s character “Michael Tyler ‘Big Bubba’ Burdette” and Clare’s character “Luke Garroway a/k/a Lucian Greymark.”
- Most of the allegedly common elements between Kenyon’s character “Ash” and Clare’s character “Jace.”
- All of the allegedly common elements between Kenyon’s character “Menyara Chartier” and Clare’s character “Madame Dorothea.”
- The bisexuality of Clare’s character “Magnus Bane” as opposed to Kenyon’s character “Eric St. James.”
- All of the allegedly common elements between Kenyon’s character “Simone DuBois” and Clare’s character “Maia Roberts.”
- All of the allegedly common elements between Kenyon’s character “Apollodorus” and Clare’s character “Max Lightwood.”
- All of the allegedly common elements between Kenyon’s character “Malachai” and Clare’s character “Moloch.”

Turning to whether the few remaining elements can support a sustainable claim of substantial similarity, this issue can be, and often is, decided as a matter of law. The Court in *Murray Hill* noted that “Courts ‘have frequently affirmed summary judgment in favor of copyright defendants on the issue of substantial similarity.’” 361 F.3d at 321 (quoting *Shaw v. Lindheim*, 919 F.2d 1353, 1355 (9th Cir. 1990)). “One reason to do so is that the question of substantial similarity can usually be decided on the basis of the works themselves and rarely, if ever, involves questions of credibility, the peculiar province of the jury.” *Id.* This reasoning applies with equal force to motions to dismiss. Indeed, the Sixth Circuit in *Murray Hill* took the even more extreme step of vacating a jury verdict in favor of the plaintiff and, based solely on its own review of the works at issue, entering judgment as a matter of law for the defendant. *Id.* at 326. Relying on *Murray Hill*, *Stromback* and *Kohus*, the Court in *Davis* did precisely that. *See* 2010 WL 2998476 at *10.

Kenyon’s attempt to demonstrate substantial similarity through a list of isolated elements is directly contrary to the accepted practice in the Sixth Circuit and elsewhere. “Such a scattershot approach cannot support a finding of substantial similarity because it fails to address

the underlying issue: whether a lay observer would consider the works as a whole substantially similar to one another.’” *Murray Hill*, 361 F.3d at 320 (quoting *Williams v. Crichton*, 84 F.3d 581, 590 (2d Cir. 1996)). See also *Davis*, 2010 WL 2998476 at *6 (quoting *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984) (“courts have cautioned against considering lists of similarities between works to determine whether the works are substantially similar because such lists ‘are inherently subjective and unreliable’ and tend to ‘emphasize [] random similarities scattered throughout the works’”). That is what Kenyon has done in the Complaint. No one who reads both Kenyon’s and Clare’s books would confuse the adventure-driven stories of teenagers descended from angels (and their occasional “PG” romances) with the immortal Greek heroes who people the adult “romance” novels of Kenyon and the more-than-bodice-ripping references to explicit adult behavior aimed at the adults for whom Kenyon’s books were intended. Although many adults enjoy Clare’s books, as they did the *Harry Potter* series, they are aimed at young adults and suitable for them. Kenyon’s are not:

The two series differ in form and tone. The *Mortal Instruments* features such YA standards as a group of attractive young people thrown together in stressful circumstances, spiced with plenty of angsty, will-they-or-won’t-they romantic tension extended over several books. Each of the *Dark-Hunter* novels centers around the courtship of a different adult couple, who, once they attain their happily-ever-after ending, serve only as background characters in the story of the couple in the next book. There’s not much sex in *Mortal Instruments*, although there are dark overtones of incest and sexual violence. Sex in the *Dark-Hunter* series is abundant and explicit but largely untouched by serious, real-world trauma or transgression. As much as the series differ from each other, they’re both very typical of their respective genres: YA urban fantasy and paranormal adult romance.

Laura Miller, *The Shadowhunters vs. the Dark-Hunters*, SLATE MAGAZINE, Feb. 17, 2016

[available at

http://www.slate.com/articles/arts/culturebox/2016/02/author_sherrilyn_kenyon_sues_casandra_clare_for_copyright_infringement.html].

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C. The Lanham Act Claims Are Barred As a Matter of Law

1. All of Kenyon's Lanham Act Claims Are Barred By Laches

“Because the Lanham Act does not contain a statute of limitations, courts use the doctrine of laches to determine whether a Lanham Act claim should be barred.” *CMH Mfg., Inc. v. U.S. GreenFiber, LLC*, No. 3:12-273, 2013 WL 3324292, *3 (E.D. Tenn. Jul. 1, 2013) (citing *Audi AG v. D'Amato*, 469 F.3d 534, 545 (6th Cir.2006)). With respect to Lanham Act claims, laches is a defense to claims for money damages. *Johnny's Fine Foods, Inc. v. Johnny's Inc.*, 286 F. Supp. 2d 876, 882 (M.D. Tenn. 2003) (citing *Kellogg Co. v. Exxon Corp.*, 209 F.3d 562, 568-69 (6th Cir. 2000)). The necessary elements are unreasonable delay by the defendant and material prejudice to the defendant.” *Id.* at 881.

“With respect to what amounts to an unreasonable delay, this Circuit holds faithfully to the principle that ‘a suit will not be barred [by laches] before the analogous statute [of limitations] has run but will be barred after the statutory time has run,’ describing it as a presumption that ‘should remain strong and uneroded in trademark cases.’” *Id.* (quoting *Tandy Corp. v. Malone & Hyde, Inc.*, 769 F.2d 362, 365-66 (6th Cir. 1985)). The applicable statute of limitations for trademark cases arising in Tennessee (borrowed from the most closely analogous state statute) is three years. *Id.* (citations omitted). When the excessive delay is clear from the face of the complaint, dismissal under Rule 12(b)(6) is warranted. *CMH Mfg.*, 2013 WL 3324292 at *3-4.

Kenyon alleges that she learned in 2006 “from distressed fans” that a then-unpublished work by Clare used the term “darkhunter.” (Complaint ¶ 12.) She next alleges that Clare substituted the term “shadowhunter” when that work was published in 2007 as *The Mortal Instruments: City of Bones*. She then acknowledges that she was aware of the continuous use of

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that term thereafter, but did nothing to prevent it, even when Simon & Schuster made its printing error in 2009. She therefore waited a full *nine years* after learning about Clare’s use of “Shadowhunters” to bring this action. Under the authorities cited above, the Lanham Act claims are wildly untimely as a matter of law.

Since 2007, “Shadowhunters” has been used in at least 10 novels and other related books, the Movie and the Television Series, all without any effort by Kenyon to prevent it. The reliance by Clare and those working with her (*i.e.*, the Doe Defendants) “greatly increased [their] potential liability in a long-delayed trademark action and clearly amounts to prejudice to [them].” *Johnny’s Fine Foods*, 286 F. Supp. 2d at 881. That prejudice, coupled with the indisputable delay, provides ample support for a finding of laches.

2. There is No Conceivable Confusion Between “Shadowhunters” and “Dark-Hunter”

There are two independent reasons that Kenyon’s claim that “Shadowhunters” infringes “Dark-Hunters” should be dismissed as a matter of law. In *General Motors Corp. v. Keystone Automotive Indus., Inc.*, 453 F.3d 351, 355 (6th Cir. 2006), the Court ruled in favor of the defendant on summary judgment on the grounds that “[t]here can be no likelihood of confusion at the point of sale where a defendant conspicuously and unequivocally informs buyers that the defendant, and not the plaintiff is the source of the product.” A comparison of Exhibits 4 (samples of Kenyon’s book covers) and 5 (samples of Clare’s book covers) to the Complaint demonstrates unequivocally that this case is a paradigmatic example of that principle. Each displays the author’s name and the title of the book in print that is far larger than that devoted to the words “Shadowhunters” and “Dark-Hunters.” Thus, it is inconceivable that a would-be purchaser of one of Kenyon’s “Dark-Hunter” books could be purchase one of Clare’s books by mistake, because such a purchaser *would see Kenyon’s name displayed prominently on the*

cover of the book. Kenyon’s claim is unbelievable on its face, and certainly fails to reach even the level of implausibility. Accordingly, dismissal is warranted.¹²

Dismissal is also warranted because the words “Shadowhunters” and “Dark-Hunters,” as a matter of law, are not confusingly similar. In *AutoZone, Inc. v. Tandy Corp.*, 373 F.3d 786, 796 (6th Cir. 2004), the Court held on summary judgment that “PowerZone” and “AutoZone” were not confusingly similar “particularly given the ubiquity of “ZONE.” The cases upon which the Court relied are also instructive. See *Little Caesar Enters., Inc. v. Pizza Caesar, Inc.*, 834 F.2d 568, 571–72 (6th Cir. 1987) (LITTLE CAESARS and PIZZA CAESAR are dissimilar because “Caesar” is often used in selling Italian food and because of the differences in sound and appearance); *Streetwise Maps, Inc. v. VanDam, Inc.*, 159 F.3d 739 (2d Cir. 1998) (finding a dissimilarity between STREETWISE and STREETSMART when both were used to sell maps); *Gruner & Jahr USA Publ'g v. Meredith Corp.*, 991 F.2d 1072, 1079–80 (2d Cir. 1993) (PARENTS magazine and PARENT'S DIGEST magazine not confusingly similar).

3. Kenyon Fails To State a Trade Dress Infringement Claim

The standard for properly alleging a viable claim of trade dress infringement are well-established:

To allege that trade dress is protectable, “plaintiffs should detail ‘exactly what the[ir] trade dress consists of.’ ” “Vague allegations that a defendant ‘uses’ protected trade dress are not enough.” “A plaintiff must ... offer a precise expression of the character and scope of the claimed trade dress ... and articulate the ‘elements of their product design with specificity to be afforded trade dress protection.’ ” “[I]t will not do to solely identify in

¹² The leading treatise on trademark law notes that “[s]ince the Supreme Court decisions in *Twombly* and *Iqbal* in 2007-2009, a growing number of courts have dismissed a trademark infringement complaint on a Rule 12(b)(6) motion when the allegations of a likelihood of confusion are implausible in view of the facts alleged.” 6 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:121:75 (4th ed.) (updated March 2016) (footnote citation omitted). Consistent with that statement, the Sixth Circuit has not hesitated to affirm the dismissal of a trademark claim when the allegations of likelihood of confusion were implausible. *Hensley Mfg., Inc. v. ProPride, Inc.*, 579 F.3d 603, 610-11 (6th Cir. 2009).

litigation a combination as ‘the trade dress.’ Rather, the discrete elements which make up that combination should be separated out and identified in a list.”

Mike Vaughn Custom Sports, Inc. v. Piku, 15 F. Supp. 3d 735, 745-46, (E.D. Mich. 2014) (citations omitted) (dismissing complaint that failed to satisfy the stated requirements) (citations omitted). The Complaint does not come close to meeting the standard. It merely alleges that “[i]n addition to adopting identifying marks and trade dress confusingly similar to PLAINTIFF’s Dark-Hunter Marks, CLARE has also copied visual representations from the Dark-Hunter Series in conjunction with the Shadowhunter Series (Complaint ¶ 18), but then provides only one example: the “Angelic Power” rune discussed above (at 7). As noted, Kenyon’s own samples show that she does not use the rune on her book covers. Even if she did, however, the Complaint nevertheless fails to state a claim. “Trade dress ‘*involves the total image of a product*’ and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques.” *Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619, 629 (6th Cir. 2002) (emphasis added) (quoting *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 764 n.1 (1992)).

4. Kenyon Fails To State a Claim For Contributory Trademark Infringement

To the extent that Kenyon is pleading contributory rather than direct infringement (and the Complaint is extremely vague in that regard), that claim must be dismissed as well. “To be liable for contributory trademark infringement, a defendant must have (1) ‘intentionally induced’ the primary infringer to infringe, or (2) continued to supply an infringing product to an infringer with knowledge that the infringer is mislabeling the particular product supplied. *Perfect 10, Inc. v. Visa Int’l Serv., Ass’n*, 494 F.3d 788, 807 (9th Cir. 2007) (quoting *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855 (1982)).

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The Complaint’s sole allegation concerning contributory infringement (at ¶ 5) is that:

At all relevant times each DEFENDANT who knowingly induced, caused, or materially contributed to the infringement alleged herein by another DEFENDANT, but who may not have committed or participated in the infringing acts himself or itself, may be held liable as a contributory infringer as each such DEFENDANT had knowledge, or reason to know, of the infringement.

That generic allegation is intended to cover all of the Defendants, including the Does, in both copyright and trademark. It “fails to state a short and plain statement of the claim showing that he is entitled to relief and fails to give each defendant fair notice of the substance of the claim and the grounds upon which it rests.” *Tovey v. Nike, Inc.*, No. 1:12-cv-0448, 2012 WL 7017821, *11 (N.D. Ohio Jul. 3, 2012) (adopted and modified on other grounds, 2013 WL 486341 (N.D. Ohio Feb. 6, 2013). “As a result, [Kenyon’s] cause of action for contributory trademark infringement does not state a claim upon which relief may be granted even under the more lenient, pre-*Twombly* standard of pleading.” *Id.*

5. Kenyon Fails to State a Claim For “False Advertising/Unfair Competition”

The sole alleged factual basis for the Seventh Cause of Action—“False Advertising” and “Unfair Competition”—is the alleged infringement of “Dark-Hunters” by “Shadowhunters.” In fact, that Cause of Action explicitly alleges (at ¶ 91) that the undifferentiated “DEFENDANTS have made false or misleading statements of fact in interstate commerce concerning the characteristics, qualities, and source of their products *by infringing on the Dark-Hunters Marks*” (emphasis added). There is no freestanding claim for “unfair competition” under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Rather, term is a shorthand for two distinct causes of action under the statute: false association (§ 1125(a)(1)(A)) and false advertising (§ 1125(a)(1)(B)). See *Lexmark Int’l, Inc. v. Static Control Components, Inc.* __ U.S. __, 134 S. Ct.

1377, 1384 (2014). The Complaint fails to comprehend the distinction and improperly lumps them together. Equally important, it bases the § 43(a) claim on the same infringement of the same mark that is the basis of the infringement claims themselves. The Cause of Action clearly warrants dismissal based on this redundancy alone. *Sussman-Automatic Corp. v. Spa World Corp.*, 15 F. Supp. 3d 258, 273 (E.D.N.Y. 2014); *Ritchie Engineering Corp. v. Delta T. Corp.*, 2012 WL 1150844, *6 (D. Minn. Apr. 6, 2012); *Tactica Int'l, Inc. v. Atl. Horizon Int'l, Inc.*, 154 F. Supp. 2d 586, 597 n.14 (S.D.N.Y. 2001).

V. CONCLUSION

Based on the foregoing, Defendant respectfully requests that the Court dismiss the Complaint due to lack of personal jurisdiction over the Defendant and for failure to state a claim.

DATED this the 25th day of April, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 25, 2016, I served a copy of this document, via ECF, upon:

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