

No. 20-CI-002542

JEFFERSON CIRCUIT COURT  
BUSINESS COURT DOCKET  
DIVISION TEN (10)  
JUDGE ANGELA MCCORMICK BISIGCUSTOM OFFICIALS WEAR, LLC, *et al.*

PLAINTIFFS

vs.

**ORDER REGARDING  
MOTION TO DISMISS & STRIKE**SCORE 451 SPORTS, LLC, *et al.*

DEFENDANTS

\* \* \* \* \*

This matter is before the Court on a Motion by Defendants, Score 451 Sports, LLC (“Score 451”) and James H. Kirk (“Kirk”) (collectively, “Defendants”), to Dismiss and Strike or Alternatively for a More Definite Statement. The Motion was filed on May 11, 2020. Plaintiffs Custom Officials Wear, LLC (“Custom Officials”) and Beulah Hester (“Hester”) (collectively, “Plaintiffs”), filed a Response on June 8, 2020. Defendants filed a Reply on June 25, 2020.

The Court heard oral argument on August 26, 2020. The Honorable Christopher B. Rambicure represented Plaintiffs. The Honorable Elisabeth S. Gray and the Honorable Brian P. McGraw represented Defendants. The matter now stands submitted. The Court, having considered the written memoranda, oral argument, record in the case, and being otherwise sufficiently advised, rules as follows.

**BACKGROUND**

This is a dispute arising out of a sale of business assets. Plaintiff Hester is the owner of Plaintiff Custom Officials, a company involved in the manufacture and sale of umpire apparel. Hester also previously served as President and Director of a separate company known as Ump

Attire, Inc. Plaintiffs allege that Hester founded the “Ump Attire” brand of umpire apparel in 1995 and has since continuously sold Ump Attire branded products, first via Ump Attire, Inc. and now via Custom Officials.

Plaintiffs allege that Defendant Kirk began working as Ump Attire’s web designer in 2001. Defendant Score 451 was formed in 2006 with Defendant Kirk as its President and CEO. In 2006, Custom Officials and Score 451 began to discuss a sale of the “internet/retail” portion of the Ump Attire business to Defendants. At the time, Hester was 62 years old and had recently experienced the death of one of her daughters.

On May 11, 2006, Custom Officials and Score 451 executed an Asset Purchase Agreement. The Agreement provided that Score 451 would pay \$313,000.00 in exchange for a portion of Custom Officials’ assets, including the Ump-attire.com website, related domains and email accounts, as well as Custom Officials’ internet/retail customer and email databases and lists, goodwill, and orders/accounts receivable. A separate Distribution Agreement executed by the Parties provided Score 451 with an exclusive right to sell Custom Officials’ private label products in certain states through May 2016, “except for sales through entities upon which Custom Officials Wear already has relationships (e.g. KHSAA and NSA).” The Distributor Agreement further provided that Score 451 would use its best efforts to promote the sale and distribution of Custom Officials’ products. Score 451 also agreed to pay a 2 ½ percent royalty on all sales until March 2016.

The Parties successfully operated under these Agreements for some period of time. In 2010, Plaintiffs hired legal counsel to address what they believed to be a trademark violation by Defendants, which they believed was resolved by late 2010. Plaintiffs allege that in late 2018 however, they learned via an Open Records Request that Defendants had signed an agreement

with KHSAA as “Ump-attire.com” in 2011, thereby obtaining a contract right Plaintiffs contend was expressly to remain with Custom Officials under the Agreements. Plaintiffs also allege that in 2012, Defendants ceased using best efforts to distribute and sell Custom Officials’ products as required by the Agreements.

Plaintiffs filed the present Complaint on April 17, 2020 stating claims for elder abuse/financial exploitation, common law trademark infringement, trade secret misappropriation, common law unfair competition, tortious interference with contract and business relations, breach of contract, and unjust enrichment. Defendants now move for dismissal of all claims for failure to state a claim upon which relief can be granted and to strike the allegations regarding elder abuse and financial exploitation. Defendants alternatively move for a more definite statement.

1. *Defendants’ Argument*

Defendants argue there is no private cause of action for elder abuse under Kentucky law. Defendants also maintain Plaintiffs fail to allege Hester was unable to manage her own affairs such that she was within the protections of the elder abuse statute, or that Defendants engaged in conduct unlawful under the statute such as intimidation or deception. Defendants request that the elder abuse allegations be stricken from the pleadings as severe and defamatory.

Defendants further argue Plaintiffs’ claim that Defendants infringed their trademark by using the “Ump-attire.com” name fails because Score 451 purchased the “Ump-attire.com” website via the Asset Purchase Agreement. Defendants further assert there is no basis to pierce the corporate veil and hold Kirk liable for any alleged trademark infringement.

Defendants similarly argue that Plaintiffs’ claim for misappropriation of trade secrets must fail because Defendants purchased the customer list and industry contacts at issue via the

Asset Purchase Agreement. Defendants also contend that customer lists generally do not constitute protectable trade secrets, that Plaintiffs do not allege they took reasonable efforts to maintain the secrecy of the customer information, and that the claim is barred by the applicable 3-year statute of limitations.

Defendants also argue that Plaintiffs' unfair competition claim must be dismissed. Defendants contend that to the extent Plaintiffs' claim is premised upon an unlawful use of Custom Officials' customer list or other trade secrets, the unfair competition claim is preempted by Kentucky's Trade Secrets Act. Defendants also maintain that to the extent the unfair competition claim is based upon Defendants' use of the "Ump-attire.com" name, it must fail because Custom Officials sold that website to Score 451. Defendants also assert there is no basis to pierce the corporate veil and allow an unfair competition claim against Kirk individually.

Defendants further argue that Plaintiffs' claim for tortious interference with contracts and business relationships must be dismissed because Plaintiffs do not identify any specific contracts or relationships with which Defendants interfered. Defendants also assert they are allowed to use the Ump-attire.com name because they purchased that website from Plaintiffs, and that Plaintiffs' claim is time-barred because they have known since 2016 that Defendants use the Ump-attire.com website. Defendants further maintain the tortious interference claim is preempted by the Trade Secrets Act to the extent it is based upon misuse of Plaintiffs' customer lists, and that there is no basis to pierce the corporate veil to hold Kirk individually liable.

Defendants also argue Plaintiffs have not stated a claim for breach of contract because they fail to identify the contract allegedly breached, how Defendants breached it, or any resulting damages. Defendants further maintain a breach of contract claim cannot be based on authorized acts such as their use of the Ump-attire.com name and Custom Officials' customer lists.

Defendants also assert that to the extent the breach of contract claim is premised upon Score 451's business with KHSAA, no term of the Parties' Agreements prohibits such business.

Defendants contend that Kirk also cannot be individually liable for a breach of contract claim because he is not a party to the Agreements and there is no basis to pierce the corporate veil.

Defendants also argue that Plaintiffs' claim for unjust enrichment must be dismissed because it is based on the same subject matter as the Parties' Agreements. Defendants also contend Plaintiffs fail to state allegations to plead a claim for unjust enrichment.

## *2. Plaintiffs' Argument*

Plaintiffs assert Defendants breached the Distributor Agreement by failing to use best efforts to promote and distribute Plaintiffs' products, and that Defendants also breached the Parties' Agreements by obtaining KHSAA's offline business. Plaintiffs further argue Defendants exceeded the scope of their intellectual property rights when they used the "Ump-attire.com" name to solicit and obtain the offline business of the KSHAA and other entities. Plaintiffs assert such conduct supports claims for trademark infringement and unfair competition.

Plaintiffs further maintain they may state a private cause of action pursuant to KRS 446.070 for Defendants' violation of the elder abuse statutes. Plaintiffs contend Defendants violated the statute by using the "Ump-attire.com" name to obtain KHSAA's offline business reserved to Custom Officials.

Plaintiffs further state Kirk may have used information obtained while he was a fiduciary and agent of Custom Officials to obtain the KHSAA business for Score 451 in 2011, and that they should therefore be allowed to conduct discovery as to their claim for misappropriation of trade secrets. Plaintiffs assert their tortious interference claims are supported by allegations that Defendants entered into prohibited contracts for offline business, and that such conduct was in

retaliation for the previous trademark dispute between the Parties. Plaintiffs further maintain such conduct occurred within the applicable statute of limitations under KRS 413.120. Finally, Plaintiffs maintain they may plead their unjust enrichment claim as an alternative theory to their breach of contract claims.

### **OPINION**

1. *Civil Rule 12.02(f)*

Civil Rule 12.02(f) provides that a defense may be made by motion for “failure to state a claim upon which relief can be granted.” In reviewing a motion to dismiss for failure to state a claim, “the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true.” Littleton v. Plybon, 395 S.W.3d 505, 507 (Ky. App. 2012). The Court “should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” Edmonson County v. French, 394 S.W.3d 410, 413 (Ky. App. 2013).

2. *Financial Exploitation/Elder Abuse*

The Court does not find that Plaintiffs have stated a private cause of action for elder abuse. Plaintiffs allege that Defendants violated KRS 209.990, a statute criminalizing financial exploitation of certain adults. Complaint ¶¶ 32; KRS 209.990(5)-(7). KRS 446.070 provides a private cause of action for statutory violations, including violations of criminal statutes, under certain circumstances. Hickey v. Gen. Elec. Co., 539 S.W.3d 19, 25 (Ky. 2018) (holding that plaintiff could bring a private cause of action for violation of statute criminalizing making of false statements in unemployment insurance proceedings). To have a private cause of action under KRS 446.070, three prerequisites must be satisfied:

[F]irst, the statute in question must be penal in nature or provide no inclusive civil remedy; second, the party [must be] within the class of persons the statute is intended to protect; and third, the plaintiff's injury must be of the type that the statute was designed to prevent.

Id. at 23-24.

The Court does not find Plaintiffs have sufficiently pled that Hester is within the class of persons protected by the elder abuse statutes. The statutes relied upon by Plaintiffs protect only “adults,” defined as

a person eighteen (18) years of age or older who, because of mental or physical dysfunctioning, is unable to manage his or her own resources, carry out the activity of daily living, or protect himself or herself from neglect, exploitation, or a hazardous or abusive situation without assistance from others, and who may be in need of protective services.

KRS 209.990(5)-(7); KRS 209.020(4). Plaintiffs' conclusory allegation that Hester was within the class of persons protected by the statute is not supported by any factual allegations aside from her age and the recent death of her daughter at the time of the transactions. See Complaint ¶ 31. Even construed liberally in Plaintiffs' favor, the Complaint is devoid of allegations that Hester suffered from mental or physical dysfunctioning, was unable to manage her resources, carry out the activity of daily living, or protect herself without assistance from others, and may have been in need of protective services. As such, the Court cannot find Plaintiffs have sufficiently alleged Hester was within the class of persons protected by the statutes. The Court also notes the Court of Appeals has twice held that the Elder Abuse Act does not give rise to a private cause of action, albeit under different sections of the Act than those relied upon by Plaintiffs. See Mason v. Stegall, No. 2015-CA-000999, 2017 WL 3129188 (Ky. App. July 21, 2017); Porter v. Cathey, No. 2011-CA-000398, 2012 WL 2471107 (Ky. App. June 29, 2012). Accordingly, the Court finds that dismissal of the elder abuse claim is warranted. However, the Court does not find that Defendants have shown that a striking of those allegations from the record is warranted. See CR

12.06 (providing that Court may strike material that is “sham, redundant, immaterial, impertinent or scandalous.”).

3. *Trademark Infringement*

Plaintiffs contend Defendants infringed their trademark when they identified Score 451 as “Ump-attire.com” in applying to serve as a KHSAA vendor. Response at 14-16, 18-19. Defendants assert this claim must be dismissed because they purchased the Ump-attire.com website and therefore cannot have unlawfully used the name Ump-attire.com. However, the Court finds Plaintiffs’ allegations sufficient to state a claim for trademark infringement.

The Asset Purchase Agreement between the parties indicates that Score 451 purchased the Ump-attire.com “website, [i]ncluding files, images and software,” and domain and related e-mail accounts from Custom Officials. Complaint Ex. 2 §(2).<sup>1</sup> However, the Agreement is silent as to whether the sale of those assets included a right for Score 451 to identify itself as Ump-attire.com. The contract is thus ambiguous as to whether Defendants’ use of that name in applying to serve as a KHSAA vendor was allowable. Nor can such a right be inferred from the mere transfer of the website and related assets because while the sale of an *entire* business is presumed to include trademark rights, Custom Officials sold only a portion of its assets to Score 451. See Yellowbook Inc. v. Brandeberry, 708 F.3d 837, 846 (6th Cir. 2013) (“[W]hen a business sells the ‘*entirety*’ of its assets, the trade name is presumably one of these assets.”) (emphasis added); Complaint Ex. 2 at 1 (“[T]he Parties hereto desire that *a portion of* [Custom Officials’] assets . . . be sold to [Score 451] pursuant to this Agreement . . . .”) (emphasis added).

The Court therefore does not find at this point that Plaintiffs’ claim for trademark infringement

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<sup>1</sup> The Court can consider the Asset Purchase Agreement and other documents central to and attached to the Complaint without converting the present Motion to one for summary judgment. Netherwood v. Fifth Third Bank, Inc., 514 S.W.3d 558, 564 (Ky. App. 2017).

fails as a matter of law in light of the terms of the Asset Purchase Agreement. Finally, accepting as true the Complaint allegations that Kirk himself “entered into new agreements with KHSAA as ‘Ump-attire.com,’” no showing of a basis to pierce the corporate veil is necessary to state the trademark infringement claim against Kirk in his individual capacity. Complaint ¶ 20. The Court therefore does not find at this point that dismissal of the trademark infringement claim is warranted.

4. *Trade Secret Misappropriation*

The Court does not find that Plaintiffs have stated a viable claim for misappropriation of trade secrets. Plaintiffs’ claim is premised upon Defendants’ alleged misappropriation of Plaintiffs’ “customer list and industry contacts.” Complaint ¶ 26. However, the Asset Purchase Agreement unambiguously identifies one of the assets purchased by Score 451 as Custom Officials’ “internet/retail customer and e-mail [d]atabases and lists.” *Id.* Ex. 2 § (2). As such, Score 451 could not misappropriate Plaintiffs’ customer lists and industry contacts because it had purchased those items. Finally, while Plaintiffs’ Response sets forth their further contention that “it is highly likely that Mr. Kirk used protected information” acquired by him in his role as an agent of Custom Officials before 2006, a bare allegation it is likely that someone may have committed an unlawful act is not sufficiently concrete to state a claim. Response at 21-22; CR 8.01 (requiring that pleadings include “a short and plain statement of the claim showing that the pleader *is* entitled to relief.”) (emphasis added). Accordingly, the Court concludes Plaintiffs have not stated a claim for misappropriation of trade secrets.

5. *Unfair Competition*

As an initial matter, the Court agrees with Defendants’ contention that Plaintiffs’ unfair competition claim is preempted by the Trade Secrets Act to the extent the claim is based upon

Defendants' alleged misappropriation of trade secrets. KRS 365.892 (providing that Trade Secrets Act "replaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret."). However, to the extent Plaintiffs' claim is based upon Defendants' use of Ump-attire.com in applying to serve as a KHSAA vendor, the claim may proceed. As noted above, the Asset Purchase Agreement is ambiguous as to whether the right to engage in such conduct was within the scope of the assets purchased by Score 451. As such, the Court cannot find that an unfair competition claim based upon such conduct fails as a matter of law. Finally, because Plaintiffs allege Kirk himself engaged in such conduct, the lack of allegations to demonstrate a basis to pierce the corporate veil does not require dismissal of the unfair competition claim against Kirk in his individual capacity.

6. *Tortious Interference*

As with their unfair competition claim, Plaintiffs' tortious interference claim is preempted to the extent it is based upon alleged misappropriation of trade secrets. KRS 365.892. To the extent the claim is based upon Defendants' identification of themselves as "Ump-attire.com" in the KHSAA vendor application, the claim is barred by the 5-year statute of limitations set forth in KRS 413.120(6). See Underwood v. Metts, No. 2018-CA-000124, 2019 WL 1313144, at \*2 (Ky. App. Mar. 22, 2019) (holding tortious interference claim subject to 5-year statute of limitations under KRS 413.120(6)). Plaintiffs contend that conduct occurred in 2011, and thus the 2020 filing of Plaintiffs' Complaint occurred after the expiration of that 5-year statute of limitations. Finally, the Court does not find that a discovery rule is applicable to the claim. See Middleton v. Sampey, 522 S.W.3d 875, 879 (Ky. App. 2017) ("With the exception of cases involving latent injuries from exposure to harmful substances, Kentucky

courts have generally refused to extend the discovery rule without statutory authority to do so.”). Accordingly, the Court finds that dismissal of the tortious interference claim is warranted.

7. *Breach of Contract*

The Court finds that Plaintiffs have stated a valid claim for breach of contract against Score 451. Defendants acknowledge that by asserting Score 451 failed to make best efforts to sell and distribute Custom Officials products as required by the Distributor Agreement, Plaintiffs have stated a claim for breach of that contract. Reply at 12. Plaintiffs’ allegation that Score 451 also breached the Distributor Agreement’s provision reserving sales to the KHSAA to Custom Officials likewise states a claim for breach of contract. Because the Asset Purchase Agreement is ambiguous as to the scope of rights conveyed to Score 451 in its purchase of the Ump-attire.com website and related assets, the Court also does not find a claim that Score 451 breached that Agreement by using the Ump-attire.com name in its KHSAA vendor application is barred as a matter of law.

However, because Kirk was not a party to the Agreements at issue, Plaintiffs cannot state a claim for breach of those Agreements against him individually. See Homestretch Logistical Solutions, Inc. v. Johnson Lawrence Walker Ins. Co., No. 2014-CA-001255, 2017 WL 729747, at \*3 (Ky. App. Feb. 24, 2017) (holding plaintiff could not state breach of contract claim against defendant who was not a party to the contract because “[u]nder Kentucky law, parties may only sue for a breach of contract if privity of contract existed.”). Accordingly, Kirk is entitled to dismissal of the breach of contract claims stated against him individually.

8. *Unjust Enrichment*

Finally, because Plaintiffs allege Defendants impermissibly used the Ump-attire.com name to obtain the KHSAA’s business, and that it would be inequitable for Defendants to retain

the resulting benefit, the Court finds Plaintiffs have pled the elements required to state a cause of action for unjust enrichment. Complaint ¶¶ 20, 23-24, 49-50; Superior Steel, Inc. v. Ascent at Roebing's Bridge, LLC, 540 S.W.3d 770, 778 (Ky. 2018) (listing elements for unjust enrichment claim as ““(1) benefit conferred upon defendant at plaintiff’s expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of [that] benefit without payment for its value.””). Moreover, while Plaintiffs may not recover on an unjust enrichment claim as to which there is a controlling contract, they may nonetheless pursue both claims as alternative theories during litigation. See Superior Steel, 540 S.W.3d at 778 (“[U]njust enrichment is unavailable when the terms of an express contract controls.”); CR 8.05 (“A party may also state as many separate claims or defenses as he has regardless of consistency . . . .”). Therefore, the Court does not find that the unjust enrichment claim should be dismissed at this time.

In sum, the Court finds that Plaintiffs have stated claims for trademark infringement, unfair competition based upon Defendants’ alleged wrongful use of the Ump-attire.com name, breach of contract by Score 451, and unjust enrichment. However, the Court does not find that Plaintiffs have stated valid claims for elder abuse/financial exploitation, trade secret misappropriation, unfair competition based upon trade secret misappropriation, tortious interference, or breach of contract against Kirk individually. Accordingly, the Motion to Dismiss is GRANTED IN PART and DENIED IN PART. The Motion to Strike is DENIED.

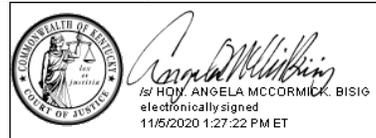
### **ORDER**

**WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED** that the Motion to Dismiss by Defendants, Score 451 Sports, LLC and James H. Kirk, is **GRANTED IN PART** and **DENIED IN PART**. Plaintiffs’ claims against both Defendants for elder abuse/financial

exploitation, misappropriation of trade secrets, unfair competition based upon misappropriation of trade secrets, and tortious interference, and against Kirk individually for breach of contract, are **DISMISSED WITH PREJUDICE**. The Motion to Dismiss as to Plaintiffs' remaining claims is **DENIED**.

**WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED** that Defendants' Motion to Strike is **DENIED**.

IT IS SO ORDERED this \_\_\_\_ day of \_\_\_\_\_, 2020.



JUDGE ANGELA MCCORMICK BISIG  
DIVISION TEN (10)  
JEFFERSON CIRCUIT COURT

cc: Christopher B. Rambicure  
Georgia T. Connally  
Elisabeth S. Gray  
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