

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

NO. 19-cv-24588-RNS

**KOBI KARP ARCHITECTURE
& INTERIOR DESIGN, INC.,**

Plaintiff,

v.

**O'DONNELL DANNWOLF
AND PARTNERS ARCHITECTS,
INC., *et al.*,**

Defendants.

DEFENDANTS' MOTION TO DISMISS

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Plaintiff's retaliatory suit against Defendants must be dismissed, under Federal Rule of Civil Procedure 12(b)(6), for failure to state a single viable cause of action.

INTRODUCTION

The developer—The Surf Club Apartments, Inc. (“Owner”)—of a forthcoming project concerning a historic building in Surfside, Florida, (the “Project”) hired Plaintiff to perform certain professional services, including preparation of technical drawings and review and revision to schematic design documents prepared by the Project design architect, Joseph Dirand Architecture (“JDA”). DE 1-3, § 1.1, 2.1 (the “Contract”). While Plaintiff boasts of being a well-known architect for its widely recognized designs (Comp., ¶ 14) that allegedly aided in governmental approval of the Project, Owner hired JDA to serve as the design architect on the Project – *not* Plaintiff. *See id.*, § 1.1. In fact, contrary to Plaintiff's allegations, the Contract explicitly states that “[i]n order to submit for Town of Surfside approval, the Owner hired [JDA] as the Design architect to provide architectural design services.” *Id.*

On September 19, 2019, Owner fired Plaintiff under Section 8.5 of the Contract. DE 1-8. In so doing, Owner stated that Plaintiff had been paid in full for all services rendered under the Contract. *Id.* Plaintiff apparently disagrees and alleges in this lawsuit that Owner has *not* paid Plaintiff's outstanding invoices. Comp., ¶ 40. While Plaintiff maintains that it is entitled to further payment from Owner for services rendered, on December 12, 2019, Owner sued Plaintiff in the Eleventh Judicial Circuit in and for Miami-Dade County, alleging that Plaintiff has not only been paid, but overpaid for its services, and that Plaintiff submitted a fraudulent final invoice for over **\$6,000,000**, the day after Owner terminated Plaintiff.¹ Notably, the suit alleges, that the substantial majority of those post-termination charges arise from unauthorized “additional services” rendered, despite none of the purported additional services being authorized in the manner required by the Contract. Taking Owner's allegations as true, Plaintiff has engaged in serious, fraudulent misconduct.

The Project

The Project, currently known as the Seaway Villas (the “Structure”), located at 9149 Collins Avenue, Surfside, Florida, is a historic building constructed in 1936. The Miami-Dade County Historic Preservation Board (“HPB”) designated the Structure as a historic building in

¹ The state court complaint is attached hereto as **Exhibit A**.

2014. DE 1-4 at 3. As such, no modification to the Structure may be made without approval of the HPB. *See* Miami-Dade Ordinance, § 16A-11(1).

On February 28, 2017, Owner—through its affiliate, Seaway Condo Acquisition, LLC—submitted an application for a special certificate of appropriateness to make extensive changes to the aging Structure. DE 1-5 at 4–6 (the “2017 COA Application”). In connection therewith, Owner, with Plaintiff’s alleged assistance (Comp., ¶ 30), submitted certain photographs of the Structure, technical drawings, design drawings, and floor plans to the HPB (collectively, the “Instruments of Service”) to obtain regulatory approval of the 2017 COA Application.² Critically, Plaintiff conveniently omits from the Complaint that it worked with Owner to submit the Instruments of Service to the HPB in 2017. On May 17, 2017, after conducting a quasi-judicial proceeding, the HPB conditionally approved the 2017 COA Application and issued the “2017 COA.” DE 1-5 at 2–3.

In January 2018, Owner and Plaintiff entered into the Contract. DE 1-3 at 2. Under the Contract, Plaintiff granted Owner an irrevocable license to reproduce the Instruments of Service “provided that the Owner pays the Architect the compensation for work completed to date due under this Agreement[.]” DE 1-3, § 6.3. “Any unauthorized use of the Instruments of Service shall be at the Owner’s sole risk and without liability to the Architect and the Owner’s consultants.” DE 1-3, § 6.4. The Contract allowed either party to terminate without cause upon 14-days’ notice. *See* DE 1-3, § 8.5.

On September 9, 2019, Owner—through its affiliate, Seaway Condo Acquisitions, LLC—submitted an application to modify the 2017 COA, DE 1-4 (the “2019 COA Application”), “which [was] based in large part on a structural assessment that had not been performed at the time of the previous Seaway approval,” DE 1-6, Transcript of Sept. 18, 2019, HPB Hearing, at 5:4-7. In connection with the 2019 COA Application, Owner re-submitted the Instruments of Service (DE 1-4, at 12–36) that had been previously submitted to the HPB in connection with the 2017 COA Application (Ex. B), along with photographs of a structural assessment of the Structure, and a LiDAR mapping survey of the Structure (DE 1-4, at 37–52; 55–61). On September 18, 2019, the

² The Instruments of Service submitted to the HPB in connection with the 2017 COA Application are attached hereto as **Exhibit B**. The Court may take judicial notice of the 2017 COA Application because it is a public record. *Roberto v. Shendell & Assocs., P.A.*, 2018 U.S. Dist. LEXIS 43355, at *2 (S.D. Fla. Mar. 16, 2018).

HPB held a quasi-judicial hearing on the 2019 COA Application. DE 1-6. Owner's representatives, including Defendants, among others, appeared at the hearing. *See* DE 1-6. After hearing Owner's presentation, and reviewing and considering the previously approved 2017 COA and the 2019 COA Application, the HPB conditionally approved the 2019 COA Application and issued the "2019 COA." DE 1-4 at 2-6.

The Allegations

Plaintiff alleges that as a result of Owner's submission of the Instruments of Service to the HPB in connection with the 2019 COA Application, Defendants, O'Donnell Dannwolf and Partners Architects, Inc. ("ODP"), and Kurt Dannwolf ("Dannwolf"), ODP's president, infringed on Plaintiff's copyrights on the Instruments of Service and trademarks, removed Plaintiff's copyright management information, tortiously interfered with the Contract, and have been unjustly enriched. The Complaint is rife with conclusory allegations, many of which are founded on information and belief and do not carry any factual support. Each of the six claims alleged in the Complaint must be dismissed for the following reasons:

First, Plaintiff's Copyright Infringement claim (Count I) must be dismissed. The Complaint does not plausibly allege any act by Defendants that violated any of Plaintiff's exclusive rights under the Copyright Act. The 2019 COA Application identifies Owner as the applicant, not Defendants. In any event, mere re-submission of the previously approved Instruments of Service with the 2019 COA Application constitutes fair use. Further, Plaintiff's Digital Millennium Copyright Act claim (Count II) fails because any alleged removal of Plaintiff's copyright management information ("CMI") does not concern electronic commerce or automated means of removing CMI, the Complaint does not allege any intent to deceive because Defendants did not infringe on Plaintiff's copyright, and Defendants did not distribute any work from which Plaintiff's CMI was removed.

Second, Plaintiff's Trademark Infringement (Count III) and Unfair Competition claims (Count IV) fail because the Complaint fails to plausibly allege that Defendants used Plaintiff's mark in commerce in connection with the sale of their services in a manner that is likely to cause consumer confusion. The HPB is not a consumer, submitting the previously approved Instruments of Service for regulatory approval is not commerce, and at no point did Defendants advertise Plaintiff's services as their own. The remainder of Plaintiff's Lanham Act claim similarly fails because Plaintiff's claims do not fall within the zone of interests protected by the Lanham Act, it

is duplicative of Plaintiff's copyright infringement claim (Count I), and it purports to assert a cause of action for Defendants' alleged non-compliance with Florida Department of Business Regulation Rule 61G1-18.002, which does not provide a private cause of action.

Third, Plaintiff's Tortious Interference claim (Count V) must be dismissed because Plaintiff has not plausibly alleged that Defendants employed any improper means that caused Owner to terminate Plaintiff, nor does the Complaint adequately allege that Defendants' actions were unjustified as compared to the lawful alternative explanation that Defendants acted pursuant to privilege in accepting work from Owner after it decided to terminate Plaintiff from the Project. Additionally, the Complaint similarly fails to allege that in all probability Owner would have retained Plaintiff but-for Defendants' interference.

Fourth, Plaintiff's Unjust Enrichment claim (Count VI) must be dismissed because it is duplicative of Plaintiff's Copyright Infringement claim (Count I), Plaintiff has not conferred any benefit on Defendants because Defendants have not infringed on Plaintiff's copyrights, and Plaintiff has an adequate remedy at law that precludes an unjust enrichment claim.

Finally, the Complaint does not allege any basis to impose individual liability on Dannwolf. Plaintiff alleges nothing more than threadbare recitals of the causes of action and fails to establish that Dannwolf had the right to control the entity that allegedly infringed Plaintiff's copyrights or trademark, or that Dannwolf personally profited from same. The Complaint does not otherwise plead any factual basis that would justify piercing the corporate veil.

Accordingly, the Complaint must be dismissed.

LEGAL STANDARD

Federal Rule of Civil Procedure 8 requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although a complaint "does not need detailed factual allegations," it must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining that Rule 8(a)(2)'s pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation"). In the same vein, a complaint may not rest on "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557 (alteration in original)). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. These elements are required

to survive a motion brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure, which requests dismissal for failure to state a claim upon which relief can be granted.

When reviewing a motion under Rule 12(b)(6), a court, as a general rule, must accept the plaintiff's allegations as true and evaluate all plausible inferences derived from those facts in favor of the plaintiff. *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance*, 304 F.3d 1076, 1084 (11th Cir. 2002); *AXA Equitable Life Ins. Co. v. Infinity Fin. Grp., LLC*, 608 F. Supp. 2d 1349, 1353 (S.D. Fla. 2009). However, this tenet does not apply to legal conclusions, and courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555; see *Iqbal*, 556 U.S. at 678; *Thaeter v. Palm Beach Cty. Sheriff's Office*, 449 F.3d 1342, 1352 (11th Cir. 2006). Moreover, "courts may infer from the factual allegations in the complaint 'obvious alternative explanations,' which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer." *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 682).

"[T]he Court need not accept the truth of allegations that are based simply 'upon information and belief,' see *Mann v. Palmer*, 713 F.3d 1306, 1315 (11th Cir. 2013), unless the 'belief is based on factual information that makes the inference of culpability plausible,'" *Associated Indus. Ins. Co. v. Advanced Mgmt. Servs.*, 2013 U.S. Dist. LEXIS 190063, at *7 (S.D. Fla. March 20, 2013) (citing *Iqbal*, 556 U.S. at 678)." *Holding Co. of the Vills. v. Little John's Movers & Storage, Inc.*, 2017 U.S. Dist. LEXIS 202882, at *20 (M.D. Fla. Dec. 11, 2017). "[I]f the court accepts the allegations made 'upon information and belief,' those allegations still must provide the factual content necessary to draw a reasonable inference of liability." *Boateng v. Ret. Corp. of Am. Partners, L.P.*, 2013 U.S. Dist. LEXIS 197898, at *11 (N.D. Ga. Mar. 5, 2013).³

ARGUMENT

I. PLAINTIFF FAILS TO STATE A CLAIM FOR COPYRIGHT INFRINGEMENT

Count I claims fail to state claims because the Complaint does not allege any facts showing that Defendants engaged in any act violating Plaintiff's exclusive rights. Further, re-submission of the previously approved Instruments of Service to the HPB in a quasi-judicial proceeding constitutes fair use.

To prevail on a claim for copyright infringement, a claimant must prove its ownership of

³ All internal citations omitted unless otherwise stated.

the asserted copyrights and Defendant's "copying" of the original or a "copy" of the copyrighted work. *Southern Bell Tel. & Tel. v. Assoc. Telephone Directory Publishers*, 756 F.2d 801, 810 (11th Cir. 1988); *Evans v. Continental Homes, Inc.*, 785 F.2d 897, 903 (11th Cir. 1986). "The second part of the two-part test for "copying" is whether Defendant has used the accused copies in any of the ways delineated in Section 106 of the Copyright Statute." *Playboy Enters. v. Starware Publ'g Corp.*, 900 F. Supp. 433, 438 (S.D. Fla. 1995). Under Section 106:

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; . . . (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; . . . (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106. "Engaging in or authorizing any of these categories without the copyright owner's permission violates the exclusive rights of the copyright owner and constitutes infringement of the copyright." *Playboy Enters. v. Frena*, 839 F. Supp. 1552, 1555-56 (M.D. Fla. 1993) (citing 17 U.S.C. § 501(a)).

A. Defendants Did Not Violate Plaintiff's Exclusive Rights Under Section 106

Here, the Complaint has not plausibly alleged any act on the part of Defendants that amounts to a violation of Plaintiff's rights under Section 106.

A complaint that fails to identify the acts through which the defendant allegedly infringed upon the plaintiff's copyrights must be dismissed. *Gregory S. Markantone DPM, P.C. v. Podiatric Billing Specialists, LLC*, 599 F. App'x 459, 460 (3d Cir. 2015) (affirming dismissal of copyright infringement claim because the plaintiff failed to plausibly allege that the defendant violated any of the plaintiff's exclusive rights under Section 106).

Here, the Complaint is devoid of allegations giving rise to the plausible inference that Defendants engaged in the unauthorized distribution of the Instruments of Service to the public. Plaintiff makes the conclusory allegation that "on information and believe, Defendants have knowingly infringed upon the [Instruments of Service] by copying, causing to be copied, publishing, and distributing" the Instruments of Service. Comp., ¶ 61. More specifically, the Complaint alleges that Defendants infringed on Plaintiff's copyright by submitting the Instruments of Service to the HPB in connection with the 2019 COA Application. Comp., ¶ 44.

The 2019 COA Application, however, contradicts Plaintiff’s conclusory allegations that *Defendants* distributed or published the Instruments of Service. In Section II of the 2019 COA Application, the applicant is identified as “Seaway Condo Acquisitions, LLC” – not Defendants. *See* DE 1-4 at 7. “[W]hen the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern.” *Griffin Indus., Inc., v. Irvin*, 496 F.3d 1189, 1205-06 (11th Cir. 2007) (“Our duty to accept the facts in the complaint as true does not require us to ignore specific factual details of the pleading in favor of general conclusory allegations.”). Thus, any allegation that Defendants published or distributed the Instruments of Service in violation of Section 106 by submitting same to the HPB is contradicted by the 2019 COA Application.

Additionally, the Complaint “does not identify the acts through which [ODP] and [Dannwolf] each allegedly infringed upon Plaintiff’s copyrights.” *Affordable Aerial Photography, Inc. v. Modern Living Real Estate, LLC*, 2019 U.S. Dist. LEXIS 132023, at *5 (S.D. Fla. Aug. 6, 2019). The only allegation in support of Plaintiff’s claims is that “on information and belief . . . Defendants submitted exact reproductions of [Plaintiff’s] copyrighted plans to the HPB in connection with the” 2019 COA Application. *Comp.*, ¶ 44. That the Complaint repeatedly conflates ODP and Dannwolf is “alone insufficient” to state a plausible claim. *Affordable Aerial Photography*, 2019 U.S. Dist. LEXIS 132023, at *6 (dismissing copyright infringement claim as shotgun pleading because it failed to distinguished the conduct of the two defendants and the specific acts through which each infringed on the plaintiff’s copyrights).⁴

Accordingly, Plaintiff has failed to plead any facts plausibly establishing that Defendants violated any of Plaintiff’s exclusive rights.

B. Submission of the Instruments of Service to the HPB Constitutes Fair Use

In any event, the Complaint must be dismissed because submission of the previously approved Instruments of Service to the HPB facially amounts to fair use.

“[A]n infringement claim fails where a defendant successfully asserts the affirmative defense of fair use of the work.” *Mizioznikov v. Forte*, 2017 U.S. Dist. LEXIS 45587, at *7 (S.D.

⁴ The Complaint is also subject to dismissal because it is a shotgun pleading. It repeatedly references the conduct of “Defendants” without adequately identifying the specific acts of each that support each claim alleged. This alone requires dismissal. *Embree v. Wyndham Worldwide Corp.*, 779 F. App’x 658, 660 (11th Cir. July 16, 2019); *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001).

Fla. Mar. 27, 2017) (Scola, J.) (citing *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1238-39 (11th Cir. 2010)). The Supreme Court has described fair use as “a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985). “Fair use” describes “limited and useful forms of copying and distribution that are tolerated as exceptions to copyright protection.” *Cable/Home Communications Corp. v. Network Prods.*, 902 F.2d 829, 843 (11th Cir. 1990) (citing *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1494 (11th Cir. 1984).

A copyright infringement claim must be dismissed if the face of the complaint shows fair use. *Mizioznikov*, 2017 U.S. Dist. LEXIS 45587, at *8 (dismissing copyright infringement claim for the defendant’s use of the plaintiff’s photograph as an exhibit in a state court filing).

In determining fair use, the Court considers the following nonexclusive factors: “The fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:”

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Cable/Home Commun. Corp., 902 F.2d at 844 (quoting 17 U.S.C. § 107 (1982)).

i. Defendants did not profit from Owner’s submission of the Instruments of Service

“With respect to the first factor, the Supreme Court has clarified that ‘a commercial or profit-making purpose’ is presumptively unfair.” *Id.* (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 448-49 (1984), and citing *Harper & Row*, 471 U.S. at 562, *Duncan*, 744 F.2d at 1496). “Implicit in this presumption is some meaningful likelihood that future market harm exists.” *Id.* (citing *Sony*, 464 U.S. at 451). “The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but ‘whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.’” *Id.* (quoting *Harper & Row*, 471 U.S. at 562). “If a challenged use of a copyrighted work is noncommercial, the party alleging infringement must demonstrate ‘either that the particular use is harmful, or that if it should

become widespread, it would adversely affect the potential market for the copyrighted work.” *Bond v. Blum*, 317 F.3d 385, 395 (4th Cir. 2003) (quoting *Sony*, 464 U.S. at 451). “The Supreme Court has made clear that commercial use of copyrighted material is not determinative of this factor.” *Rosen v. eBay, Inc.*, 2015 U.S. Dist. LEXIS 49999, at *38 (C.D. Cal. Jan. 16, 2015).

Here, accepting Plaintiff’s allegations as true, the Instruments of Service were not used for an exploitative commercial purpose; rather, they were submitted to comply with the legal requirements imposed by the HPB—which does not constitute a consumer—to obtain approval of a COA for construction of the Project. Critically, the HPB previously reviewed and approved the Instruments of Service in granting the 2017 COA Application.

Pursuant to Miami-Dade Ordinances, “no building [or] structure . . . within Miami-Dade County which is designated pursuant to section 16A-10 shall be erected, altered, restored, renovated, excavated, moved, or demolished until an application for a Certificate of Appropriateness regarding any architectural features, landscape features, or site improvements has been submitted to and approved pursuant to the procedures in this section.” Miami-Dade County Code, § 16A-11(1).

An applicant for a special Certificate of Appropriateness shall submit an application to the Board on a form prescribed by the Historic Preservation Chief and accompany such application to the Board with full plans and specifications, site plan, and samples of materials as deemed appropriate by the Board to fully describe the proposed appearance, color, texture or materials, and architectural design of the building and any outbuilding, wall, courtyard, fence, landscape feature, paving, signage, and exterior lighting. The applicant shall provide adequate information to enable the Board to visualize the effect of the proposed action on the applicant’s building and its adjacent buildings and streetscapes.

Miami-Dade County Code, § 16A-11(5)(a). “The Board shall hold a quasi-judicial public hearing upon an application for a special Certificate of Appropriateness.” Miami-Dade County Code, § 16A-11(5)(b).

The Complaint does not plead any facts giving rise to a plausible inference that Defendant submitted or caused to be submitted the Instruments of Service for a commercial purpose. Submission of the Instruments of Service served just one purpose: to provide the HPB, a non-purchasing governmental entity, with the evidentiary support necessary—i.e., the “information to enable the Board to visualize the effect of the proposed action on the applicant’s building and its adjacent buildings and streetscapes,” Miami-Dade County Code, § 16A-11(5)(a)— to obtain the HPB’s approval for Owner to construct the Project, in accordance with the above Ordinances.

Further, Owner, with Plaintiff's assistance, previously submitted the Instruments of Service of to the HPB in connection with the COA 2017 and granted Owner permission to construct the Project. *See* Ex. B; DE 1-5. Thus, any alleged distribution of the Instruments of Service to the HPB in connection with the 2019 COA was not done in connection with a commercial transaction or exploitative profit-making motive on the part of Defendants. Indeed, it would defy common sense to say that Defendants would have had to pay Plaintiff to use the Instruments of Service when Plaintiff's own allegations and the Contract establish that the *Owner* has to pay Plaintiff for same and saved money as a result of not doing so. *See* Comp., ¶ 40; DE 1-3, § 6.3.

The Instruments of Service were not used for their intrinsic value; rather, they were submitted as evidence of the Structure's current state and the previously approved construction plans for the Project to be used in the 2019 COA hearing, which is akin to utilizing protected works in judicial proceedings. Use of protected works in judicial proceedings constitutes fair use. *See Mizioznikov*, 2017 U.S. Dist. 45587, *12 (citing extensive cases). Thus, by extension, submission of protected works embodying a proposed construction plan to a governmental entity for the sole purpose of accurately conveying the existing structure and the fact that the HPB previously approved the Instruments of Service to obtain the legally required governmental approval—which approval is granted only after the HPB conducts a quasi-judicial hearing under Miami-Dade County Code, § 16A-11(5)(b)—similarly constitutes fair use.

“Finally, the Court need look no further than the context of the Defendants' use of the work to conclude that [Plaintiff] cannot demonstrate any harmful or adverse effect on the potential market for the [Instruments of Service].” *Id.* at *13. Submission of the Instruments of Service was extremely “limited, targeted, and not offensive to any right protected by copyright law,” *id.*, because they were submitted only to the HPB for the sole purpose of gaining regulatory approval of a modification to a historically designated building that is afforded protected legal status under the Miami-Dade Ordinances; not as part of a widespread marketing scheme to promote Defendants' services. The Complaint is devoid of any allegations creating the plausible inference that Plaintiff is harmed by submission of the Instruments of Service to the HPB, particularly where the Project was already approved pursuant to the 2017 COA, and the 2019 COA was “based in large part on a structural assessment that had not been performed at the time of the” 2017 COA Approval. DE 1-6, Transcript of Sept. 18, 2019, HPB Hearing, at 5:4-7. Additionally, the Complaint fails to even identify a relevant market of Plaintiff's Instruments of Service that are

uniquely tailored to the Project. The omission is telling because there is no such market. Accordingly, this factor weighs heavily in favor of fair use.

ii. The Instruments of Service were re-submitted to serve a historical purpose

“The second fair use factor—the nature of the copyrighted work—recognizes that there is a hierarchy of copyright protection in which original, creative works are afforded greater protections than derivative works or factual compilations.” *Mizioznikov*, 2017 U.S. Dist. LEXIS 45587, at *14 (quoting *Katz v. Google Inc.*, 802 F.3d 1178, 1183 (11th Cir. 2015)). “The second factor that we must consider is the nature of the copyrighted work. This factor is ‘highly relevant to whether a given use is fair.’” *Id.* (quoting *Harper & Row*, 471 U.S. at 552-53). “In evaluating this factor, courts consider (1) whether the work was previously published and (2) whether the work is primarily creative or factual.” *Katz*, 802 F.3d at 1183 (citing *Harper & Row*, 471 U.S. at 563–64 (1985)). But, as *Campbell v. Acuff-Rose Music, Inc.*, instructs, the § 107 factors are not considered “in isolation, one from another,” but are weighed together “in light of the purposes of copyright.” 510 U.S. 569, 578, 114 S. Ct. 1164, 1171 (1994).

Here, the Instruments of Service were published when they were previously submitted to the HPB in connection with the 2017 COA. *See* Ex. B. Thus, re-submitting same to the HPB in connection with the 2019 COA Application constituted a purely factual use, demonstrating the prior approval the HPB had already granted for the Project. This factor weighs in favor of fair use.

iii. The amount of work used is irrelevant in this case

The third factor is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). A court must ask whether the defendant has “helped [itself] overmuch to the copyrighted work in light of the purpose and character of the use.” *Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1314 (11th Cir. 2008). “This factor ‘weighs less when considering a photograph—where all or most of the work often must be used in order to preserve any meaning at all—than a work such as a text or musical composition, where bits and pieces can be excerpted without losing all value.’” *Katz v. Google Inc.*, 802 F.3d 1178, 1184 (quoting *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 188 (D. Mass. 2007), and citing *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1178 (9th Cir. 2013) (“[U]nlike an episode of the Ed Sullivan show or a book manuscript, [a drawing] is not meaningfully divisible.”) (parenthetical and alteration in original)).

Here, the Instruments of Service consist of previously submitted and approved architectural drawings and photographs of the Structure as it existed in a public space at the time the photographs were taken and do not constitute highly original works under the circumstances alleged in the Complaint. Further, because the HPB previously received complete copies of the Instruments of Service in connection with the 2017 COA, they could not be meaningfully re-submitted to the HPB as evidence of prior approval of same unless the Instruments of Service were re-submitted in their entirety. As such, this factor is neutral.

iv. There is no effect on the market value for Plaintiff's work

The fourth factor is “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. 107(4). The “central question” is whether, assuming that everyone engaged in the conduct of the defendant, the use “would cause substantial economic harm such that allowing [the conduct] would frustrate the purposes of copyright by materially impairing [the defendant's] incentive to publish the work.” *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1276 (11th Cir. 2014).

Here, the face of the Complaint, exhibits thereto, and Defendants' Exhibit B show that the submission of the Instruments of Service that were already approved by the HPB in connection with the 2017 COA and re-submitted to obtain a modification of same. The 2019 COA and 2017 COA refute any allegation that submission of the Instruments of Service in connection with the 2019 COA was done to capitalize on Plaintiff's architectural designs (*see* Comp., ¶ 65) because those designs were already submitted to HPB in connection with the 2017 COA. *See* Ex. B. Further, the 2019 COA, which is the submission forming the basis of Plaintiff's claims, was done to modify the 2017 COA for the purpose of demonstrating the means by which certain structural components of the Project would be construed does not adversely affect the marketability of the Instruments of Service. In other words, re-submitting previously approved plans in connection with a modification to a structural element of the Project does not materially impair Plaintiff's incentive to publish architectural drawings and photographs, particularly since those documents are required for gaining regulatory approval and were used for that purpose. Plaintiff has not identified any harm to its actual or potential sale of services due to re-submission of the previously submitted and approved Instruments of Service. As such, this factor weighs in favor of fair use.

Because the face of the Complaint and exhibits thereto show that any alleged use of the Instruments of Work constituted fair use. As such Count I should be dismissed, with prejudice.

C. The DMCA Claim Fails

Even taking as true Plaintiff's allegations that ODP removed Plaintiff's signature block, name, and logo from the certain photographs in the Instruments of Service (*see* Comp., ¶ 31), Plaintiff has not stated a claim for relief under the DMCA, 17 U.S.C., § 1202, because the alleged removal of Plaintiff's CMI has no relation to electronic commerce and the Complaint fails to allege that Defendants removed Plaintiff's alleged CMI for any improper purpose, including to conceal infringement.

Under the DMCA:

“No person shall, without the authority of the copyright owner or the law—(1) intentionally remove or alter any copyright management information, (2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law,. . . knowing, or, with respect to civil remedies under section 1203 [17 USCS § 1203], having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.”

17 U.S.C. § 1202(b). “In enacting the DMCA, Congress sought to mitigate the problems presented by copyright enforcement in the digital age.” *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 942 (9th Cir. 2010). “The committee reports show that Congress intended the DMCA to apply to ‘electronic commerce’ and the ‘electronic marketplace’ (H.R. Rep. No. 105-551 (1998)) and to ‘digital networks’ (S. Rep. No. 105-190 (1998)).” *IQ Grp. v. Wiesner Publ'g, Inc.*, 409 F. Supp. 2d 587, 596 (D.N.J. 2006); *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (explaining that “[t]he DMCA was enacted both to preserve copyright enforcement on the Internet and to provide immunity to service providers from copyright infringement liability for ‘passive,’ ‘automatic’ actions in which a service provider’s system engages through a technological process initiated by another without the knowledge of the service provider”); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1125 (N.D.Cal. 2002) (Congress sought “to protect against unlawful piracy and promote the development of electronic commerce and the availability of copyrighted material on the Internet”); *ITC Textile, Ltd. v. Wal-Mart Stores, Inc.*, 2009 U.S. Dist. LEXIS 136889, at *13 (C.D. Cal. Mar. 31, 2009) (“Congress passed section 1202 as a means to ensure the integrity of the electronic marketplace by preventing fraud and misinformation.”).

Thus, “[t]o state a claim for a violation of Section 1202(a) or (b), a plaintiff must allege facts showing that the alleged falsification or removal of CMI has some relation to the Internet,

electronic commerce, or the purposes for which the DMCA was enacted.” *Brown v. Stroud*, 2011 U.S. Dist. LEXIS 70126, at *17 (N.D. Cal. June 30, 2011). Further, the complaint must “contain sufficient factual content to allow a reasonable inference” that the defendant improperly removed CMI. *Merideth v. Chi. Tribune Co., Ltd. Liab. Co.*, 2014 U.S. Dist. LEXIS 2346, at *8 (N.D. Ill. Jan. 9, 2014); *Appsoft Dev., Inc. v. Diers, Inc.*, 2014 U.S. Dist. LEXIS 109712, at *14 (M.D. Fla. Aug. 8, 2014) (dismissing DMCA claim where the plaintiff made only “generalized allegations that Defendants have committed the acts constituting a violation of that section”).

In *Brown*, the court dismissed a DMCA claim because the plaintiff failed to “allege any facts linking [the removal of CMI] to the Internet, electronic commerce, or any other purpose for which the DMCA was enacted.” 2011 U.S. Dist. LEXIS 70126, at *17.

Here, Plaintiff’s DMCA claim must be dismissed because the Complaint does not allege any relation between the alleged removal of Plaintiff’s CMI and electronic commerce, or that Defendants employed any passive automatic actions through a technological process that was used to allegedly remove its CMI. The Complaint also fails to plausibly allege that any alleged removal of its CMI was done with the intention to induce, enable, facilitate, or conceal infringement because, as discussed above, Defendants did not engage in any act violating Plaintiff’s exclusive rights under Section 106 (i.e., Defendants did not distribute or reproduce the Instruments of Service), and submission of the Instruments of Service to the HPB did not constitute infringement. Further, the Complaint fails to plead sufficient factual content to allow a reasonable inference that Defendants knew that removal of Plaintiff’s CMI was improper. *Merideth v. Chi. Tribune Co., Ltd. Liab. Co.*, 2014 U.S. Dist. LEXIS 2346, at *8 (dismissing DMCA claim because the complaint failed to allege facts showing that the defendant knew that removal of the plaintiff’s CMI was improper). Accordingly, Count II must be dismissed.

II. THE COMPLAINT DOES NOT PLEAD PLAUSIBLE LANHAM ACT VIOLATIONS

A. The Trademark Infringement Claim Fails

Counts III and IV must be dismissed because the Complaint fails to plausibly allege that Defendants: (1) used Plaintiff’s trademark; (2) in commerce; (3) in connection with the sale of their goods or services; or (4) in a manner that is likely to cause consumer confusion.

To prevail on a trademark infringement claim, a plaintiff must show:

(1) that [it] possess a valid mark, (2) that the defendants used the mark, (3) that the

defendants' use of the mark occurred "in commerce," (4) that the defendants used the mark "in connection with the sale ... or advertising of any goods," and (5) that the defendants used the mark in a manner likely to confuse consumers.

North American Medical Corp. v. Axiom Worldwide, 522 F.3d 1211, 1218 (11th Cir. 2008) (citing *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d 400, 406-07 (2d Cir. 2005)). The elements of an unfair competition claim are the same as a trademark infringement claim. "Because trademark infringement is a type of unfair competition, the two claims have virtually identical elements, and they are properly addressed together as an action brought . . . under Section 43 of the Lanham Act." *3700 Assocs., LLC v. Griffin*, 2008 U.S. Dist. LEXIS 79721, *8 (S.D. Fla. Oct. 06, 2008).

"The law of unfair competition has its roots in the common-law tort of deceit: its general concern is with protecting consumers from confusion as to source." *Suntree Techs., Inc. v. Ecosense Int'l, Inc.*, 693 F.3d 1338, 1346 (11th Cir. 2012) (quoting *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 157 (1989)) (emphasis in original). "Unfair competition goes to the question of marketing, not to the question of manufacture." *Flexstake, Inc. v. DBI Servs., LLC*, 2018 U.S. Dist. LEXIS 202825, at *14 (S.D. Fla. Nov. 30, 2018).

Here, Plaintiff's trademark infringement and unfair competition claims fail for multiple reasons. *First*, it fails to plausibly allege that Defendants "used" its trademark; rather, the 2019 COA Application expressly identifies "Seaway Condo Acquisitions, LLC" as both the owner and the applicant. *See* DE 1-4. Counts III and IV can be dismissed on this basis alone. *See Flexstake, Inc.*, 2018 U.S. Dist. LEXIS 202825, at *12 (explaining that implicit in the "use" prong is that the defendant actually "uses" the plaintiff's mark in commerce).

Second, the Complaint does not adequately allege that Defendants used Plaintiff's mark "in commerce" or that the HPB is a consumer. In *Technoglass, LLC v. RC Home Showcase, Inc.*, the plaintiff alleged that the defendant violated the Lanham Act by submitting certain technical documents to Miami-Dade County in connection with the construction of a project. 301 F. Supp. 3d 1267, 1271 (S.D. Fla. 2017). The plaintiff alleged that the defendant copied the technical drawings and passed them off as its own and used same in connection with applications to Miami-Dade County and used product designations similar to those used by the plaintiff. *Id.*, at 1271, 1275. Although this Court dismissed the Lanham Act claim as duplicative of the plaintiff's copyright claim, this Court explained that "[i]t is unlikely that use of the drawings in the [Miami-Dade County] application constitutes commerce, or that Miami-Dade can constitute a consumer, or both." *Id.*

Here, like this Court observed in *Technoglass*, submitting the Instruments of Service to the HPB in connection obtaining a modification of the 2017 COA does not constitute use in commerce. The Complaint fails to identify any commercial transaction proposed by mere submission of the Instruments of Service to the HPB. To the contrary, as explained above, the Instruments of Service were (1) legally required to obtain regulatory approval, and (2) previously approved by the HPB. Thus, the Complaint does not plausibly allege facts suggesting that submission of the Instruments of Service to the HPB constitutes use in commerce. For those same reasons, the HPB cannot be regarded as a consumer. Accordingly, the Complaint must be dismissed on this basis.

Third, the Complaint makes the conclusory allegation that Defendants made “use” of marks confusingly similar to Plaintiff’s, but the Complaint fails to plausibly allege that Defendants made use of Plaintiff’s mark “in connection with the sale . . . or advertising of goods or services.” 15 U.S.C. § 1114(1)(a). There are no facts alleged that would enable the Court to infer that Defendants used the mark to advertise their services. Even taking as true Plaintiff’s allegations that Defendants “used” their mark by submitting same to the HPB, this does not amount to using Plaintiff’s mark to *advertise* their services. Re-submission of previously approved plans to the HPB simply does not amount to the sale or advertisement of Defendant’s goods or services.

Fourth, as explained above, the Complaint alleges that submission of the Instruments of Service to the HPB is likely to result in consumer confusion. The HPB, under the facts alleged in the Complaint and as discussed above, is a non-purchasing governmental agency charged with approving modifications to historical buildings. Submission of the Instruments of service in connection with modifying a historical building does not constitute advertising or marketing of Defendants’ services. And the HPB cannot be regarded as a consumer. Notably, the Complaint generally alleges that Submission of the Instruments of Service will “cause a likelihood of confusion and deception of *members of the trade and public.*” Comp. ¶ 82. This is not the test. The test is *consumer* confusion. Plaintiff has failed to adequately allege this element.

Accordingly, Count III and Count IV must be dismissed.

B. Plaintiff Fails To Adequately Plead An Unfair Competition Claim

Plaintiff alleges four discrete bases for its unfair competition claim: (1) Defendants passed off the Instruments of Service as their own by submitting them to the HPB; removed Plaintiff’s seals therefrom, and replaced them with ODP seals (Comp., ¶¶ 88, 89); (2) Defendants misappropriated the Instruments of Service without Plaintiff’s consent (*id.*, ¶ 91); and (3)

Defendants misrepresented at the September 18, 2019, HPB hearing that they, and not Plaintiff, had assumed the role of architect of record (*id.*, ¶ 94). In addition to the reasons set forth in Section II(A), *supra*, Count IV must be dismissed because Plaintiff has not alleged plausibly claims of false designation.

Section 1125(a)(1) states in relevant part:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which— (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person

15 U.S.C. § 1125(a)(1).

“Section 1125(a) thus creates two distinct bases of liability: false association, § 1125(a)(1)(A), and false advertising, § 1125(a)(1)(B).” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 122 (2014). The “drafters wrote the purposes of the Lanham Act, two of which are relevant here, into the statute itself: to make ‘actionable the deceptive and misleading use of marks in . . . commerce’ and ‘to protect persons engaged in . . . commerce against unfair competition.’” *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1108 (9th Cir. 1992), abrogated on other grounds by *Lexmark Int’l, Inc.*, 572 U.S. 118.

i. Plaintiff’s claims do not fall within the Lanham Act’s zone of interests

Section 1125(a) of the Lanham Act “extends only to plaintiffs whose interests fall within the zone of interests protected by” the Lanham Act. *Lexmark Int’l, Inc.*, 572 U.S. at 129 (internal quotations omitted). “[A] typical false advertising case will implicate only the Act’s goal of ‘protect[ing] persons engaged in [commerce within the control of Congress] against unfair competition.’” *Id.* at 131. Thus, a Lanham Act plaintiff asserting a claim for false advertising must allege an injury to a commercial interest in reputation or sales. *Id.* at 131–32. Further, to show proximate cause, a plaintiff suing under the Lanham Act “must show economic or reputational injury flowing directly from the deception wrought by the defendant’s advertising; and that occurs when deception of consumers causes them to withhold trade from plaintiff.” *Id.* at 133. “[T]he proximate-cause requirement generally bars suits for alleged harm that is ‘too remote’ from the defendant’s unlawful conduct.” *Id.* at 133.

Here, as pled, Plaintiff's Lanham Act claims do not fall within the zone of interests protected by the Lanham Act. As discussed above, the Complaint does not plausibly allege consumer deception because the HPB is not a consumer and submission of the Instruments of Service to the HPB does not constitute commerce under the facts alleged in the Complaint. Further, the Complaint does not allege any false statement or representation by Defendants that caused *consumers* to withhold trade from Plaintiff. Nor does the Complaint plead any facts giving rise to the inference that any conduct on the part of Defendants proximately caused harm to Plaintiff. Instead, Plaintiff merely sets forth the elements of its claim, which does not state a claim for relief. *Twombly*, 550 U.S. at 555.

ii. Plaintiff's false designation claim restates its copyright infringement claim

“Section 1125(a)(1)(A) of the Lanham Act protects against unfair competition based on false designations of origin.” *Tecnoglass, LLC*, 301 F. Supp. 3d at 1274–75. “To state a claim for false designation of origin, a plaintiff must allege it was ‘either actually or likely to be damaged by the fact that the defendant used [‘in commerce’] a ‘false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which [wa]s likely to cause confusion, or to cause mistake, or to deceive . . . as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.’” *Id.* (quoting *Lipscher v. LRP Publ'ns, Inc.*, 266 F.3d 1305, 1312-13 (11th Cir. 2001) (alterations in original)). “As relevant here, two kinds of unfair competition exist under the Lanham Act: (1) ‘passing off’; and (2) ‘reverse passing off.’” *Id.* at 1275. “Passing off . . . occurs when a producer misrepresents his own goods or services as someone else’s. ‘Reverse passing off,’ as its name implies, is the opposite: The producer misrepresents someone else’s goods or services as his own.” *Id.* (quoting *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 n.1 (2003)).

“*Dastar* made it clear that there is no claim under the Lanham Act for copying, revising, and using a copyright-able work. Such claims exist if at all under copyright law.” *Id.* (quoting *Francois v. Jack Ruch Quality Homes, Inc.*, 2006 U.S. Dist. LEXIS 57062 at *13 (C.D. Ill. Aug. 14, 2006)). “[C]ourts must dismiss Lanham Act claims that amount to no more than a claim for copyright infringement because to ‘hold otherwise would be akin to finding that [the Lanham Act] created a species of perpetual patent and copyright, which Congress may not do.’” *Id.* at 1274. (quoting *Dastar*, 539 U.S. at 27).

In *Tecnoglass*, the plaintiff alleged that the defendant misappropriated its technical

drawings and used them in an application to Miami-Dade County and falsely represented to the county that the drawings belonged to the defendant. *Id.* The defendant moved to dismissed on the basis that the plaintiff's false designation claim simply restated its copyright infringement claim. *Id.* at 1271. Although the plaintiff denied that it had alleged a reverse passing off claim, this Court found that "these allegations precisely constitute a reverse passing off claim." *Id.* at 1275. This Court further explained that the plaintiff's claimed amount "to no more than that [the defendant] misrepresented to Miami-Dade County that the technical drawings were its own. [The plaintiff's] additional allegations regarding consumer confusion fail because the alleged consumer confusion results from similarly sounding product names—not any false representation, or designation by [the defendant]." *Id.* This Court dismissed the plaintiff's unfair competition claim as duplicative of the plaintiff's copyright claim. *Id.*

Plaintiff's Lanham Act claim is identical to the one in *Tecnostar* and must be dismissed for the same reasons. Plaintiff's unfair competition claim is predicated on Defendants allegedly misrepresenting that they are the authors of the alleged copyrighted work by submitting the Instruments of Service to the HPB. *See Comp.*, ¶¶ 88–93. Here, like *Technostar*, "this claim amounts to no more than that [Defendants] misrepresented to [the HPB] that the technical drawings were its own." *Id.* The Court should therefore dismiss Count IV as duplicative of Plaintiff's copyright infringement claim (Count I).

Even if the Court does not dismiss Count IV as duplicative, it nonetheless fails for the reasons addressed above in Sections II(A) and (B), *supra*.

iii. Alleged non-compliance with Florida Administrative Code does not support a Lanham Act claim

Plaintiff's Lanham Act claim cannot rely on a purported violation of the Florida Administrative Code. Further, even if the Court finds that it can, Plaintiff has not alleged any facts creating a plausible inference of Defendants' alleged non-compliance with Rule 61G1-18.002.

Rule 61G1-18.002 is enforceable only by the Board of Architecture and Interior Design; it does not provide a private cause of action. Plaintiff's attempt to support its Lanham Act claim amounts to a usurpation of the Board's authority to make and enforce its rules. Section 481.205 empowers the Board to receive complaints and investigate and discipline persons licensed as architects. § 481.205(3)(a), Fla. Stat. Section 481.225 sets forth certain acts that constitute grounds for the Board to take disciplinary action against an architect, including an architect's

“fail[ure] to perform any statutory or legal obligation placed upon a registered architect.” § 481.225(1)(j), Fla. Stat. And Rule 61G1-12.001 sets forth specific grounds that provide a basis for the Board to take disciplinary proceedings pursuant to Section 481.225.

Section 481.223(1) provides three specific grounds that afford an “affected person” the right to file an action to prevent a person from violating paragraphs (1)(a), 1(b), and 1(c). No section of Chapter 481 or the Florida Administrative Code provides a private right of action for damages or to ensure a successor architect’s compliance with Rule 61G1-18.002.

“[W]hether a statutory cause of action should be judicially implied is a question of legislative intent.” *Patel v. Catamaran Health Sols., LLC*, 2016 U.S. Dist. LEXIS 156576, at *23 (S.D. Fla. Jan. 13, 2016) (quoting *Murthy v. N. Sinha Corp.*, 644 So.2d 983 (Fla. 1994)). “Accordingly, ‘[t]he primary guide in determining whether the Legislature intended to create a private cause of action is the actual language used in the statute.’” *Id.* (quoting *Murphy*, 644 So.2d at 553 (finding that the notion that “courts cannot provide a remedy when the Legislature has failed to do so is also entirely consistent with the position of Florida courts in other contexts”)). Plaintiff’s cannot attempt to make an end-run around the Legislator’s decision to withhold a statutory cause of action for a violation of the architecture code by asserting such a claim under the guise of a Lanham Act violation. *See Patel*, 2016 U.S. Dist. LEXIS 156576, at *27. “Florida law is clear that no private right of action exists for alleged statutory violations, even on common law theories, unless the text or legislative history of the statute at issue confirms that the Legislature intended to confer such a right.” *Id.* The ““federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.”” *McCulloch v. PNC Bank Inc.*, 298 F.3d 1217, 1223 (11th Cir. 2002) (quoting *California v. Sierra Club*, 451 U.S. 287, 297 (1981)). “[T]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.” *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

Here, the Legislature clearly did not intend to provide private parties such as Plaintiff with a private right to enforce a successor architect’s alleged non-compliance with Rule 61G1-18.002. The Architecture Code provides the Board with the sole authority to enforce that provision. *See* § 481.225(1)(j), Fla. Stat; § 481.223(1), Fla. Stat. That the Legislature did not intend to provide private litigants with such a cause of action is clear from its provision for the right of an “affected person” to file a lawsuit to enjoin non-compliance with Sections 481.223(1)(a)–(c) and its absolute

silence on a private cause of action for a purported violation of Rule 61G1-18.002; this strongly suggests that the Legislature did not intend to create such a private cause of action. Nowhere does Chapter 481 or the Rules implementing same mention that terminated architects, like Plaintiff, may bring a claim for a violation of Rule 61G1-18.002. Thus, Plaintiff cannot make an end-run around the confines of the Architecture Code by pleading such a claim under the guise of a Lanham Act violation.

Even if the Court finds that Plaintiff may base its Lanham Act claim on a violation of Rule 61G1-18.002, the Complaint does not plausibly allege that Defendants violated it. Rule 61G-18.002 provides:

(1) A successor registered architect *seeking to reuse already sealed contract documents under the successor registered architect's seal* must be able to document and produce upon request evidence that he has in fact recreated all the work done by the original registered architect. Further, the successor registered architect must take all professional and legal responsibility for the documents *which he sealed and signed* and can in no way exempt himself from such full responsibility. . . . *A successor registered architect must use his own title block, seal and signature and must remove the title block, seal and signature of the original registered architect before sealing, signing and dating any sealed contract documents.*

(2) *Prior to sealing, signing and dating work*, a successor registered architect shall be required to notify the original registered architect, his successors, or assigns by certified letter to the last known address of the original registered architect of the successor's intention to use or reuse the original registered architect's work. The successor registered architect will take full responsibility for the drawing as though they were the successor registered architect's original product. (Emphasis added.)

Here, the Complaint does not plausibly allege a violation of this Rule. While Rule 61G1-18.002 requires a successor architect to notify the terminated architect of its intention to “use or reuse the original registered architect’s work”; it does not require the successor to notify the terminated architect that the successor architect: (1) has assumed all professional and legal responsibility of previously submitted drawings; or, (2) has removed the terminated architect’s information from relevant documents. *Accord* Comp., ¶¶ 41(a), (b). And Rule 61G-18.002 requires the successor architect to provide notice of its intent to use or reuse the original architect’s work “[p]rior to sealing, signing, and dating work”; the Complaint does not allege that Defendants sealed, signed, or dated such that they were required to provide Plaintiff with the required notice prior to doing so.

Accordingly, Count IV must be dismissed in its entirety.

III. THE COMPLAINT DOES NOT PLAUSIBLY ALLEGE TORTIOUS INTERFERENCE

Plaintiff fails to state a plausible tortious interference claim because it has not plausibly alleged that Defendants interfered with Plaintiff's relationship with Owner and did so through improper means. The Complaint also fails to plausibly allege that in all probability Owner would have completed the Contract with Plaintiff but for Defendants' alleged interference. Plaintiff's tortious interference claim is built upon conclusory allegations founded "upon information and belief" and lacking any factual support.

"To establish a claim for tortious interference with an advantageous business or contractual relationship, a party must prove: (1) the existence of a business relationship or contract; (2) the defendant's knowledge of the relationship; (3) an intentional and unjustified interference with that relationship by the defendant which induces or otherwise causes nonperformance; and (4) damages resulting from the tortious interference." *Border Collie Rescue, Inc. v. Ryan*, 418 F. Supp. 2d 1330, 1343 (M.D. Fla. 2006). "An action for intentional interference with a business relationship or expectancy will lie if the parties' understanding would have been completed if the defendant had not interfered." *Charles Wallace Co. v. Alternative Copier Concepts, Inc.*, 583 So. 2d 396, 397 (Fla. 2d DCA 1991).

"The third element, intentional and unjustified interference with a business relationship, requires the plaintiff to allege that 'the defendant acted without justification.'" *Duty Free Ams., Inc. v. Estee Lauder Cos.*, 797 F.3d 1248, 1280 (11th Cir. 2015). "Florida law is clear that the privilege of interference encompasses actions taken to protect a company's economic interests as long as the methods employed were not improper." *Id.* at 1282. "This means that where 'there is no contract right to have the relation continued, but only an expectancy[,] . . . a competitor has the privilege of interference in order to acquire the business for himself.'" *Id.* at 1280.

"If a defendant interferes with a contract in order to safeguard a preexisting economic interest of his own, the defendant's right to protect his own established economic interest outweighs the plaintiff's right to be free of interference, and his actions are usually recognized as privileged and nonactionable." *See Heavener, Ogier Servs., Inc. v. R.W. Fla. Region, Inc.*, 418 So. 2d 1074, 1076-77 (Fla. Dist. Ct. App. 1982); *Sec. Title Guarantee Corp. of Balt.*, 543 So. 2d at 855 (noting that, as "long as improper means are not employed, activities taken to safeguard or promote [a company's] own financial interests are entirely non-actionable." (quotation and alteration omitted)). Indeed, Florida courts have explained that, even

if the plaintiff has an existing, terminable-at-will contract, the defendant's interference to protect its economic interests is privileged unless the plaintiff alleges "a purely malicious motive" divorced from any "legitimate competitive economic interest." See *Heavener, Ogier Servs., Inc.*, 418 So. 2d at 1077.

Id.

A "skeletal pleading [that] merely recites the elements of a claim for tortious interference with actual and prospective business relationships, without any factual allegations in support of those elements" is insufficient to survive a motion to dismiss. *Advisors Excel, L.L.C. v. Scranton*, 2014 U.S. Dist. LEXIS 199141, at *20 (S.D. Fla. Sep. 15, 2014).

Here, Count V must be dismissed. Plaintiff's allegation that "[u]pon information and belief, [Defendants] intentionally and unjustifiably interfered with" the Contract and the terminated Plaintiff-Owner relationship by "soliciting [Owner] to engage ODP as its architect in connection with the Project, actions which resulted in the termination of the Seaway Agreement with" Plaintiff (Comp., ¶ 101) are insufficient to state a plausible claim for relief. The Complaint fails to allege any facts showing that Defendants' alleged interference with the Contract was *improper*. The Complaint does not plead any specific facts making it plausible that Defendants solicited Owner to engage ODP as the Project architect through improper means, or that any such solicitation caused Owner to terminate Plaintiff. Rather, the Complaint alleges only that Owner terminated Plaintiff from the Project and replaced it with ODP. This is insufficient to show improper means.

Critically, the Contract was terminable at will by Owner, and Plaintiff has not plausibly alleged "a purely malicious motive" divorced from any "legitimate competitive economic interest" sufficient to overcome Defendants' business privilege to seek work from Owner. *Duty Free Ams.*, 797 F.3d at 1280. Under *Iqbal*, this Court may "infer from the factual allegations in the complaint 'obvious alternative explanations,' which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer." *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d at 1290 (quoting *Iqbal*, 556 U.S. at 682). Here, under Plaintiff's own allegations, Owner terminated Plaintiff the day after Owner had Defendants attend the HPB hearing on its behalf. Comp., ¶¶ 35, 39. The Complaint is devoid of facts plausibly establishing that Defendants employed *improper* means to interfere with the Contract. Accordingly, the Court may infer that Defendants did not act improperly, but rather, acted justifiably in furtherance of their own economic interests to complete the Project for the Owner.

Finally, the Complaint’s allegation that but-for Defendants’ alleged interference, “it is unknown whether [Owner] would have terminated the [Contract],” Comp., ¶ 103, does not support the required element that “the parties’ understanding would have been completed if the defendant had not interfered.” *Charles Wallace Co. Co.*, 583 So. 2d at 397. This too warrants dismissal. *See Duty Free Ams., Inc. v. EstÉe Lauder Cos.*, 946 F. Supp. 2d 1321, 1339 (S.D. Fla. 2013) (Scola, J.) (dismissing tortious interference claim where the complaint failed to allege that, “in all probability,” the transaction would have been completed “had [the defendant] not interfered”). The Complaint is devoid of allegations plausibly establishing that Owner would have carried out the terminable at-will Contract with Plaintiff absent Defendants’ alleged interference.

Plaintiff’s tortious interference claim, which merely alleges the elements of a tortious interference claim without *any* factual support, must be dismissed *See Advisors Excel, L.L.C.*, 2014 U.S. Dist. LEXIS 199141, at *20 (dismissing inadequately pled tortious interference claim); *Minsurg Int’l, Inc. v. Frontier Devices, Inc.*, 2011 U.S. Dist. LEXIS 37962, at *17 (M.D. Fla. Apr. 6, 2011) (dismissing tortious interference claim that merely recited the elements of the claim).

IV. PLAINTIFF’S UNJUST ENRICHMENT CLAIM FAILS

The unjust enrichment claim must be dismissed because it is preempted by the Copyright Act, Plaintiff has not conferred any benefit on Defendants, and Plaintiff has an adequately remedy at law against the Owner and through Counts I, III, and IV.

A. The Copyright Act Preempts Plaintiff’s Unjust Enrichment Claim

Plaintiff alleges that Defendants have been unjustly enriched by receiving the benefit of the use of the Instruments of Service. Comp., ¶¶ 107–109.

Federal copyright law preempts state law claims “that are equivalent to any of the exclusive rights within the general scope of [the Copyright Act].” *Jaggon v. Rebel Rock Entm’t, Inc.*, 2010 U.S. Dist. LEXIS 90685, at *4 (S.D. Fla. Aug. 31, 2010). Preemption occurs if the rights at issue (1) fall within the ‘subject matter of copyright’ and (2) “are ‘equivalent to’ the exclusive rights of section 106. *Crow v. Wainwright*, 720 F.2d 1224, 1225–26 (11th Cir. 1983). However, “[t]he Act ‘preempts only those state law rights that may be abridged by an act which, in and of itself, would infringe one of the exclusive rights provided by federal copyright law.’” *Foley v. Luster*, 249 F.3d 1281, 1285 (11th Cir. 2001). “The Court applies the ‘extra element’ test to determine ‘if an extra element is required instead of or in addition to the acts of reproduction, performance,

distribution or display, in order to constitute a state-created [cause] of action, then the right does not lie within the general scope of copyright and there is no preemption.” *Psychic Readers Network, Inc. v. Take-Two Interactive Software Inc.*, 2018 U.S. Dist. LEXIS 19435, at *9 (S.D. Fla. Feb. 5, 2018). Thus, a state law claim can survive preemption by adding an “extra element” which changes the nature of the claim, making it “qualitatively different from a copyright infringement claim.” *Foley*, 249 F.3d at 1285.

“[T]ypical unjust enrichment claims are preempted because they are mere attempts to state a claim for damages for unauthorized copying or other activity encompassed by Section 106.” *Id.*, at *10. “[C]ourts typically regard unjust enrichment claims as equivalent to copyright claims and therefore preempted.” *Tolbert v. High Noon Prods., LLC*, 2019 U.S. Dist. LEXIS 2937, at *20 (N.D. Ala. Jan. 8, 2019) (dismissing unjust enrichment claim as preempted under the Copyright Act). Courts must dismiss unjust enrichment claims that are identical to copyright infringement claims. *Ross v. Apple, Inc.*, 2016 U.S. Dist. LEXIS 189650, at *15 (S.D. Fla. Dec. 30, 2016) (dismissing unjust enrichment claim as identical to copyright infringement claim).

In *Psychic Readers Network*, the plaintiff alleged that the defendant acquired a benefit “[b]y using the Plaintiff’s Look and Sound in Vice City without paying Plaintiff.” 2018 U.S. Dist. LEXIS 19435, at *9. The defendant moved to dismiss the unjust enrichment claim as preempted by the Copyright Act. *Id.* The Court agreed, finding that the “unjust enrichment claim is premised on the same actions as [the plaintiff’s] copyright claims. No ‘extra element’ is present. Additionally, the remedies available to [the plaintiff] under the Copyright Act would compensate [the plaintiff] for [the defendant’s allegedly unauthorized use.” *Id.*, at *9–10.

Here, Count VI is a copyright infringement claim masquerading as an unjust enrichment claim. The entire claim is predicated on the purported unfair benefit to Defendants as a result of submitting the Instruments of Service to the HPB. There is no extra element. Indeed, Plaintiff’s allegations are identical to the plaintiff in *Psychic Readers Network*. Count VI must be dismissed.

B. Plaintiff Has Not Conferred Any Benefit on Defendants

Plaintiff’s unjust enrichment claim fails because it has not conferred any benefit on Defendants. As discussed above in Section I, Defendants did not infringe on Plaintiff’s copyright or trademark. Where there is no infringement, there is no benefit to the defendant, and dismissal is appropriate. *See G Clay v. Cameron*, 2011 U.S. Dist. LEXIS 153496, at *6 (S.D. Fla. Oct. 20, 2011) (dismissing unjust enrichment claim predicated on copyright infringement because the

complaint failed to establish infringement such that no benefit was conferred on the defendant).

C. Plaintiff Has An Adequate Legal Remedy

An unjust enrichment claim must be dismissed where the plaintiff can recover its damages pursuant to an express contract and other claims providing legal remedies. *Prohias v. Pfizer, Inc.*, 490 F. Supp. 2d 1228, 1237 (S.D. Fla. 2007); *Matthews v. Am. Honda Motor Co.*, 2012 U.S. Dist. LEXIS 90802, 2012 WL 2520675, at *2 (S.D. Fla. June 6, 2012) (dismissing unjust enrichment claim: “[B]ecause [plaintiff]’s unjust enrichment claim is predicated on the same wrongful conduct as her FDUTPA claim, she does not lack an adequate legal remedy.”)

The existence and adequacy of a legal remedy is determined by the court. *See Acquafredda v. Messina*, 408 So. 2d 828 (Fla. 5th DCA 1982). Under Florida law, if the face of the complaint identifies an adequate legal remedy, equitable remedies are not available. *Mobil Oil Corp. v. Dade County Essoil Mgmt. Co., Inc.*, 982 F. Supp. 873 (S.D. Fla. 1997); *see, e.g., H.L. McNorton v. Pan American Bank of Orlando*, 387 So. 2d 393, 399 (Fla. 5th DCA 1980).

In the present case, Plaintiff’s unjust enrichment claim fails because it has an adequate legal remedy. First, Plaintiff has an adequate remedy at law in the form of a breach of contract claim against Owner. Plaintiff alleges that the Work For Hire provision in the Contract (DE 1-3, § 6.3) did not grant Owner, or its agents, a license to submit the Instruments of Service because Owner has not paid Plaintiff for the right to use same under the Contract. Comp., ¶ 40. Thus, Plaintiff has a legal remedy against Owner for recovery of those sums. Second, Plaintiff’s claims under Count I, Count III, and Count IV provide an adequate legal remedy that preclude an unjust enrichment claim.

Accordingly, Count VI must be dismissed.

V. NO PLAUSIBLE CLAIM FOR RELIEF IS ALLEGED AGAINST DANNWOLF INDIVIDUALLY

Each claim pled in the Complaint is asserted against Dannwolf, but there are no allegations in the Complaint that would allow the fact-finder to hold Dannwolf personally responsible under these claims. Plaintiff does not allege any facts supporting the imposition of vicarious liability under the Copyright Act or Lanham Act. As to the remaining claims, Plaintiff essentially seeks to pierce the corporate veil but has not pled any facts that this case presents “rare circumstances” where the corporate form may be set aside. *Brown v. Family Dollar Corp.*, 2018 U.S. Dist. LEXIS 81204, at *4 (M.D. Fla. May 15, 2018).

A. The Complaint Does Not Allege Any Basis For Vicarious Liability Against Dannwolf

“Under the Lanham Act, corporate officers are liable for trademark infringement without regard to piercing of the corporate veil.” *Blue Water Innovations, LLC v. Fetting*, 2019 U.S. Dist. LEXIS 73605, at *17 (S.D. Fla. Mar. 8, 2019) (Scola, J.). “[I]n order to establish individual liability for trademark infringement, the complaint must alleged that the corporate officer directs, controls, ratifies, participates in, or is the moving force behind the infringing activity.” *Id.* The same is true under the Copyright Act, which imposes vicarious liability for copyright infringement if the individual: “(1) has the right and ability to supervise the infringing activity, and (2) has a direct financial interest in such activities.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). “Financial benefit exists where the availability of infringing material acts as a draw for customers.” *Ellison v. Robertson*, 357 F.3d 1072, 1078 (9th Cir. 2004). Threadbare allegations are insufficient to impose vicarious liability. *Blue Water Innovations, LLC*, 2019 U.S. Dist. LEXIS 73605, at *17.

In *Blue Water*, the plaintiff sought to impute liability to the owner of a company that had allegedly infringed on the plaintiff’s copyrights and trademarks. 2019 U.S. Dist. LEXIS 73605, at *15. The owner moved to dismissed because the complaint failed to allege facts sufficient to impute liability to him for his company’s alleged infringement. *Id.* This Court agreed, finding that the complaint failed to allege facts to support the plaintiff’s “threadbare allegations” that the owner “orchestrated the acts complained of.” *Id.*, at *17.

Here, just like *Blue Water*, there are no facts to support Plaintiff’s threadbare allegations that Dannwolf “directed and controlled” (Comp., ¶ 68) the acts in violation of the Copyright and Lanham Act. The Complaint further fails to allege that Dannwolf had the right to control the alleged supervising activity or had a direct financial interest in such activities. As discussed above, Defendants did not engage in any act in violation of Plaintiff’s rights under the Copyright Act because Defendants did not submit the Instruments of Service to the HPB.⁵ As to the latter prong, Plaintiff did not so much as allege, even in conclusory fashion, that Dannwolf directly profited from submission of the Instruments of Service to the HPB, or that the HPB would not otherwise

⁵ Notably, Plaintiff’s Copyright Act and Lanham Act claims are asserted against Dannwolf, but only Paragraph 68 (which is in relation to Count I – Copyright Act claim) contains any allegation that Dannwolf directed and controlled the infringing activity. *See* Comp. The remaining statutory claims do not contain *any* explicit reference to Dannwolf.

have approved the 2019 COA absent the alleged infringement. Accordingly, dismissal of all claims against Dannwolf is warranted. *See Blue Water*, 2019 U.S. Dist. LEXIS 73605, at *15 (dismissing inadequately pled vicarious trademark infringement claim); *Myeress v. Heidenry*, 2019 U.S. Dist. LEXIS 205631, at *22 (S.D. Fla. Nov. 25, 2019) (dismissing inadequately pled vicarious copyright infringement claim); *Nafra Worldwide v. Home Depot U.S.A, Inc.*, 2013 U.S. Dist. LEXIS 201841, at *35 (N.D. Ga. Aug. 29, 2013) (same).

B. The Complaint Is Devoid Of Facts Sufficient to Pierce the Corporate Veil

“The corporate entity is an accepted, well used, and highly regarded form of organization in the economic life of our state and nation.” *S-Fer Int’l, Inc. v. Stonesheets, LLC*, 2016 U.S. Dist. LEXIS 190241, at *8 (S.D. Fla. July 22, 2016).

Those who utilize Florida law to do business in the corporate form have every right to rely on the rules of law that protect them against personal liability unless it can be shown that the corporation is formed or used for some illegal, fraudulent, or other unjust purpose, which justifies piercing the corporate veil. [] This is the reason for Florida’s rule that courts are reluctant to pierce the corporate veil and will only disregard the corporate entity to prevent some injustice.

Id. Thus, mere ownership or management of a corporation is not sufficient to pierce the corporate veil. *Id.*

“A party seeking to pierce the corporate veil and hold a parent corporation liable for the actions of its subsidiary must prove: (1) that the subsidiary was a ‘mere instrumentality’ of the parent, and (2) that the parent engaged in ‘improper conduct’ through its organization or use of the subsidiary.” *Johnson Enters. of Jacksonville v. Fpl Grp.*, 162 F.3d 1290, 1320 (11th Cir. 1998) (quoting *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So.2d 1114, 1117-21 (Fla. 1984)). “Under Florida law . . . alter ego (i.e., domination and control) is” the first element of Florida’s alter ego theory of piercing the corporate veil. *Raimbeault v. Accurate Mach. & Tool, LLC*, 2014 U.S. Dist. LEXIS 140313, at *8 (S.D. Fla. Oct. 2, 2014). To show that a corporation is the alter ego of its shareholders, a plaintiff must first allege the shareholders dominated and controlled the corporation to such an extent that the corporation’s independent existence was in fact nonexistent and the shareholders were in fact alter egos of the corporation. *Oginsky v. Paragon Props. of Costa Rica LLC*, 784 F. Supp. 2d at 1373.

Here, ODP is a Florida corporation; Dannwolf is the president and a director of ODP. As Plaintiff’s own Complaint makes clear, Owner retained ODP to succeed Plaintiff on the Project.

Comp., ¶¶ 27, 28. Further, Plaintiff alleges that *ODP* submitted an application to the HPB⁶ on behalf of Owner and alleged submitted documents at the Special Certification Application – not Dannwolf. Comp., ¶¶ 29, 30, 35. The Complaint is completely devoid of any allegations establishing a plausible claim against Dannwolf in his individual capacity. Instead, the conclusory allegations forming the basis of Plaintiff’s claims invariably lump together “Defendants,” without distinguishing between their conduct, and not allege any specific conduct on the part of Dannwolf in his individual capacity as compared to *ODP*. To the contrary, the Complaint centers entirely on *ODP*’s alleged conduct. Thus, Dannwolf must be dismissed from the Complaint.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendants respectfully move the Court to dismiss the Complaint, with prejudice.

Respectfully submitted on December 18, 2019,

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⁶ This allegation, as stated above, is contradicted by the 2019 COA Application identifying Owner is the applicant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 18, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will serve a true and correct copy of the foregoing on all counsel or parties of record designated to receive service in CM/ECF.

s/ Andrew R. Schindler