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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
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9 ACT Group Inc., an Arizona corporation,

No. CV-12-567-PHX-GMS

10 Plaintiff,

**ORDER**

11 v.

12 James Hamlin and Jodi Hamlin, husband  
13 and wife; WaterFurnace International Inc.,  
an Indiana corporation,

14 Defendants.  
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17 Pending before the court are Defendants James Hamlin and Jodi Hamlin's  
18 ("Hamlin Defendants") motion to dismiss, (Doc. 10), and Defendant WaterFurnace  
19 International, Inc.'s ("WaterFurnace") motion to dismiss, (Doc. 14). For the reasons  
20 stated below, the Court grants Defendants' motions in part and denies them in part.  
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22 **BACKGROUND**

23 Plaintiff, The ACT Group ("ACT"), provides training and education services to  
24 HVAC distributors, dealers and their representatives nationwide. (Doc. 1, ¶¶ 9–11; Doc.  
25 17 at 2). In the course of its business, ACT has developed copyrighted sales training  
26 materials, which it labels "the Works." (Doc 1, ¶¶ 10, 39–41). "The Works," which  
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1 includes written hand-outs and training materials, was copyrighted in February 2012.  
2 (*Id.*). Defendant James Hamlin, a one-time provider of sales training for ACT, is now  
3 employed as a national sales trainer by Defendant WaterFurnace. (Doc. 1, ¶¶ 12, 18).  
4 WaterFurnace is a manufacturer and distributor of HVAC systems, which also provides  
5 sales training to HVAC dealers and representatives. (Doc. 1, ¶ 19). Mr. Hamlin had  
6 access to “the Works” in his role at ACT. (Doc. 1, ¶15). ACT alleges that Mr. Hamlin is  
7 “utilizing ACT Group’s proprietary sales training concepts and materials to perform sales  
8 training services for WaterFurnace.” (Doc. 1, ¶ 22). Further, ACT alleges that Mr.  
9 Hamlin copied ACT’s copyrighted materials and now uses materials that are, “as a whole  
10 substantially similar to the Works,” and “some of the materials” used by Mr. Hamlin “are  
11 identical to some of the Works.” (Doc. 1, ¶26). ACT brought a suit seeking injunctive  
12 relief and claiming copyright infringement, breach of duty of loyalty, aiding and abetting  
13 breach of duty of loyalty, and unfair competition. (Doc 1). Hamlin Defendants now move  
14 to dismiss for lack of personal jurisdiction and venue, and Hamlin Defendants and  
15 WaterFurnace move to dismiss for failure to state a claim on the latter three claims. (Doc.  
16 10; Doc. 14).

## 21 DISCUSSION

### 22 I. Rule 12(b)(2): Dismissal for Lack of Personal Jurisdiction

#### 23 A. Legal Standard

24 To make a prima facie showing that jurisdiction is proper, “the plaintiff need only  
25 demonstrate facts that if true would support jurisdiction over the defendant.” *Ballard v.*  
26 *Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). The Court therefore takes Plaintiff’s  
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1 allegations as true and resolves factual conflicts in Plaintiff’s favor. *Harris* at 1129.

2 “Where, as here, there is no applicable federal statute governing personal  
3 jurisdiction, the law of the state in which the district court sits applies.” *Harris Rutsky &*  
4 *Co. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003). Arizona Rule of Civil  
5 Procedure 4.2(a) allows state courts to exercise personal jurisdiction to the extent  
6 permitted by the state and federal constitutions. *Cybersell, Inc. v. Cybersell, Inc.*, 130  
7 F.3d 414, 416 (9th Cir. 1997). The Court must, therefore, examine whether exercising  
8 jurisdiction over the Hamlin Defendants comports with due process. *Cybersell v.*  
9 *Cybersell*, 130 F.3d 414, 416 (9th Cir. 1997). Due process for jurisdictional purposes  
10 consists of two elements: the defendant must have sufficient “minimum contacts” with  
11 the forum state, and the exercise of jurisdiction must “comport with fair play and  
12 substantial justice.” *Allison v. Wise*, 621 F. Supp. 2d 1114, 1117 (D. Colo. 2007) (citing  
13 *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945); *Burger King*  
14 *Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

15 “Minimum contacts” are established either through “general jurisdiction” or  
16 through “specific jurisdiction.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466  
17 U.S. 408, 414 (1984). The ACT Group does not allege that Mr. Hamlin maintained the  
18 “continuous and systematic” contacts in Arizona necessary to support general personal  
19 jurisdiction. (Doc. 17 at 6; Doc. 18 at 1). *See Helicopteros*, 466 U.S. at 416. The Ninth  
20 Circuit uses a three-prong test to determine if a party has sufficient minimum contacts to  
21 be subject to specific personal jurisdiction. As outlined in *Schwarzenegger v. Fred*  
22 *Martin Motor Co.*, the three-prong test is:

1 (1) The non-resident defendant must purposefully direct his activities or  
2 consummate some transaction with the forum or resident thereof; or  
3 perform some act by which he purposefully avails himself of the privilege  
4 of conducting activities in the forum, thereby invoking the benefits and  
5 protections of its laws;

6 (2) the claim must be one which arises out of or relates to the defendant's  
7 forum-related activities; and

8 (3) the exercise of jurisdiction must comport with fair play and substantial  
9 justice, i.e. it must be reasonable.

10 374 F.3d 797, 802 (9th Cir. 2004).

## 11 **B. Analysis**

12 The Hamlin Defendants claim that they have not directed their activity towards  
13 Arizona or purposefully availed themselves of its protections sufficiently to establish  
14 personal jurisdiction here. (Doc. 10 at 3–4). Because personal jurisdiction is established  
15 through purposeful direction for the reasons outlined below, the Court does not reach the  
16 question of purposeful availment.<sup>1</sup>

17 Purposeful direction is “the proper analytical framework” in copyright claims.  
18 *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010)  
19 (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004)).  
20 Purposeful direction does not require physical contact with the forum state.  
21 *Schwarzenegger*, 374 F.3d at 803 (citing *Burger King v. Rudzewicz*, 471 U.S. 462, 476  
22 (1985)). Nor need the “brunt” or “bulk” of the effects of a defendant’s actions be located  
23 there. *Brayton Purcell*, 606 F.3d at 1131. Rather, purposeful direction is evaluated using

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26 <sup>1</sup> Hamlin Defendants argue that Mr. Hamlin did not purposefully avail himself of  
27 the laws of the Arizona forum state, due to his limited physical contacts in and with the  
28 state. Without addressing their contentions regarding purposeful availment, the Court  
notes that, because this dispute involves a copyright claim purposeful direction is both the  
proper standard and all that is required to establish personal jurisdiction.

1 the three-part “*Calder-effects test*.” *Id.* at 1128. *See also Bancroft & Masters, Inc., v.*  
2 *Augusta National, Inc.*, 223 F.3d 1082 (9th Cir. 2000) (noting same in trademark  
3 infringement case). It requires that the defendant have “(1) committed an intentional act,  
4 (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is  
5 likely to be suffered in the forum state.” *Brayton Purcell*, 606 F.3d at 1128 (quoting  
6 *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1206 (9th  
7 Cir.2006) (en banc)).

### 10 1. Intent

11 In *Brayton Purcell v. Recordon & Recordon*, the Ninth Circuit deemed the intent  
12 act met if the defendant had copied any of the plaintiff’s copyrighted materials. 606 F.3d  
13 1124, 1128 (9th Cir. 2010). Here, Plaintiff alleges that Mr. Hamlin copied ACT’s  
14 copyrighted material. (Doc. 1, ¶¶ 26–27, 31–37). Likewise, Plaintiff alleges Hamlin  
15 solicited dealers and others to attend WaterFurnace’s classes by promoting the classes  
16 through reference to Hamlin’s former position at ACT and as being substantially similar  
17 to the ACT courses. (Doc. 1, ¶¶ 29, 30). While Defendant challenges the accuracy of both  
18 of these assertions, it has not done so on summary judgment, but in a motion to dismiss.<sup>2</sup>  
19 Thus, at this stage the accuracy of the allegations will be assumed. Plaintiff’s allegations  
20 of copying are an allegation that Defendant has committed intentional acts. Taking  
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25 <sup>2</sup> Several of Defendants’ arguments appear to be defenses on the merits. To the  
26 extent that this and similar arguments made by Defendants constitute defenses on the  
27 merits of the claim, the Court does not address these questions at this stage of the  
28 proceedings. *See* CHARLES ALAN WRIGHT, ARTHUR R. MILLER, 5 FED. PRAC. & PROC.  
CIV. § 1277 (3d ed. 1998) (“[M]otions to dismiss or to strike only can attack matters  
appearing on the face of the complaint; new defensive material therefore must be raised  
by answer.”)

1 Plaintiff's allegations as true and resolving factual conflicts in Plaintiff's favor, the intent  
2 prong is satisfied as to the Hamlins and WaterFurnace. *Harris*, 328 F.3d at 1129.

## 3                   **2.     Targeting**

4           Mr. Hamlin has also met the requirement for express aiming. Express aiming  
5 occurs when the “defendant is alleged to have engaged in wrongful conduct targeted at a  
6 plaintiff whom the defendant knows to be a resident of the forum state.” *Bancroft &*  
7 *Masters, Inc., v. Augusta National, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). In *Brayton*  
8 *Purcell*, the Ninth Circuit found the defendant had expressly aimed at the forum when it  
9 “individually targeted Brayton Purcell by making commercial use of Brayton Purcell’s  
10 copyrighted material for the purpose of competing with Brayton Purcell” in the same  
11 market niche and geographic region. *Brayton Purcell*, 606 F.3d at 1129–30.

12           Other courts in the Ninth Circuit have found purposeful direction when a  
13 copyright is infringed by a national competitor. In *Precision Craft Log Structures, Inc. v.*  
14 *Cabin Kit Co.*, for example, two firms competed nationally in the “business of selling  
15 architectural cabin plans and materials for the construction of such homes.” CV05-199-S-  
16 E JL, 2006 WL 538819, at \*1 (D. Idaho Mar. 3, 2006). Plaintiff, an Idaho firm, alleged  
17 that defendant, an Arizona firm, had impermissibly infringed on its copyrighted cabin  
18 plans. *Id.* In *Precision Craft*, the court noted that “[c]opyright infringement is in the  
19 nature of a tort. When a corporation’s copyright is infringed, the corporation suffers harm  
20 in its primary place of business.” *Id.* at \*5 (internal citations omitted). The court then  
21 ruled that, because the two companies both sold their plans nationally, “a sale of the  
22 copyrighted plans . . . would injure Plaintiff even if the sale was not to an Idaho resident.  
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1 Any usage of the copyrighted materials had the effect of injuring [Plaintiff] . . . where it  
2 has its principal place of business.” *Id.* at \*7. As a result, defendant’s “intentional actions  
3 were expressly aimed or directed at the forum state” and the *Precision Craft* court found  
4 it had personal jurisdiction over the Arizona defendant *Id.* See also, *Goldberg v.*  
5 *Cameron*, 482 F.Supp.2d 1136, 1146 (N.D. Cal. 2007) (finding personal jurisdiction  
6 where movie producer planned to distribute worldwide, including in forum state, a work  
7 which willfully infringed plaintiff’s copyright).

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10 As in *Brayton Purcell* and *Precision Craft*, here ACT alleges that Hamlin and  
11 WaterFurnace have copied ACT’s copyrighted materials in order to entice dealers to  
12 whom ACT markets its services, “capitaliz[ing] on the positive reputation and name  
13 recognition that ACT group has developed throughout the industry.” (Doc. 1, ¶¶ 29, 30).  
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15 As in *Brayton Purcell*, both ACT and WaterFurnace apparently target the same market,  
16 HVAC dealers and representatives.<sup>3</sup> As in both *Brayton Purcell* and *Precision Craft*,  
17 Plaintiff alleges that Defendants have and are infringing its copyright. Because ACT  
18 holds a copyright in the allegedly infringed materials, it is being harmed in its forum state  
19 by Hamlin and WaterFurnace’s intentional acts. *Precision Craft*, 2006 WL 538819, at \*5.  
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21 These intentional acts by Defendants, therefore, are expressly aimed at this forum state.  
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### 23 3. Foreseeable Harms

24 The final prong of the *Calder* test is that the defendants must have caused  
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26 <sup>3</sup> Defendants do not challenge the accuracy of these allegations in their motion to  
27 dismiss. Further, while the complaint does not specifically state the two companies are  
28 competitors in the same region or nationally, given the language in the complaint and the  
fact that neither motion asserts the parties are not competitors, the allegations of the  
complaint are that the parties are competitors either in the same region or nationally.

1 foreseeable harm or effects in the forum. *Brayton Purcell*, 606 F.3d at 1131 (citing  
2 *Yahoo!*, 433 F.3d at 1206; *Bancroft*, 223 F.3d at 1087). The “brunt” of the harm need not  
3 be suffered in the forum, “this element may be established even if “the bulk of the harm”  
4 occurs outside the forum.” *Id.*

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6 Plaintiff alleges that Mr. Hamlin copied Plaintiff’s copyrighted materials and that  
7 WaterFurnace marketed his services “as being substantially the same as ACT Group’s  
8 Boot Camp training course, but less expensive” and “promot[ed] Hamlin as a former  
9 sales trainer from ACT Group, to capitalize on the positive reputation and name  
10 recognition that ACT Group has developed throughout the industry.” (Doc. 1, ¶¶ 29–30).  
11 Taking these allegations as true, it was foreseeable that ACT “would be harmed by  
12 infringement of its copyright, including harm to its business reputation and goodwill, and  
13 decreased business and profits. It was also foreseeable that some of this harm would  
14 occur in the Forum, where [ACT] was known to reside.” *Brayton Purcell*, 606 F.3d at  
15 1131. According to the Complaint, ACT is an Arizona corporation with its principal  
16 place of business and its principal offices located in Maricopa County. “Consequently,  
17 [ACT] has satisfied the third and final element of the *Calder*-effects test.” *Id.* Therefore,  
18 this Court has jurisdiction over Plaintiff’s claims against Defendants.  
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## 23 **II. 28 U.S.C. §§ 1381 and 1400(a): Dismissal for Improper Venue**

24 Venue in copyright cases is governed by 28 U.S.C. §1400(a), which provides that  
25 “[c]ivil actions, suits, or proceedings arising under any Act of Congress relating to  
26 copyrights . . . may be instituted in the district in which the defendant or his agent resides  
27 or may be found.” 28 U.S.C. § 1400(a). “Venue under 28 U.S.C. § 1400(a) is proper in  
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1 any judicial district in which the defendant would be amenable to personal jurisdiction if  
2 the district were a separate state.” *Columbia Pictures Television v. Krypton Broad. of*  
3 *Birmingham, Inc.*, 106 F.3d 284, 289 (9th Cir. 1997) *rev’d on other grounds sub nom.*  
4 *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998). Because this Court  
5 has personal jurisdiction over the Defendants, venue is also appropriately placed here.

6 **III. Rule 12(b)(6): Dismissal for Failure to State a Claim**

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8 Defendants Hamlin move for dismissal of Plaintiff’s claims of breach of duty of  
9 loyalty (Count III), aiding and abetting same (Count IV), and unfair competition (Count  
10 V). Defendant WaterFurnace joins the Hamlins in moving for failure to state a claim as to  
11 the latter two claims. For the reasons stated below, the Court grants Defendants’ motion  
12 only as to Count V.

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14 **A. Legal Standard**

15 When considering a motion to dismiss under Federal Rule of Civil Procedure  
16 12(b)(6), courts must “accept as true the facts alleged in the complaint,” *Zimmerman v.*  
17 *Or. Dep’t of Justice*, 170 F.3d 1169, 1171 (9th Cir. 1999), and “must draw inferences in  
18 the light most favorable to the plaintiff.” *Barker v. Riverside County Office of Ed.*, 584  
19 F.3d 821, 824 (9th Cir. 2009) (citation omitted). “A motion under 12(b)(6) tests the  
20 formal sufficiency of the statement of claim for relief.” *Fednav Ltd. V. Sterling Int’l*, 572  
21 F. Supp. 1268, 1270 (N.D. Cal. 1983). Therefore, complaints are to be “liberally  
22 construed in favor of the plaintiff.” *Id.*

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26 To survive a Rule 12(b)(6) challenge, a complaint must contain more than “labels  
27 and conclusions” or a “formulaic recitation of the elements of a cause of action”; it must  
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1 contain factual allegations sufficient to “raise a right to relief above the speculative  
2 level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While “a complaint need  
3 not contain detailed factual allegations . . . it must plead ‘enough facts to state a claim to  
4 relief that is plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017,  
5 1022 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility  
6 when the plaintiff pleads factual content that allows the court to draw the reasonable  
7 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556  
8 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). The plausibility standard “asks  
9 for more than a sheer possibility that a defendant has acted unlawfully. Where a  
10 complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops  
11 short of the line between possibility and plausibility of entitlement to relief.’” *Id.* (quoting  
12 *Twombly*, 550 U.S. at 555) (internal citations omitted). Similarly, legal conclusions  
13 couched as factual allegations are not given a presumption of truthfulness, and  
14 “conclusory allegations of law and unwarranted inferences are not sufficient to defeat a  
15 motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

## 20 **B. Analysis**

### 21 **1. Breach of Duty of Loyalty and Aiding and Abetting**

22 Defendants dispute whether Mr. Hamlin owed or owes ACT a duty of loyalty, as  
23 well as whether, if such a duty is or was due, such duty was breached by Mr. Hamlin. If  
24 Mr. Hamlin owes no duty of loyalty to ACT, he therefore he cannot have breached a duty  
25 of loyalty (Count III), and WaterFurnace cannot have aided and abetted Mr. Hamlin’s  
26 breach of duty (Count IV). (Docs. 10 at 4–5; 14 at 2). The analysis for the arguments of  
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1 the separate Defendants is the same, and so is addressed here collectively. Construing  
2 Plaintiff's claims liberally, the Court finds that Plaintiff has stated sufficient facts to state  
3 a claim for relief.

4 First, whether Hamlin was an employee or an independent contractor, it is not  
5 facially implausible that Hamlin owed ACT a duty of loyalty, as Plaintiff alleges. (Doc.  
6 1, ¶57). An employee clearly owes his employer "a fiduciary duty of loyalty." *McAllister*  
7 *Co. v. Kastella*, 170 Ariz. 455, 457, 825 P.2d 980, 982 (App. 1992). Defendant concedes  
8 as much. (Doc. 10 at 5), but argues that Mr. Hamlin was not an employee, but an  
9 independent contractor.  
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12 An independent contractor, however, may also owe his employer/principle a duty  
13 of loyalty. "[T]he common term "independent contractor" is equivocal in meaning and  
14 confusing in usage because some termed independent contractors are agents while others  
15 are nonagent service providers." RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006). *See*  
16 *also Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182, 1189 (9th Cir. 2002)  
17 ("Under Arizona law, the categories "independent contractor" and "agent" are not  
18 mutually exclusive."). The Supreme Court of Arizona has noted that "[w]hile it is always  
19 the case that an independent contractor is not a servant, it is not always the case that an  
20 independent contractor is not an agent." *Wiggs v. City of Phoenix*, 10 P.3d 625, 628  
21 (Ariz. 2000). An agent may owe a duty of loyalty to his employer, just as an employee  
22 does. *See, e.g., In re Urgent Med. Care, Inc.*, 153 B.R. 784, 790 (Bankr. S.D. Ohio 1993)  
23 ("As with the employee/employer relationship, the agent's duty of loyalty exists during  
24 the terms of the relationship.) Therefore, regardless of whether Mr. Hamlin was an  
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1 employee or an independent contractor for ACT, the Court cannot conclude at this stage  
2 as a matter of law that Mr. Hamlin owed ACT no duty of loyalty.

3           Second, Plaintiff has alleged facts relating to at least one breach of duty by Mr.  
4 Hamlin. An agent may not “use property of the principal for the agent’s own purposes.”  
5 *Taser Int’l, Inc. v. Ward*, 224 Ariz. 389, 396, 231 P.3d 921, 928 (Ct. App. 2010), *review*  
6 *granted* (Oct. 26, 2010), *review denied and order vacated* (Dec. 9, 2010). *Taser*, 231 P.3d  
7 (citing RESTATEMENT (THIRD) OF AGENCY § 8.05). Plaintiff alleges that “[b]y creating a  
8 sales training program . . . that improperly replicates and is substantially derived from  
9 proprietary sales training concepts and materials developed by ACT Group,” Hamlin  
10 breached his duty. (Doc. 1, ¶ 58). To the extent that these materials include the property  
11 of ACT and that Hamlin was ACT’s agent, Plaintiff has alleged sufficient facts to  
12 establish a breach of duty by Mr. Hamlin.  
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16           Defendants argue there could be no breach because, “none of the actions claimed  
17 to be a breach of a duty of loyalty are alleged to have occurred prior to the termination of  
18 the relationship between Hamlin and ACT group.” (Doc. 10 at 5). Nevertheless, liberally  
19 construing the complaint and drawing reasonable inferences from it, Plaintiff has alleged  
20 sufficient facts that it is facially plausible that while still employed by ACT, Hamlin  
21 created his training program which plagiarized portions of ACT’s program. Plaintiff  
22 alleges that Hamlin represented that he had developed his own training program called  
23 “Fantastic Training.” (Doc. 1, ¶20). The allegation in question comes after the statement  
24 in Plaintiff’s complaint stating the date on which Hamlin advised ACT that he would be  
25 leaving (Doc. 1, ¶18), and prior to the statement in Plaintiff’s allegation which begins  
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1 “[a]fter [Hamlin] leaving ACT Group and beginning work for WaterFurnace.” (Doc. 1,  
2 ¶22). To the extent that such an act is a breach of duty, Plaintiff also asserts that it has  
3 suffered damages as a result of Mr. Hamlin’s breach. (Doc. 1, ¶ 59). Having pled facts  
4 sufficient to support all the elements of a claim for breach of duty of loyalty, Defendants’  
5 motions to dismiss these two claims are denied.  
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## 7 **2. Unfair Competition**

8 In Arizona, the common law doctrine of unfair competition “encompasses several  
9 tort theories, such as trademark infringement, false advertising, ‘palming off,’ and  
10 misappropriation.” *Fairway Constructors, Inc. v. Ahern*, 193 Ariz. 122, 970 P.2d 954,  
11 956 (Ct. App. 1998) (internal citations omitted). “[A]n unfair competition claim is  
12 preempted unless it alleges elements that make it qualitatively different from a copyright  
13 infringement claim.” *Id.* Under Arizona law, “[t]he universal test [for unfair competition]  
14 is whether the public is likely to be confused.” *Doe v. Arizona Hosp. & Healthcare Ass’n*,  
15 CV07-1292-PHX-SRB, 2009 WL 1423378 at \*11 (D. Ariz. Mar. 19, 2009) (quoting  
16 *Boice v. Stevenson*, 66 Ariz. 308, 187 P.2d 648, 653 (Ariz. 1947)).  
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20 As Plaintiff has not alleged either trademark infringement or false advertising, if  
21 Plaintiff has stated an unfair competition claim it must be either for palming off or for  
22 misappropriation. “[P]alming off,’ or ‘passing off,’ . . . consists in a false representation  
23 tending to induce buyers to believe that the defendant’s product is that of the plaintiff.”  
24 *Fairway Constructors*, 970 P.2d at 956. The typical “palming off” case consists of “an  
25 attempt to make the purchaser believe that the product of the subsequent entrant is that of  
26 his better known competitor.” *Kaibab Shop v. Desert Son, Inc.*, 135 Ariz. 487, 489, 662  
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1 P.2d 452, 454 (Ct. App. 1982).

2 While confusion alone is not sufficient to impose damages or to avoid federal  
3 preemption under copyright law, customer confusion or deception is a necessary element  
4 of palming off. *Fairway Constructors*, 970 P.2d at 956. *See also, Boice*, 187 P.2d at 653;  
5 *Doe*, 2009 WL 1423378 at \*11 (same); *Cleary v. News Corp.*, 30 F.3d 1255, 1262–63  
6 (9th Cir.1994) (noting that test for both state law unfair competition claim and federal  
7 Lanham Act claim is whether the public is likely to be deceived or confused). Indeed,  
8 “[t]he line between palming off and creating confusion as to source is indistinct; in effect,  
9 palming off is simply a direct and more flagrant means of misleading purchasers as to the  
10 source of the product.” *Kaibab Shop v. Desert Son, Inc.*, 135 Ariz. 487, 489, 662 P.2d  
11 452, 454 (Ct. App. 1982).

12 Here, however, Plaintiff has not alleged any deception or confusion of either  
13 party’s clientele. *Compare Taylor v. Quebedeaux*, 126 Ariz. 515, 617 P.2d 23, 24 (1980)  
14 (finding unfair competition where two similarly-named rental companies operated in  
15 close proximity with each other and plaintiff produced evidence of confusion) *with*  
16 *Liniger v. Desert Lodge*, 63 Ariz. 239, 160 P.2d 761, 764 (1945) (finding no unfair  
17 competition when similarly-named and closely-located tourist lodgings competed but no  
18 evidence of confusion by clientele). Therefore, Plaintiff has not stated a claim for unfair  
19 competition due to Defendant’s ‘palming off’ of Plaintiff’s goods.

20 “Misappropriation involves the unfair taking for profit, at little or no cost, of  
21 property acquired by another through investment of substantial time and money.”  
22 *Fairway Constructors, Inc.*, 970 P.2d at 957 (internal citations omitted). Under Arizona  
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1 law, information misappropriation consists of either:

2 (a) Acquisition . . . by a person who knows or has reason to know that the  
3 [information] was acquired by improper means.

4 (b) Disclosure or use of [information] of another without express or implied  
5 consent by a person who either:

6 (i) Used improper means to acquire knowledge of the  
7 [information].

8 (ii) At the time of disclosure or use, knew or had reason to  
9 know that his knowledge of the [information] was derived  
10 from or through a person who had utilized improper means to  
11 acquire it, was acquired under circumstances giving rise to a  
12 duty to maintain its secrecy or limit its use or was derived  
13 from or through a person who owed a duty to the person  
14 seeking relief to maintain its secrecy or limit its use.

15 Ariz. Rev. Stat. Ann. § 44-401(2). *See also, Summit*, 7 F.3d 1434, 1441 (noting elements  
16 of common law misappropriation claim under California law are “(1) the plaintiff has  
17 invested substantial time and money in development of its ... ‘property’; (2) the defendant  
18 has appropriated the [property] at little or no cost; and (3) the plaintiff has been injured  
19 by the defendant's conduct”).

20 Here, Plaintiff clearly alleges that, “Defendants are aware that” their sales training  
21 “program . . . improperly replicates and substantially derives from ACT Group’s ideas,  
22 language and materials contained in its sales training materials” thus “avoid[ing] the time  
23 and expense of developing their own content and generating their own notoriety and basis  
24 of expertise within the industry.” (Doc. 1, ¶¶ 68, 70). Plaintiff alleges these actions by  
25 Defendants were done without Plaintiff’s consent, that Defendants “have been unjustly  
26 enriched” by such misconduct, and that Defendants’ actions have caused ACT to  
27 “suffer[] injury, including reduced attendance in its sales training classes and loss of  
28 customer goodwill.” (Doc. 1, ¶¶ 32, 33, 65, 73). Thus stated, Plaintiffs have stated a

1 claim for misappropriation of information.

2       However, misappropriation claims based on copyright are preempted by federal  
3 copyright law. *Fairway Constructors, Inc.*, 970 P.2d at 957 (citing *Warner Bros. Inc. v.*  
4 *Am. Broad. Companies, Inc.*, 720 F.2d 231, 247 (2d Cir. 1983)). *See also Summit*, 7 F.3d  
5 at 1442 (holding that unfair copying claim is preempted by federal law). To escape  
6 preemption, “an unfair competition action for misappropriation of time and effort” must  
7 “contain[] an extra element which changes its nature” to something qualitatively different  
8 from a copyright claim. *Summit*, 7 F.3d at 1439. *See also Kodadek v. MTV Networks,*  
9 *Inc.*, 152 F.3d 1209, 1212 (9th Cir. 1998) (noting test for Copyright Act preemption). For  
10 this reason, “[t]he common law doctrine of ‘misappropriation’ is normally invoked in an  
11 effort to protect something of value that is not covered either by patent or copyright law.”  
12 *Fairway Constructors, Inc.*, 970 P.2d at 957. Claims ruled not pre-empted include trade  
13 secret claims, negligent misrepresentation or breach of contract. *Firoozye v. Earthlink*  
14 *Network*, 153 F. Supp. 2d 1115, 1127 (N.D. Cal. 2001) (noting that extra elements of  
15 secrecy, false representation and promise required for claims of trade secret, negligent  
16 misrepresentation, and breach of contract respectively made those claims not preempted  
17 by copyright law). *See generally*, 1-1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER  
18 ON COPYRIGHT § 1.01[B][1] (2006) (discussing the impact of copyright preemption on  
19 various state law claims).

20       Plaintiff has not stated sufficient facts to establish an extra element that would  
21 preclude preemption by the copyright. As Defendants note, Plaintiff has not alleged a  
22 trade secret or other element that would “change the nature” of their claim from one  
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1 sounding in copyright. (Docs. 10 at 5–6, 14 at 2–3, 18 at 4–5, 19 at 3–4). Indeed, here it  
2 appears that the information allegedly misappropriated is copyrighted material. If “the  
3 essence of Plaintiff’s unfair competition claim is that Defendants used copyrighted works  
4 without authorization,” Plaintiff’s claim is pre-empted. *AJF Eng’g, Inc. v. Wade*, CV 05-  
5 3862 PHXSMM, 2007 WL 841416 (D. Ariz. Mar. 16, 2007).  
6

7 Plaintiff has not clearly alleged sufficient facts to state a claim of unfair  
8 competition under a theory of misappropriation. Nor has it alleged confusion, which is a  
9 required element of a ‘palming off’ claim. Nor is the court willing to entertain a theory of  
10 unfair competition that is novel to Arizona. *See Doe*, CV07-1292-PHX-SRB, 2009 WL  
11 1423378 (D. Ariz. Mar. 19, 2009) (noting that “the Court is unwilling to find that  
12 Plaintiffs may maintain a theory of unfair competition that is entirely novel in Arizona”).  
13 Therefore, the Court grants Defendant’s motion to dismiss the unfair competition claim.  
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15 Plaintiff has requested leave to amend its pleadings with regards to its unfair  
16 competition claim and, to the extent that the same conduct also gives rise to a claim for  
17 unjust enrichment, to assert that additional claim as well. (Doc. 17 at 13). Rule 15(a)  
18 declares that “[t]he court should freely give leave when justice so requires.” FED.R.CIV.P.  
19 15(a). “If the underlying facts or circumstances relied upon by a plaintiff may be a proper  
20 subject of relief, he ought to be afforded an opportunity to test his claim on the merits.”  
21 *Foman v. Davis*, 371 U.S. 178, 182 (1962). Finding no bad-faith, dilatory motive or other  
22 reason which would preclude allowing Plaintiff to amend its complaint, the Court grants  
23 Plaintiff’s request to amend its Complaint within 30 days of the date of this Order.  
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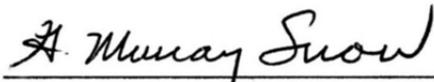
**CONCLUSION**

Plaintiff, an Arizona corporation, owns copyrights in its sales training materials. To the extent those copyrights have been infringed by Defendants for commercial use, jurisdiction and venue are appropriate in the District of Arizona. *Brayton Purcell*, 606 F.3d at 1129–30. As Plaintiff has pled sufficient facts to make claims in breach of duty of loyalty and aiding and abetting facially plausible, dismissal of these claims at this time would not be not appropriate. Plaintiff has not, however, pled sufficient facts to make its claim for unfair competition facially plausible. This claim is therefore dismissed without prejudice.

**IT IS THEREFORE ORDERED:**

1. Hamlin Defendants’ Motion to Dismiss (Doc. 10) is **GRANTED IN PART AND DENIED IN PART.**
2. Defendant WaterFurnace’s Motion to Dismiss (Doc. 14) is **GRANTED IN PART AND DENIED IN PART.**
3. Plaintiff has leave of the Court to amend its complaint **within 30 days** consistent with this Order.

Dated this 20th day of July, 2012.

  
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G. Murray Snow  
United States District Judge