

**Geiger et. al. v. Z-Ultimate et. al.**

**Motions for Summary Judgment**

**14-cv-240 BNB-NYW**

**May 3, 2016 2:00pm**

# Two Issues Before the Court

The only issues before the Court are:

- 1) Whether Chief Instructors are Employees under the FLSA's suffer or permit standard, ?
- 2) Whether Defendants are an "Enterprise" and thus covered by the FLSA?

# FLSA “Suffer or Permit” Standard

- **The worker is:**
  - **Economically Dependent** on the employer for their livelihood; or
  - in business for him or her self.
- **Undisputed Facts:**
  - Work at **Z-Ultimate’s** studios
  - Under the **Z-Ultimate** name
  - In a **Z-Ultimate** uniform
  - Selling **Z-Ultimate’s** lessons
  - Teaching **Z-Ultimate’s** style of martial arts
  - To **Z-Ultimate’s** students

# Economic Realities Factors

- 1) Is the Work an Integral Part of the Employer's Business?
- 2) Does the Worker's Managerial Skill Affect the Worker's Opportunity for Profit or Loss?
- 3) How Does the Worker's Relative Investment Compare to the Employer's Investment?
- 4) Does the Work Performed Require Special Skill and Initiative?
- 5) Is the Relationship between the Worker and the Employer Permanent or Indefinite?
- 6) What is the Nature and Degree of the Employer's Control?

# FLSA “Suffer or Permit” Standard

- Defendants made Chief Instructors sign **non-competition agreements**.
  - Defendants’ Opposition Motion at 7
- “The employer **cannot have it both ways** by calling the employees independent contractors, yet **simultaneously prevent them from working** for other companies in the same industry in the area.”
  - Swinney v Amcomm Telecomm, Inc, 30 F.Supp.3d 629 633 (E.D. Mich. 2014)

# CONFIDENTIALITY, NON-DISCLOSURE & NON-COMPETITION AGREEMENT

The undersigned ("Independent Contractor") does hereby represent and warrant to Z Ultimate Self Defense Studios LLC ("Z Ultimate") and to \_\_\_\_\_ ("Company") that he/she is, in fact, the recipient of privileged and confidential information regarding Martial Arts training and the operation of the Martial Arts business, which confidential information constitutes a body of knowledge and practice which are trade secrets of Company.

Independent Contractor hereby represents and warrants to Z Ultimate and/or Company that he/she will safeguard said trade secrets and disclose only that confidential information which Company specifically authorizes Independent Contractor to disclose and that said disclosures shall only be at those times and places and in those forms and fashions as may be set forth by Z Ultimate and/or Company.

Independent Contractor further acknowledges that it would be highly detrimental to Z Ultimate and/or Company if Independent Contractor were to discontinue his/her course of service for Z Ultimate and/or Company and establish a competitive business within the existing demographic area/region of Z Ultimate and/or Company. Independent Contractor further acknowledges that it is highly likely that Independent Contractor would benefit greatly from the trade secrets learned from Z Ultimate and/or Company if Independent Contractor were to establish a competitive business and that said benefit would be at the expense and to the detriment of Z Ultimate and/or Company.

Independent Contractor hereby represents and warrants to Company that, in the event that Independent Contractor discontinues his/her course of service for Z Ultimate and/or Company, he/she will not enter into a competitive business within FIVE (5) MILES of any established business operation of Z Ultimate and/or Company for a period of TWO (2) YEARS from and after the date upon which Independent Contractor discontinues said course of service.

# FLSA “Suffer or Permit” Standard

Plaintiffs are **Economically Dependent** on Defendants.

- A worker constrained under a non-compete agreement is strong evidence that the worker is an employee because it shows:

(1) the employer had the ability to **control** the workers livelihood,

(2) the worker **depended on the employer** for her livelihood, and

(3) the working relationship was **permanent**.

(4) that the **employee’s skill was not provided in an independent manner**.

- Thomas v. Brock, 617 F.Supp. 526 W.D.N.C. 1985); Swinney 30 F.Supp.3d 629, 633.

# Economic Realities Factors

- 1) Is the Work an Integral Part of the Employer's Business?
- ★ 2) Does the Worker's Managerial Skill Affect the Worker's Opportunity for Profit or Loss?
- 3) How Does the Worker's Relative Investment Compare to the Employer's Investment?
- ★ 4) Does the Work Performed Require Special Skill and Initiative?
- ★ 5) Is the Relationship between the Worker and the Employer Permanent or Indefinite?
- ★ 6) What is the Nature and Degree of the Employer's Control?
  
- ★ = a factor that is met by the Non-Compete Agreement alone.



# Factor #1: Plaintiffs' Work Is Integral

## 1) The Work Is Integral to Z-Ultimate's Business.

- “workers are more likely to be employees if they performed the primary work of the employer”
  - Rutherford, 331 U.S. at 729
- The Seventh Circuit stated, “its does not take much of a record to demonstrate that pickling the pickles is a necessary and integral part of the pickle business.”

- Secy of Labor v. Lauritzen, 835 F.2d 1537-38

# Factor #1: Plaintiffs' Work Is Integral



“Z-Ultimate Self Defense Studios LLC – ZUSDS – is a part of a family of martial arts companies **formed with one goal in mind – to provide “Z-Ultimate” martial arts experience for students and their families by providing life changing and character building experiences through world-class personalized martial arts instruction.** It is the largest martial arts company of its kind, with locations in the Midwest and on the West Coast.”

- Z-Ultimate Website, Ex. A

## Factor #1: Plaintiffs' Work Is Integral

- Z-Ultimate teaches martial arts and sells martial arts supplies.
- Q: Well, we'll make that simple. **Are they primarily in the business of teaching martial arts?**
- A: **Yes**
  - Clark Deposition, 67:20-22, Ex. G

# Economic Realities Factors

- ✓ 1) The Work Is an Integral Part of Z-Ultimates' Business?
    - ✓ No Genuine Dispute
  - ★ 2) Does the Worker's Managerial Skill Affect the Worker's Opportunity for Profit or Loss?
    - 3) How Does the Worker's Relative Investment Compare to the Employer's Investment?
  - ★ 4) Does the Work Performed Require Special Skill and Initiative?
  - ★ 5) Is the Relationship between the Worker and the Employer Permanent or Indefinite?
  - ★ 6) What is the Nature and Degree of the Employer's Control?
- ★ = factors met by the Non-Compete Agreement alone.

# Factor #2: Opportunity for Profit And Loss

**2) Plaintiffs cannot suffer the type of capital financial loss contemplated under this factor.**

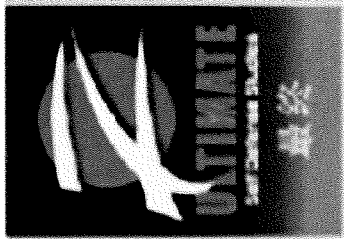
- A worker in business for him of her self faces the possibility to not only make a profit but also **experience a loss.**
  - Dole v. Snell 875 F.2d at 810.
- **Workers that only risk a loss of wages are employees.**
  - Sec’y of Labor v. Lauritzen, 835 F.2d at 1536.

# Factor #2: Opportunity for Profit And Loss

- Plaintiffs **cannot** experience a financial loss beyond lost wages.
  - Q: is there a tangible financial loss to an instructor, other than from their paycheck, when the studio closes?
  - A: It would be outside of them not having the opportunity to get a check anymore, **I would say no.**
    - Eszlinger Deposition (133:25-134:7), Ex. E to Reply

# Factor #2: Independent Managerial Decisions

- Plaintiffs do not make **independent decisions** associated with owning their own business.
- Courts have recognized the significance of the putative employer's **control over profits and losses** through implementing **minimal price controls**.
- Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1313 (5<sup>th</sup> Cir 1976)



# Z-ULTIMATE RATE SCHEDULE

*Effective September 1, 2010*

To ensure fairness to all students of Z-Ultimate Self Defense Studios and professional consistency amongst all Z-Ultimate studio locations, the following rate schedule reflects the minimal Enrollment, Tuition, and Testing Fees. All rates have been carefully and competitively calculated to assure maximum VALUE may be realized by our students and families.

*Discount Tuition Agreements may be cancelled at any time by providing a 30-day written notification along with payment sufficient to cover the Enrollment and Tuition Discounts received to date. Cancellation will be authorized upon the receipt of both the written notification and full payment. Family, fire, military, police, and multiple lesson discounts begin at 10% off.*

TESTING FEES	BLACK BELT PROGRAM
<i>Testing Fees are to include the Testing Procedure, Rank Certificate, New Belt, and Z-Ultimate Logo T-Shirt.</i>	<b>\$10,000.00</b> <i>including</i>
Yellow & Orange	One (1) Private Lesson plus Unlimited Group Classes for a term of 48 Months
Purple	or
Blue & Blue / GS	Two (2) Private Lessons plus Unlimited Group Classes for a term of 24 Months
Green & Green / BS	plus
Brown	Additional Incentives and Savings - Limited Availability
Black	...
<i>All Brown and Black Belt Testing is conducted by Z-Ultimate Board of Masters - No Discounts Apply.</i>	<b>Black Belt Programs are Non-Transferable</b>

©2012 Z-Ultimate Self Defense Studios V105.21.12

**All Rates have been Reviewed and Approved by the Z-Ultimate Board of Masters.**



# Factor #2: Independent Managerial Decisions

- Plaintiffs do not make **independent decisions** associated with owning their own business.
  - Defendants operating agreements give the Control Group complete operational control – not Plaintiffs.
  - Managers “**shall have complete and exclusive authority, power and discretion to manage and control the LLC's business, property and affairs, make all decisions regarding those matters and perform all other acts or activities customary or incident to the management of the LLC.**”
    - Operating Agreements § 5, Ex. I

# Economic Realities Factors

- ✓ 1) The Work Is an Integral Part of the Employer's Business.
  - ✓ No Genuine Dispute
- ✓ 2) The Worker's Managerial Skill Does Not Affect the Worker's Opportunity for Profit or Loss.
  - ✓ No Genuine Dispute
- 3) How Does the Worker's Relative Investment Compare to the Employer's Investment?
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## Factor #3: Relative Investment

### 3) The Workers Relative Investment Is Paltry Compared to the Employer's Investment?

- The investment must be to support the business beyond any particular job to expand the business' capacity, reduce costs, or extend the businesses' market. **Specifically, investing in tools and equipment is not necessarily a business investment** contemplated under this factor.

- Snell, 875 F.2d at 810.

## Factor #3: Relative Investment

- Defendants' Investment:
  - “It varies. Construction can go from **40 grand up to 100 grand.**”
    - Clark Deposition (197:3-7), Ex. S
  - “The United Partner entity for the studio pays the rent, building out and utility costs. Marketing is paid by the United Partner entity for the studio.”
    - Defendant's Response to Interrogatory 35, Ex. D
- Chief Instructor's investment:
  - **Less than \$1000** in total on personal equipment
    - Defendants Response to Interrogatory 36, Ex. D

## Factor #3: Relative Investment

- Undisputed Fact:
  - “Admittedly the amount of investment between the instructor and the studio entities shows that the studios invest much more than the instructor.”
  - Defendants Opposition Motion at 10

# Economic Realities Factors

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- ★ 4) Does the Work Performed Require Special Skill and Initiative?
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# Factor #4: Special Skill or Initiative

## 4) The Work Performed by Plaintiffs Required the Ability to:

- Teach Martial Arts, and
- Run a Martial Arts Studio
- Defendants Opposition Motion at 8

### Both Skills are Provided by Z-Ultimate.

- The meaningfulness of this skill as indicating that they are in business for themselves or economically independent is **undermined** by the fact that the **employer provided** most of them with their skills.
  - Keller 781 F.3d 799, 809-10 (6<sup>th</sup> Cir. 2015)
- For skill to be indicative of independent contractor they be used in some **independent way** showing business-like initiative
  - Brock v. Superior Care Inc., 840 F.2d 1054, 1060 (2<sup>nd</sup> Cir. 1988)

# Factor #4: Skills Provided By Defendants

(1) Teaching martial arts and business skills are **provided by Defendants** and their agents to Plaintiffs.

Undisputed Facts:

- **“Each and every ZUSDS Instructor is hand picked and trained by the Board of Masters** through the Z-Ultimate University of Martial Arts Professionals, **they continue to train each and every week under the tutelage of the Board of Masters,** improving as instructors and location operators.”
  - Z-Ultimate Website, Ex. A
- Defendants admit that they held weekly business training sessions.
  - Defendants Aug. 10 Response to Interrog 19, Ex. N



# Factor #4: Skills Provided By Defendants

- Q: And what are they trained in?
- A: First and foremost is **martial arts**. Second would be **instruction of martial arts**. And then the third primary would be the **business aspects of operating a studio**.
- A: Our primary thing is teaching karate. Karate, Kung Fu, Jujitsu, under Kempo. The board of masters and when we direct instructors, the majority of things that we direct these guys is through -- **how to instruct better, how to teach better, how to get more students**.
  - Eszlinger Deposition (105:5-9, 46:17-22), Ex. E of Reply

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# Factor #4: Independent Business

- (2) For skill to be indicative of independent contractor they must be used in some **independent way** showing business-like initiative.
  - Superior Care Inc., 840 F.2d 1054, 1060
- “Only [Martial Arts Instructors] who operate as independent businesses, as opposed to being economically dependent on their employer, are independent contractors”
  - U.S. Department of Labor Administrator’s Interpretation No 2015-1

# Factor #4: Independent Business

- Use of the skill is not provided in an independent manner because it is **constrained under a non-compete agreement.**
- Non-compete agreements are strong evidence “that the **employee’s skill was not provided in an independent manner.**”
  - Thomas v. Brock, 617 F.Supp. 526 W.D.N.C. 1985); Swinney 30 F.Supp.3d 629, 633.

# Economic Realities Factors

- ✓ 1) The Work Is an Integral Part of the Employer's Business.
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  - ✓ **No Genuine Dispute**
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  - ✓ **No Genuine Dispute**
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- ★ 6) What is the Nature and Degree of the Employer's Control?

# Factor #5: Indefinite / Permanent

## 5) The Workers' Employment Relationship Is Indefinite.

- A worker's indefiniteness indicates that the **worker is an employee.**
  - DialAmerica Mktg., 757 F2d at 1384-85
- Workers who “worked until they quit or were terminated have a relationship of an at will employee and not an independent contractor.”
  - Cascom, 2011 WL 10501391

# Factor #5: Indefinite / Permanent

- Defendants admit that a Chief Instructor Independent Contractor Agreement **does not define a finite end date** or time period or a project for completion.
  - Defendants' Answer to RFA No. 21, Ex. 00
- Defendants do not dispute that Plaintiffs relationship with their employer is **indefinite**.
  - Defendant's Opposition Motion at 10-11
- The **non-compete agreement** is strong evidence of **indefinite** relationship.
  - See Swinney 30 F.Supp.3d 629

# Economic Realities Factors

- ✓ 1) The Work Is an Integral Part of the Employer's Business.
  - ✓ No Genuine Dispute
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- ✓ 5) The Relationship between the Worker and the Employer Is Permanent or Indefinite.
  - ✓ No Genuine Dispute
- ★ 6) What is the Nature and Degree of the Employer's Control?



# Factor #6: Nature of Control

(6) Although Z-Ultimate Exercises Extensive Control, the Degree of Control Need Not Be Significant.

- FLSA Covers Workers Even When There is Little to No Control.
- Control is only Relevant to Workers Dependence.

• The U.S. Supreme Court has found economic dependence where the alleged employer **exercised little to no control or supervision** over employees not at a central location.

- See Walling v. Portland Terminal Co., 330 U.S. at 150-51 (1947); Nationwide Mut Ins. Co. v. Darden, 503 U.S. at 326 (1992); Antenor v. D&S Farms, 88 F.3d. 925, 933 (11<sup>th</sup> Cir. 1996)

• Control is **only relevant** to whether the worker is economically dependent on the employer.

- U.S. Department of Labor Administrator's Interpretation No 2015-1

# Factor #6: Nature of Control

## Context of Control

- Not only are the Individual Defendants the Chief Instructors' superiors in the Z-Ultimate Business but also Defendants are their **martial arts Masters**.
- Individual Defendants are in a considerable position of power, in a field that promotes unquestioning loyalty and they provide detailed instructions about how to operate the studios that Defendants Clark, Eszlinger, and Prosch own.

# Factor #6: Nature of Control

## Plaintiffs Exercised Extensive Control

- 1) Plaintiffs were provided **detailed and continuous instructions** on how to operate the studios from Defendants and their agents.
  - Weekly business and sales training sessions
  - “Hit lists” (daily/weekly/monthly to-do checklists)
    - Ex. R of Reply
  - Agendas
    - Ex. J
  - University Manual
    - Ex. I of Reply
  - Sales Scripts and 8-Step Sign Up
    - Ex. AA

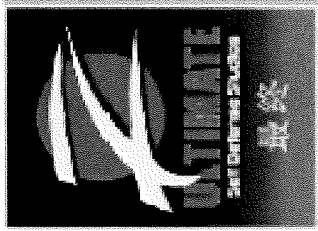


# Z-ULTIMATE SELF DEFENSE STUDIOS

**THE BEST & MOST EXTREME EXAMPLE OF ANY KIND**

## THE TEN ABSOLUTES OF BUILDING A SUCCESSFUL DOJO:

- REMAIN A STUDENT** - WORKOUTS & MEETINGS = Practice what you teach.
- STUDIO HOURS** - No less than 12pm to 9pm of ACTIVE HOURS... vs 'inactive':
- CLEAN STUDIO** - Store front, windows, lobby, office, restroom, DOJO, etc.
- INSTRUCTOR(S) IMAGE** - Full Uniform & Belt during all dojo HOURS.
- DAILY HIT LISTS** - Daily, Weekly, Monthly, & Quarterly CHECK LIST of To Do's.
- TRACKING** - PC / AS / IN / PR / SU / Revenue / Active / In-Active / Profit & Loss.
- PROMOTE Z & ENROLL THEE** - Promotional Routines SCHEDULED daily.
- TEACH-N-TRAIN & RETAIN** - Every lesson & class BETTER than before - Inspire.
- MANAGE, PROBLEM SOLVE & EVOLVE** - Day to day with INTENT & PURPOSE.
- FREE 30 DAY TEST DRIVE** - Maintain TEN 30DTD at all times without exception.



# Z-ULTIMATE RATE SCHEDULE

## INTRODUCTION

*Before you review the Z-Ultimate Rate Schedule, are you **PROFESSIONALLY COMMITTED** to:*

***INSPIRING** the Men, Women, and Children of Your Community to Realize their Personal Best?*

*Being a **TRUE PRODUCT** of What You Represent, accepting that Hypocrisy is the silent killer?*

*Maintaining a Professional Studio Environment that never compromises the Hours of Operation, Starts and Ends All Classes On Time, Always is Clean and Clutter Free, and has only **HAPPY** Instructors?*

*Being an Active, Productive, and Supportive Member of Z-Ultimate Tribe offering realistic solutions?*

*Knowing that you will only **SUCCEED** in getting what you want, by helping others get what they want?*

*Believing in the immense **VALUE** that our Professional Instruction and studio environments provide to our students' lives? – Belief in an “exchange” that is truly priceless?*

*Asking for **HELP** when in doubt or confused, realizing the benefits of being a **STUDENT** on Z-GROW?*

*Knowing and Understanding the **REAL NUMBERS** and never seeking “reasons” to compromise rates?*

## Daily Hit List

### Opening:

- "Open" Studio: Turn on T.V.(s) – Lights – Open all doors for fresh air – Touch up cleaning (Febreeze carpets, shine glass)
- Read, Review & Reflect on posted goals in storeroom, unlock storeroom file cabinet
- 10 Minute \$\$\$ Forecast (Enrollments, supplies, renewals, upgrades & outstanding balances)
- "Billing" time: Check Voice Mail and return calls IMMEDIATELY. Check & Reply to Emails – Follow up calls on any days missed lessons or pending issues – "Receive payments" - Enter new applications.
- Reminder Calls for next day's lessons and to sick / injured / vacationing students to show you care and keep rapport
- (Don't forget: Hand-out Test Cards, Update Greaseboards / FanPage Announcements, Hang Posters, Pass out Flyers, etc....)

### Closing:

- Nightly Meeting (10 Minutes) – What happened today? What do we have planned for tomorrow? What did you learn? Numbers: Current & To Go! Review of day's performance / Transfer incomplete tasks to next days list
- Update Daily transactions (Payments In-House – Cancellations – Special Tuition Requests – Auto-Renew Notifications – Billing information changes)
- Log all private blocks used / Punch Cards
- Make all necessary call-backs to students
- Cumulate Weekly Receipts and write total in bottom corner of last receipt (if \$Bag contains \$500 or more, then deposit)
- Call in #'s to District Manager (Tuesday, Thursday, Saturday)
- Straighten up Dojo, disinfect bathroom, light Lysol over Dojo floor, Glass, Carpet Powder & Vacuum. (*Cleaning Hitlist*)
- "Close" studio: Turn off T.V.(s) – Lights – Turn Off Air Conditioner/Heater – Lock all Doors

### Minimum Performance Requirements

- Teach exciting, energetic and enthusiastic classes & ASK FOR REFERRALS

- 20 Appointments Set (per instructor)

- 7 Presentations (per instructor – scheduled intro & walk by if need be!)

- 3 Sign Up (per instructor)

- \$ \_\_\_\_\_,00 Revenue

## Monday

- 12-1pm Studio Meeting (*CI/UG Meet Hitlist*) – Rep Check, Partners, Studio Issues, Communicate, Studio Trends, Momentum
- Make out next weeks schedule in Black Ink & Hi-Lite all open intro times – Look at next 3 weeks and Plan Ahead!
- Print out Master List - check balances - resale #'s – reps – student status check
- Assign Weekly Cleaning Tasks/Rooms using Cleaning Hitlist
- Inventory KSE supplies and cumulate last week's ZUMAS order and submit through Netsuite
- Promote: Lead / Guest Registry calls

## Tuesday

- CI - Workout / Meeting
- Promote: Promo route – lead boxes and flyers
- Numbers call-in

## Wednesday

- 12-1pm Update MASTERS / Quickbooks: Enter Applications, Invoices and Receive Payments (use Quickbooks Hitlist)
- Promote: Inactive calls and Referral calls

## Thursday

- CI – Workout
- Promote: Community packets and School packets
- Numbers call-in

## Friday

- Inventory ZUMAS & "Enter Statement Charges" in Quickbooks (*ZUMAS Hitlist*)
- Back Up Quickbooks on the "Friday" CD / Thumbdrive
- Promote: Store front meet & greet

## Saturday

- Intro and enrollment day!
- Total previous weeks Studio numbers (includes all Instructors)
- Write total revenue below last receipt in book
- Fill out Weekly Audit Sheet & "Save As" then print & staple & file w/ QB dep. Summary, ABC / ZUSA rpt., Inst. Payroll.
- Email Audit Sheet: [agomez@zultimate.com](mailto:agomez@zultimate.com), [sblackink@aol.com](mailto:sblackink@aol.com), [epelman@zultimate.com](mailto:epelman@zultimate.com).
- Enter in "LAST WEEKS" performance numbers in STUDIO MASTER TRACKING sheet.
- Back Up Quickbooks on Saturday Disk
- Numbers call-in

## Sunday

- Teach exciting, energetic and enthusiastic classes & ASK FOR REFERRALS
- Write out summary of day's events to review Monday morning
- Call in daily totals to Chief Instructor

## Important Dates to Remember

- Big Fun Friday - First Friday of every month (ZUMAS items Return Day)
- Last Tuesday of the month - Z-Vally Territory Workout & Meeting
- 1<sup>st</sup> of Month - Review Quickbooks Resale Numbers for the next 2 months
- 1<sup>st</sup> of Month - *Back Up My Documents & Current Projects Folder to Alternating Thumbdrives*
- April, July, October, January - Quarterly Number Review of Studio Master Tracking File with Team

## 28<sup>th</sup> of Every Month - Inventory Cleaning, Office & Printing Supplies

- Cleaning: See Cleaning Hitlist
- Printing: ZUUMAP Brochures, Studio Info Guide, Guest Registries, Business Cards, IEP & Current Promo Flyers, Red Cards, Posters, Applications, CC Auth Forms, Daily Planning/Tracking Sheets, Lead Pads, Who Do You Knows, Child Perf. To-Do-Lists, Class Schedules, Inside Logo Stickers, Z-Ultimate Folders, IDTheft Flyers and Brochures, Sign-Up Boards, Welcome New Student Packs: Adults ages 14+ & Juniors ages 10-13 (C.O.C., Mission, Std Image, Logo Def.) - Child (same - STAR Program), TinyTigs (Same + Ninja Warrior and Parents C.O.C.) 25 for each group.
- Office: Receipt Books, Poster Tape, Pens-Blue-Black-Red-Highlighter, Staples, White Out, Tape, Dry Erase Pens and Cleaner, **Z-USDS Bags**