

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**ASSESSMENT TECHNOLOGIES
INSTITUTE, LLC,**

Plaintiff,

v.

CATHY PARKES d/b/a LEVEL UP RN,

Defendant.

Case No. 19-2514-JAR

MEMORANDUM AND ORDER

In this lawsuit, Plaintiff Assessment Technologies Institute, LLC (“ATI”) brings the following claims against Defendant Cathy Parkes, doing business as Level Up RN, arising out of her sale and distribution of nursing-education study material: copyright infringement under the Copyright Act, misappropriation of trade secrets under the Defend Trade Secrets Act (“DTSA”) and the Kansas Uniform Trade Secrets Act (“KUTSA”), unfair competition under Kansas law, and breach of contract under Kansas law. Before the Court are Plaintiff’s Motion for Partial Summary Judgment (Doc. 295), Defendant’s Motion for Summary Judgment (Doc. 298), and Defendant’s Motion for Leave to File Sur-Reply in Opposition to Plaintiff’s Motion for Partial Summary Judgment (Doc. 351). For the reasons explained fully below, the Court grants Defendant’s motion for leave to file surreply, denies Plaintiff’s motion for summary judgment, and grants in part and denies in part Defendant’s motion for summary judgment.

I. Summary Judgment Standard

Summary judgment is appropriate if the moving party demonstrates that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law.¹ In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party.² “There is no genuine issue of material fact unless the evidence, construed in the light most favorable to the nonmoving party, is such that a reasonable jury could return a verdict for the nonmoving party.”³ A fact is “material” if, under the applicable substantive law, it is “essential to the proper disposition of the claim.”⁴ An issue of fact is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the non-moving party.”⁵

To prevail on a motion for summary judgment on a claim upon which the moving party also bears the burden of proof at trial, the moving party must demonstrate “no reasonable trier of fact could find other than for the moving party.”⁶ Defendant raises several affirmative defenses in response to Plaintiff’s motion for summary judgment that are not separately raised in Defendant’s motion for summary judgment. In considering these affirmative defenses, the Court is mindful that

when the plaintiff moves for summary judgment on an entire claim, it is necessarily also moving for summary judgment on any affirmative defenses to that claim. It is therefore incumbent on a defendant that wishes to prevent entry of summary judgment on

¹ Fed. R. Civ. P. 56(a); *see also Grynberg v. Total*, 538 F.3d 1336, 1346 (10th Cir. 2008).

² *City of Harriman v. Bell*, 590 F.3d 1176, 1181 (10th Cir. 2010).

³ *Bones v. Honeywell Int’l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004).

⁴ *Wright ex rel. Trust Co. of Kan. v. Abbott Labs., Inc.*, 259 F.3d 1226, 1231–32 (10th Cir. 2001) (citing *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998)).

⁵ *Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1160 (10th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

⁶ *Leone v. Owsley*, 810 F.3d 1149, 1153 (10th Cir. 2015).

the claim to come forward with evidence showing the existence of a genuine factual dispute concerning an affirmative defense that, if ultimately successful, would defeat the claim.⁷

Thus, the Court rejects Plaintiff's contention that the Court should not consider the affirmative defenses invoked in Defendant's response to Plaintiff's motion for summary judgment because they were not raised in Defendant's own motion for summary judgment. The Court considers whether Defendant has come forward with evidence showing a genuine issue of material fact concerning an affirmative defense that would defeat Plaintiff's claims if successful.

Finally, summary judgment is not a "disfavored procedural shortcut;" on the contrary, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action."⁸ In responding to a motion for summary judgment, "a party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial."⁹

II. Factual Background

A. Evidentiary Rulings

Before reciting the uncontroverted facts in this matter, the Court must rule on the following evidentiary issues: (1) Defendant's authentication and foundation objections; (2) Plaintiff's hearsay objections; and (3) Plaintiff's objections to Defendant's affidavit as self-serving. In considering these objections, the Court is mindful that summary judgment evidence

⁷ *United Cent. Bank v. Wells St. Apartments, LLC*, 957 F. Supp. 2d 978, 987–88 (E.D. Wis. 2013), *aff'd sub nom. United Cent. Bank v. KMWC 845, LLC*, 800 F.3d 307 (7th Cir. 2015); *see also Everest Indem. Ins. Co. v. Jake's Fireworks, Inc.*, 501 F. Supp. 3d 1158, 1188 (D. Kan. 2020) (quoting *United Cent. Bank*, 957 F. Supp. 2d at 987–88).

⁸ *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

⁹ *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988).

need not be “in a form that would be admissible at trial.”¹⁰ But “the content or substance of the evidence must be admissible.”¹¹ As the advisory committee note to the 2010 Federal Rule amendment explains: “The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated.”¹² “The requirement is that the party submitting the evidence show that it will be possible to put the information, the substance or content of the evidence, into an admissible form.”¹³

1. Defendant’s Authentication and Foundation Objections

Defendant objects that several exhibits Plaintiff offers in support of its motion for summary judgment are not properly authenticated. To meet the authentication requirement in Fed. R. Evid. 901(a), “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”¹⁴ An affidavit is not required to authenticate every document submitted with a motion for summary judgment.¹⁵ “[D]ocuments produced during discovery that are on the letterhead of the opposing, producing party are authentic per se for purposes of Federal Rule of Evidence 901.”¹⁶ Moreover, a document may “be sufficiently authenticated taking into consideration the ‘[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances, even if they do not

¹⁰ *Brown v. Perez*, 835 F.3d 1223, 1232 (10th Cir. 2016) (quoting *Trevizo v. Adams*, 455 F.3d 1155, 1160 (10th Cir. 2006)).

¹¹ *Id.* (quoting *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006)).

¹² Fed. R. Civ. P. 56 advisory committee’s note to 2010 amendment.

¹³ *Brown*, 835 F.3d at 1232 (quoting 11 James Wm. Moore et al., *Moore’s Federal Practice—Civil* § 56.91 (3d ed. 2015)) (citations omitted); see *O’Connor v. Williams*, 640 F. App’x 747, 750 (10th Cir. 2016).

¹⁴ Fed. R. Evid. 901(a).

¹⁵ *Law, Inc. v. Mohawk Const. & Supply Co.*, 577 F.3d 1164, 1170 (10th Cir. 2009) (citing *Anderson v. Cramlet*, 789 F.2d 840, 845 (10th Cir. 1986)).

¹⁶ *Id.* (citations omitted).

appear on [the opposing party’s] letterhead.”¹⁷ The Tenth Circuit has counseled that “the bar for authentication of evidence is not particularly high.”¹⁸

Defendant also raises foundation objections. Under Fed. R. Evid. 602, a witness “may testify to a matter only if evidence is introduced sufficient to support a finding that [he] has personal knowledge of the matter.” The witness’s own testimony can provide evidence of personal knowledge.¹⁹

a. Schuman Declaration

Plaintiff submitted the declaration of its counsel Brett Schuman to authenticate many of the challenged summary judgment exhibits— Exhibits 21–30 and 33. Schuman attests in the declaration that he has “personal knowledge of the facts set forth in this declaration,” and that each exhibit is a true and correct copy.²⁰ Schuman states that Exhibits 21–27 are true and correct copies of documents produced by Plaintiff during discovery, which are Bates stamped. Schuman further states that Exhibits 28–30 are versions of ATI’s Terms and Conditions—Exhibit 28 was marked and introduced during Defendant’s deposition, while the other two versions are Bates stamped. Finally, Schuman states that “Exhibit 33 is a true and correct copy of a log of user activity on ATI’s website for the ATI user ‘Cathy A Parkes,’ with a physical address at ‘2852 Camino Serbal, Carlsbad, California,’ and an email address of ‘cathy@leveluprn.com,’ that was produced by ATI in this Action under Bates No. ATI0124227.”²¹

¹⁷ *Id.* at 1171 (quoting Fed. R. Evid. 901(b)(4)).

¹⁸ *United States v. Isabella*, 918 F.3d 816, 843 (10th Cir. 2019); *Jackson v. Kan. City Kan. Pub. Sch. Dist.*, 799 F. App’x 586, 590 (10th Cir. 2020) (quoting *Isabella*, 918 F.3d at 843).

¹⁹ *See* Fed. R. Evid. 602.

²⁰ Doc. 297.

²¹ *Id.* ¶ 16.

The Court overrules and denies Defendant’s objection as to Exhibits 22–27, 29, 30, and 33 because Schuman’s declaration reveals the source of the records—they were all produced during discovery and bear Plaintiff’s Bates stamp.²² The Court easily finds that Schuman, as one of Plaintiff’s attorneys, has personal knowledge that these documents were produced by Plaintiff during discovery. Moreover, the Court has reviewed the exhibits and finds that their contents, coupled with Schuman’s declaration and their Bates stamps, sufficiently authenticate them. Exhibit 28, Plaintiff’s 2013 Terms and Conditions, does not contain a Bates stamp, and although it was introduced during Defendant’s deposition, her testimony is not sufficient to authenticate it.²³ However, ATI offers the declaration of Jeff Marsh with its summary judgment reply, which sufficiently authenticates Exhibit 28. Marsh is the Test Security Manager at Ascend Learning, which is the parent company of ATI, and has worked there since 2012. He is responsible for “establishing and implementing any new policies and procedures” to make ATI content secure, and attests to having personal knowledge that the 2013 Terms and Conditions exhibit is a true and correct copy.²⁴ Marsh’s job responsibilities allow the Court to easily infer that he has personal knowledge about the authenticity of these documents. This is sufficient under Fed. R. Evid. 602 to demonstrate the witness’s personal knowledge. Defendant’s objection to Exhibit 28 is overruled and denied.

²² The parties “stipulated” to the authenticity of the documents they produced during discovery. Doc. 293 at 5 ¶ 2.c.1–2. Plaintiff “stipulates” that its documents are what they say they are and Defendant does the same for her own documents. It is unclear why these statements are included in the stipulation section of the Amended Pretrial Order given that neither party agrees that their opponent’s documents are authentic. Tellingly, Defendant picks and chooses when to rely on Plaintiff’s stipulation—relying on it at least once in its own statements of fact when it cites to Plaintiff’s Bates-numbered documents. *See* Doc. 335 at 10 n.1.

²³ *See* Doc. 346-1 at 33:16–20 (“I don’t recall seeing this document. I’m assuming this was probably the document, but I didn’t read when I hit ‘agree,’ but I can’t say for certain because I didn’t read it.”).

²⁴ Doc. 346-8 ¶¶ 1–2. The Court has already ruled separately that Marsh’s declaration is not “new material” raised for the first time in the reply that necessitates a surreply if the Court considers it. This declaration was submitted in direct rebuttal to the authentication challenge lodged by Defendant in the response. *See* Doc. 349.

b. Exhibit 21

Defendant objects to Exhibit 21, Plaintiff's responses to Defendant's Second Set of Interrogatories, because it was not "signed under oath by anyone who is competent to testify to the facts contained therein, or who has personal knowledge of the facts."²⁵ The Court agrees with Plaintiff that Fed. R. Civ. P. 56(c)(1)(A) allows a party to support a factual position by citing to interrogatory answers, and Fed. R. Civ. P. 33(b)(5) only requires that the person who "makes" the answers sign them. Plaintiff's attorneys signed the answers to interrogatories. And Schuman—one of the answer's signatories—states in his declaration that this document is what it says it is. The Court finds this is sufficient under the Fed. R. Civ. P. 56 and 33, and Fed. R. Evid. 901; therefore, the objection is overruled and denied.

c. Preliminary Injunction Hearing Exhibit 1

Defendant objects to Plaintiff's reliance on ATI's User Terms and Conditions offered and admitted during the preliminary injunction hearing as ATI Exhibit 1, filed as Doc. 14-10. The parties specifically stipulated to the authenticity of this exhibit in the Pretrial Order.²⁶ Therefore, Defendant's objection is overruled and denied.

d. Preliminary Injunction Hearing Exhibit 14-11

And finally, Defendant objects to Mark Williams-Abrams' Declaration, which was admitted by stipulation during the preliminary injunction hearing.²⁷ Defendant argues that Williams-Abrams lacks personal knowledge to support the statement in ¶ 30 of his declaration that "[s]tudents taking the ATI Proctored Exams must click the 'I Agree' box next to the following terms that are conspicuously displayed on a screen prior to beginning an ATI

²⁵ Doc. 335 at 24.

²⁶ Doc. 293 at 3 ¶ 2.b.1.

²⁷ Doc. 14-11; *see also* Doc. 56-1 (admitting exhibit at Nov. 12, 2019 preliminary injunction hearing).

Proctored Exam [screen shot of the terms and check box].”²⁸ The objection is overruled and denied. Abrams-Williams attests in the declaration that he has personal knowledge of the facts stated therein, and his personal knowledge can easily be inferred from his position as Chief Product Officer at ATI, which is described in ¶¶ 4–5 of the declaration. This is sufficient under Fed. R. Evid. 602 to demonstrate the witness’s personal knowledge.²⁹ Defendant’s objection goes to the weight and not the admissibility of his testimony.

2. Plaintiff’s Hearsay Objection to Exhibits 821 and 822

Plaintiff objects that Defendant’s Exhibits 821 and 822 are inadmissible hearsay.³⁰ These exhibits memorialize an October 19, 2018 conversation between Defendant’s husband, Bill Parkes, and Becky Pontes, the Senior Corporate Paralegal and Intellectual Property Specialist for Ascend Learning, ATI’s parent company.³¹ Exhibit 821 is a calendar entry for Bill Parkes with notes about the conversation. Exhibit 822 is an instant message from Bill Parkes setting forth his notes from the conversation. These objections are overruled and denied.

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”³² The proponent of

²⁸ Doc. 14-11 ¶ 30.

²⁹ See, e.g., *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1123 (10th Cir. 2005) (“Although Bryant does not give the source for her allegations, as supervisor of the RPI department, Bryant would have had personal knowledge of the fact that the audits were never intended to be used to dismiss employees and the fact that the poor audit results should be attributed to Nagle’s performance.”).

³⁰ Plaintiff also lodges hearsay objections in response to Defendant’s Additional Statements of Fact 58 and 59, but fails to explain the basis for these objections. These facts cite to paragraphs in Defendant’s declaration that do not reference statements made by a third-party declarant and thus, do not appear to fall within the rule against hearsay. For example, there is no basis for a hearsay objection to Defendant’s statement that she did not take notes during the proctored exams she took in nursing school, her statement that she did not have access to the proctored exams after graduation, or her statement that she does not remember the proctored exam questions. See Doc. 300 ¶¶ 6, 13.

³¹ Docs. 337-8, 337-9.

³² *United States v. Lovato*, 950 F.3d 1337, 1341 (10th Cir. 2020) (quoting *United States v. Collins*, 575 F.3d 1069, 1073 (10th Cir. 2009)).

the summary judgment evidence must make some showing that the substance of the evidence would be admissible at trial by either demonstrating that an exception to the hearsay rule applies, or that the declarant would testify to the document's contents.³³

To the extent Bill Parkes' notes are offered to show that he made them and they were relayed to Defendant, they are not being offered for the truth of the matter asserted. Pontes' statements in these exhibits are also admissible for the truth of the matter asserted because they are statements by a party opponent. This exclusion to the hearsay rule applies if the "statement is offered against the opposing party" and was either "made by the party in an individual or representative capacity," "made by a person whom the party authorized to make a statement on the subject," or "made by the party's agent or employee on a matter within the scope of that relationship and while it existed."³⁴ It is undisputed that Pontes had a conversation with Bill Parkes on October 19, 2018, and it is undisputed that Pontes was making the statement on behalf of ATI. To the extent Pontes disputes the content of the conversation, that goes to the weight and not the admissibility of Exhibits 821 and 822. Plaintiff's hearsay objections to exhibit 821 and 822 are overruled and denied.

3. Plaintiff's Objection to Defendant's Declaration

Plaintiff repeatedly objects that Defendant's declaration is "self-serving," and thus not sufficient to create a genuine issue of material fact. But Plaintiff fails to elaborate on why the self-serving nature of the declaration mandates its exclusion. As the Tenth Circuit has explained, "virtually any party's testimony can be considered 'self-serving,' and self-serving testimony is

³³ See *Brown v. Perez*, 835 F.3d 1223, 1232–33 (10th Cir. 2016).

³⁴ Fed. R. Evid. 801(d)(2)(A), (C), (D).

competent to oppose summary judgment.”³⁵ A declaration is competent summary judgment evidence if it “is based upon personal knowledge and sets forth facts that would be admissible in evidence.”³⁶ Plaintiff offers no argument as to why or how the declaration is not based on personal knowledge. The Court has reviewed the declaration and finds that Defendant’s statements therein satisfy the personal knowledge requirement because they relay her first-hand experiences and impressions. Plaintiff’s objections are overruled and denied because they go to the credibility of Defendant’s sworn statements, not their admissibility.³⁷

Plaintiff separately lodges a meritorious objection that certain statements in Defendant’s declaration are inadmissible conclusions of law about whether Plaintiff’s material is protectable under copyright law or constitutes a trade secret.³⁸ The Court disregards Defendant’s declaration to the extent it advances legal opinions or attempts to apply the law to the facts of this case.³⁹

B. Uncontroverted Facts

Having resolved the parties’ evidentiary objections, the Court now recites the following material facts, which are uncontroverted, stipulated, or viewed in the light most favorable to the nonmoving party.

Plaintiff ATI is a provider of educational and assessment nursing education resources, which include review modules, practice tests to assess students’ understanding of specific

³⁵ *Greer v. City of Wichita*, 943 F.3d 1320, 1325 (10th Cir. 2019) (citing *Sanchez v. Vilsack*, 695 F.3d 1174, 1180 n.4 (10th Cir. 2012)).

³⁶ *Janny v. Gamez*, 8 F.4th 883, 900 (10th Cir. 2021) (quoting *Speidell v. United States ex rel. IRS*, 978 F.3d 731, 740 (10th Cir. 2020)).

³⁷ *Id.* (“The self-serving nature of a sworn statement ‘bears on its credibility, not on its cognizability for purposes of establishing a genuine issue of material fact.’” (quoting *United States v. Shumway*, 199 F.3d 1093, 1104 (9th Cir. 1999))).

³⁸ *See Anderson v. Suiters*, 499 F.3d 1228, 1237 (10th Cir. 2007); *Specht v. Jensen*, 853 F.2d 805, 808 (10th Cir. 1988) (en banc).

³⁹ *See Christiansen v. City of Tulsa*, 332 F.3d 1270, 1283 (10th Cir. 2003).

content areas, and proctored examinations administered in a secure, proctored environment to assess students' nursing knowledge. The review modules are textbooks that are divided into nine topic areas: (1) Fundamentals for Nursing; (2) Nursing Leadership and Management; (3) Nutrition for Nursing; (4) RN Adult Medical Surgical Nursing; (5) RN Community Health Nursing; (6) RN Maternal Newborn Nursing; (7) RN Mental Health Nursing; (8) RN Nursing Care of Children; and (9) RN Pharmacology for Nursing. Plaintiff created editions of its review modules covering these nine topic areas in 2013 and 2016. Plaintiff owns valid U.S. copyright registrations for each edition of its review modules.

The selection, organization, and arrangement of nursing information in each review module is developed by many ATI employees across different ATI departments.

Plaintiff also publishes quizzes within its nine review modules that it sells to the public and resells on Amazon. Plaintiff includes quizzes in its Comprehensive NCLEX Review book that is sold to the public and can be purchased on Amazon.⁴⁰

Proctored Exams

Plaintiff expends substantial resources to develop its proctored exams. They are stored in ATI's secure servers at a secure third-party data center facility. Access to Plaintiff's facilities is restricted by keycard access and keycards are only provided to employees and/or consultants that have signed agreements containing strict non-disclosure and confidentiality provisions. ATI rigorously protects the confidentiality of its proctored exams in order to maintain its competitive edge.

Plaintiff's proctored exams are administered in a secure testing environment. Students are prohibited from bringing into the testing center any electronic devices or personal electronics.

⁴⁰ "NCLEX" stands for National Council Licensure Examination, the standardized test required for nurses.

Students are only permitted to bring into the testing center an ATI-provided calculator, number two pencils, and scratch paper. Students taking the ATI proctored exams are presented with the following confidentiality terms that are conspicuously displayed on a screen prior to beginning the exam:

All assessment questions are the copyrighted property of Assessment Technologies Institute®, LLC. The removal or attempt to remove questions or other assessment material from the test site is prohibited. It is forbidden under federal copyright law to copy, reproduce, record, distribute, or disclose these assessment questions by any means, in whole or in part. A violation of this type can result in civil and criminal penalties.⁴¹

Students are required to check an “I agree” box next to these terms.

The proctored exams are supervised by a proctor. The proctor remains present during the entire test administration. Proctors must adhere to an ATI Proctor Process Script and review and agree to an ATI Proctor Oath. There are eligibility requirements that a person must meet before becoming an ATI Proctor. Before the test, proctors remind test takers of their obligation to keep confidential any information contained in the exam and that they may not discuss the contents of the proctored exam outside the testing center. Proctors remind test takers that unauthorized disclosure of any information on the proctored exam is subject to penalty and legal damages. Plaintiff trains proctors to monitor and report any instances of unauthorized disclosure of proctored exam information.

Plaintiff creates its proctored exams through substantial review in collaboration with experts to ensure that the subject matter presented is accurately tested. The proctored exams assess the proficiency of nursing students for accreditation as nursing professionals. They test student knowledge of nursing topics, including concepts that appear on the NCLEX. Each

⁴¹ Doc. 14-11 ¶ 30.

question presented on an ATI proctored exam is written by Plaintiff's employees or consultants. Each ATI proctored exam question also undergoes psychometric evaluation before being included.

Practice Exams

Plaintiff also produces practice exams for each of the ATI proctored exam topics. According to Dr. Jerry Gorham, the Chief Measurement and Testing Officer at ATI, the purpose of the practice exams "is to give the student a flavor for the kind of content they're going to see on a proctored exam, give them a sense for the kind—the topic areas they're going to encounter, have them become comfortable with formats."⁴² The practice exams at issue in this case were registered with the Copyright Office. Like the ATI proctored exams, ATI practice exams are original works created by ATI through intensive collaboration of ATI educational, nursing, and test development experts to ensure that relevant topics and sub-topics are accurately, adequately, and proportionately tested in a unique and non-biased manner.

The process for creating, developing, reviewing, editing, and finalizing items for ATI practice exams is substantially similar to the process described above for the ATI proctored exams. However, practice exams are not proctored or monitored and can be accessed from any location through ATI's secure online portal. When students take the practice exams, they are not prevented from taking notes that can be studied later. According to Plaintiff's records, many of the practice exams have been accessed thousands of times.⁴³

⁴² Doc. 307-2 at 132:19–23.

⁴³ Doc. 307-4.

ATI Terms and Conditions

Nursing students enrolled with Plaintiff’s nursing school clients generally have access to its products—the review modules, practice exams, and proctored exams—through its online portal, which is available to students who have registered for an ATI account through affiliation with their nursing school. Before creating an account with ATI, students must review and affirmatively accept ATI’s Terms and Conditions. Users can only access Plaintiff’s products, including the practice exams, by clicking a box indicating “Yes, I Agree” next to the following language: “I have read and understand the ATI Terms and Conditions, and agree to be bound by all of the terms, conditions and policies described therein, including, but not limited to, the following specific consents.”⁴⁴

The Terms and Conditions include the following provisions: (a) “You agree to use ATI Products and ATI Services only as permitted under this Agreement”; (b) “You agree that . . . you will not disclose any portion of ATI Products to any other person or entity”; and (c) “[y]ou agree not to copy . . . or create any derivative works of or based on the ATI Products.”⁴⁵

Defendant’s Use of ATI Materials

Defendant attended California State University–San Marcos (“CSUSM”) from January 2013 through December 2015 in the Accelerated Bachelor of Science in Nursing program. At CSUSM, one specific type of ATI proctored exam, the ATI Comprehensive Predictor Exam, is administered before a student may take the NCLEX. Students in this program must achieve a minimum requisite score in order to sit for the NCLEX. If a student fails to achieve the

⁴⁴ Doc. 14-9 ¶ 15.

⁴⁵ Doc. 14-10 at 2–3 (July 2016 Terms and Conditions); Docs. 297 ¶ 13.a & 297-3 (2013 Terms and Conditions); Docs. 297 ¶ 13.b & 297-4 (June 2018 Terms and Conditions); Docs. 297 ¶ 13.c & 297-5 (December 2018 Terms and Conditions).

minimum passing score on the ATI Proctored Exam three times, that student cannot sit for that year's administration of the NCLEX. Instead, the student must wait until the next NCLEX administration the following year. Accordingly, at the CSUSM nursing program, achieving a minimum requisite score on the ATI proctored exams is required for nursing licensure.

While in nursing school, Defendant tutored her fellow classmates with new and difficult nursing concepts. Defendant received the 2013 ATI Review Modules in early 2013 as part of the mandatory ATI package that all students at her school had to purchase. After graduation, but before October 2018, Defendant purchased the 2016 ATI Review Modules on Amazon, with the exception of the RN Pharmacology for Nursing Edition 7.0, which she purchased on January 26, 2019.

As a student at CSUSM, Defendant created an ATI account. Defendant first accepted ATI's Terms and Conditions in 2013 at the time she created her student account. Defendant accessed the practice exams and proctored exams while a student enrolled at CSUSM. She took three different administrations of the ATI proctored exam in 2015. Each administration of the ATI proctored exam followed the standard secure procedure that applies to all of ATI's proctored exams. A CSUSM faculty member proctored all of the ATI proctored exams Defendant took in 2015 under strict protocols to make sure students did not take notes or take anything out of the exam room. Defendant took at least 230 ATI Practice Exams while she was a student at CSUSM.

Defendant eventually graduated at the top of her class from CSUSM with a 4.0 GPA. She has worked as a practicing nurse for a cumulative five years since graduation, currently working as a part-time wound-care nurse. After graduating from the CSUSM program in December 2015, Defendant accessed ATI practice exams through her ATI account on at least 43

occasions. She did this “so that [she] could brush up on [her] knowledge in the various nursing subject areas in order to more effectively teach students the key concepts they needed to know.”⁴⁶ Defendant testified during her deposition that she took the tests after graduation in order to refresh her knowledge and explain the nursing concepts well in her YouTube videos. Defendant did not have access to the proctored exams after graduation.

Defendant accepted ATI’s Terms and Conditions on July 24, 2018 at 4:33 p.m. before accessing an ATI practice exam. And she accepted ATI’s Terms and Conditions again on January 8, 2019 at 8:47 p.m. before logging into her account.

Defendant’s Initial Videos and Study Cards

Chief Digital Advisors, LLC (“CDA”) is a California limited liability company that currently does business under the name “Level UP RN.” Defendant’s husband, Bill Parkes, is the Chief Executive Officer and Defendant is the Chief Educator at CDA. CDA used the name “Pass the ATI” until October 2018.

In 2017, Defendant created nursing tutorial videos that were posted to a “Pass the ATI” YouTube Channel.⁴⁷ The following video playlists were posted: (1) Community Health Nursing, (2) Nursing Fundamentals, (3) Nursing Leadership, (4) Maternal Newborn, (5) Medical Surgical Nursing, (6) Mental Health Nursing, (7) Nutrition for Nursing, and (8) Pharmacology for Nursing. Defendant explained the purpose of her initial videos as follows:

[M]y goal with this [YouTube channel] is to go through each of the ATI books and my plan is to do them all . . . and go over all of the main points and the things that ATI seems to focus on and like[s] to ask questions about so it helps kind of streamline your studying to the most important things.⁴⁸

⁴⁶ Doc. 28-1 ¶ 34.

⁴⁷ Defendant contends that CDA and not Defendant used the “Pass the ATI” business name, but Defendant admits that she created the videos and study cards. See Doc. 297-9, Nos. 3 and 4 .

⁴⁸ Doc. 308, Hard Drive § III(001) at 2:35–2:57.

In the first video of each playlist, Defendant stated that she used ATI’s review module books to create the videos in each playlist—she held up the hard copy edition of the ATI review module that she planned to cover during that playlist. In four of the eight videos, she stated that the 2013 and 2016 editions of ATI’s review modules were very similar and that the audience could follow along with either version. For these initial videos, Defendant “used the ATI modules and made notes alongside highlighted facts with her tricks/hints for remembering the information. Then she would make the videos, explaining the highlighted facts and her tricks/hints as she went through the modules, giving attribution to ATI.”⁴⁹

Defendant discussed in the initial videos information she learned from taking practice exams. For example, she states in one video:

So, just as with all the other books, ATI may ask you questions about anything in these books, and sometimes they ask you stuff that’s actually not in these books. I’m just gonna try to focus on some of the key concepts that I’ve seen in a lot of the practice tests and in the tests I’ve taken with ATI in the past.⁵⁰

Defendant admits that she included information in her initial videos based on the questions she saw on ATI’s practice exams.⁵¹

Defendant created “Pass the ATI”-branded study cards that were posted at the URL, www.passtheati.com. In May 2018, CDA began selling Defendant’s study cards on this website with its first set, Pharmacology for Nursing Students. By October 12, 2018, the following four sets of study cards were offered for sale on the website: Pharmacology for Nursing Students, Community Health Nursing Cards, Nutrition for Nursing, and Nursing Fundamentals.

⁴⁹ Doc. 297-9 at 4, No. 3(c).

⁵⁰ Doc. 308, Hard Drive § I(F)(001) at 00:15–00:36.

⁵¹ See, e.g., Doc. 305-17 at 166:25–167:20; 190:22–192–13; 194:9–196:2.

Defendant used both the 2013 and 2016 ATI Review Modules to create her study cards, in addition to other sources including nursing school textbooks, nursing school notes, her experience as a practicing nurse, and various online sources.⁵² For each study card deck, Defendant “ordered the topics in a way that allowed students to ‘roughly’ follow along with their ATI books.”⁵³ For the first two study card decks, she “built out this content in a Word document before moving it to a PDF,” but “[f]or most decks, she entered information directly into a PDF file.”⁵⁴ Defendant created the study card files with the corresponding ATI Review Modules in front of her, for the purpose of sending the document to her third-party printer to have the study cards made. Defendant admits she used some “very similar examples” to ATI in order to illustrate certain nursing concepts in her study cards, but that “as soon as [she] was alerted that that was not okay, then [she] took them out right away.”⁵⁵

ATI’s Review of Defendant’s Products

Jeff Marsh is the Director of Test Security for Plaintiff, and he supervises Karen Wood, the Test Security Administrator. Plaintiff’s Test Security Team monitors the Internet to find material that is substantially similar to ATI’s intellectual property, and locates improper disclosure of Plaintiff’s proctored exam material.

The Test Security Team received several reports about Defendant’s YouTube videos from nursing school and student customers between April and October 2018. Wood reviewed five or six videos posted by Defendant before responding to the first report on April 4, 2018, explaining that “[t]he videos from Cathy Parkes are—fortunately—not a violation of ATI

⁵² Doc. 337-2 ¶ 9 (listing sources).

⁵³ Doc. 297-9, No. 4.

⁵⁴ *Id.*

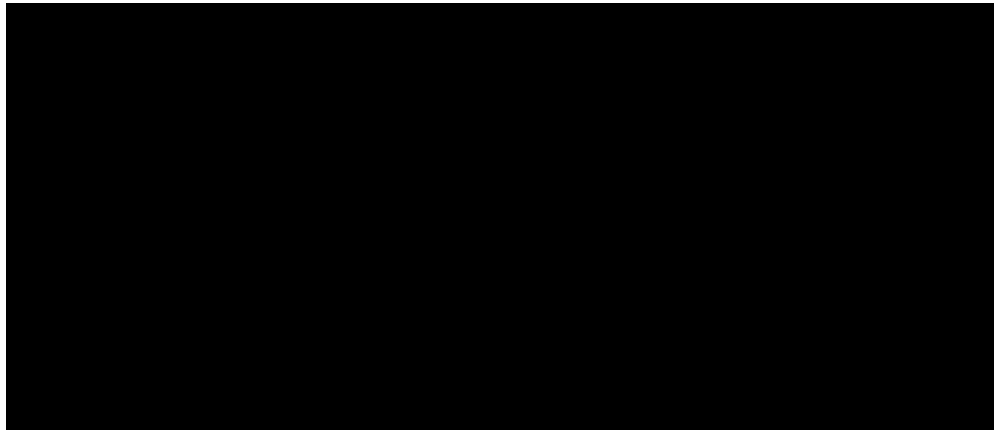
⁵⁵ Doc. 305-17 at 287:16–18.

intellectual property. In the videos she goes over information in various chapters of ATI's Study Materials, which is considered fair use. They're kind of like Cliff's Notes. . . . [T]here's also no security risk."⁵⁶

The Test Security Team received another report about Defendant's YouTube videos from a nursing school customer on May 21, 2018. This customer was concerned that its students were scoring higher on the proctored exams after watching Defendant's videos, and requested that Plaintiff conduct a psychometric review of the school's proctored exams to see if the instructors' concerns had any merit. Wood responded by email the next day, copying Marsh:

I'm familiar with the youtube videos and have investigated them in the past. The wom[a]n in the videos is merely going over information that's in our Review Modules, so there's no real benefit that a student couldn't obtain by using the Review Modules themselves. She's a good tool for students to use, so the scores could possibly be because of her.

There's nothing she's doing that constitutes copyright or IP infringement, she's providing a service much like Cliffs Notes which is considered fair use since she's not saying she's ATI or even using significant portions of our materials. So if students want to use her as a source, they're actually smart for doing that.



⁵⁶ Doc. 336-2.

⁵⁷ Doc. 336-3 at 2.

Marsh performed a statistical analysis on that school's test scores and determined that the "data has come back 'clean,' which indicates to us that the testers had a legitimate understanding of the material."⁵⁸ Marsh found no evidence of cheating or other impropriety.

The Test Security Team received another report about Defendant's YouTube videos on June 26, 2018, this time from ATI employee Michael Hux. Wood responded the same day:

This is a youtuber we're aware of. Her videos are just her going through our review modules giving helpful information/tips/etc. She's not sharing information that's on our proctored assessments or violating any copyright infringement. It's just like if someone used Cliff's Notes to study for a test.⁵⁹

On August 10, 2018, Agnes Di Stasi, an ATI Nurse Education Account Executive told a nursing school customer that Defendant's YouTube videos are protected by fair use law and that ATI cannot legally have the videos removed. DiStasi also told this customer that she had never had a student who clearly remembered the items on an assessment two or three year after taking it.⁶⁰

On September 5, 2018, in response to a nursing student's report about Defendant's YouTube videos, Wood stated that "[t]his youtuber is only reviewing our Review Modules and we have no reason to believe she's doing anything wrong. It's just like a Cliff's Notes situation."⁶¹

On September 7, 2018, in response to a nursing customer's report about Defendant's YouTube videos, Jamie Fiorucci-Hughes, Chief of Staff/Vice President of Operations, Clinical

⁵⁸ *Id.* at 1.

⁵⁹ Doc. 336-4 at 1.

⁶⁰ Plaintiff's foundation objection is overruled and denied. The stated fact recites what DiStasi told the customer; it is not offered for the truth of her statement. Plaintiff's objection also goes to the weight and not the admissibility of her statement.

⁶¹ Doc. 336-6.

Health for ATI's parent company, stated that "we had our test security team review and they indicated there is nothing copywritten in her videos and that they are primarily study tips so we have no problem with students using them if they are helpful."⁶²

That same day, ATI received an inquiry from a nursing school administrator asking if Defendant's YouTube videos were authorized. Wood responded on September 10 to the ATI employee who received the inquiry, stating:

The person who made the videos is not associated with ATI and is not endorsed by ATI, but there's nothing illegal or actionable about what she's doing. It's just like Cliff's Notes: she's reviewing the books and giving people helpful tips on studying. As long as she's not presenting herself as us (she's not) or giving information on our proctored assessments (again, she's not) then she's within her rights due to "fair use."⁶³

Wood forwarded her email to Marsh and Becky Pontes in the legal department.

Wood sent two other emails on September 19 and 28, 2018, respectively, to fellow ATI employees who inquired about Defendant's YouTube videos, advising them that they are not a problem, and are "like Cliff's Notes."⁶⁴ In the September 28 email, Wood stated that the legal department was planning to ask Defendant to change the name of the website and post a disclaimer.

ATI Challenges Defendant's Use of ATI Trademarks

On September 6, 2018, ATI employee Kendra Darigan was instructed by someone at ATI to purchase three sets of study cards from the "passtheati" website, and she complied. On October 12, 2018, Pontes sent a cease-and-desist email to Defendant with the subject line "Trademark Infringement" that was approved by Christine Erickson, in-house counsel for ATI:

⁶² Doc. 336-10.

⁶³ Doc. 336-11 at 2.

⁶⁴ Docs. 336-12, 336-13.

It has recently come to my attention that you have created a website, www.passtheati.com, in which you provide some of the same, or similar services as ATI. In addition, you are using ATI Trademarks on many social media sites, including, but not limited to, YouTube, Instagram, and Facebook. As you may be aware, using a registered trademark in a manner other than fair use constitutes trademark infringement. Your use of ATI Trademarks clearly infringe upon ATI's intellectual property rights as ATI did not authorize, consent to, or grant permission to you to use ATI Trademarks in any manner. Your continued and unauthorized use of ATI Trademarks in a manner other than fair use, may constitute unfair competition, intentional trademark infringement, trademark dilution, and unjust enrichment, and seems to be an attempt to confuse consumers by misleading them into believing you are affiliated with, or endorsed by, ATI.

As you can assume, ATI places the highest priority on its reputation and intellectual property rights and will act zealously to protect its interests. Therefore, we expect that you will appreciate our concerns and resolve this matter immediately.⁶⁵

Defendant forwarded the email to Bill Parkes on October 15, 2018, who responded to Pontes on October 16. His email states in part:

Thank you for bringing this to our attention. We had no intention whatsoever of creating consumer confusion of any kind. This is not our area of expertise and we were not aware that this would be an issue.

We have already begun making changes and will do so at best speed so that we can address your concerns so as to remove any potential confusion this may have created in the marketplace.

We have already removed 'Pass The ATI' from the banner image on our website yesterday and are in the process of renaming and rebranding our Instagram, Facebook and YouTube presence.⁶⁶

By October 18, 2018, Bill Parkes rebranded the www.passtheati.com website to the domain name www.leveluprn.com, and included a footer on the new website disclaiming any

⁶⁵ Doc. 337-5 at 2.

⁶⁶ *Id.* at 1.

affiliation between ATI and Level Up RN. Pontes emailed Bill Parkes on October 19 that “[t]he footnote on the website looks good,” and that she would try to call him that morning.⁶⁷ That same day, Bill Parkes spoke to Pontes on the phone for 15 to 30 minutes. Bill Parkes took contemporaneous notes during the phone call indicating that Pontes told him: (1) ATI believed that Defendant was helping students greatly; (2) ATI knew that Defendant was not using ATI’s content; (3) ATI thought what Defendant was doing was “awesome”; (4) Defendant taught to the curriculum and not the tests; (5) ATI had reviewed the study cards and had no copyright concerns; (6) Pontes had listened to a dozen of Defendant’s videos and thought Defendant was “great” and ATI would love to have her as an instructor; (7) after ATI started looking at Defendant’s work product, it concluded that Defendant was helping people and it was “wonderful”; (8) Pontes loved the new name, Level Up RN; (9) ATI did not see any copyright issues; and (10) he should tell his wife that she is doing a “fantastic job.”⁶⁸

After this call, Bill Parkes copied his notes into a text message and sent them to Defendant. Defendant responded that she was relieved to hear that ATI did not have any concerns with the content she had created. Defendant had no prior experience with copyright issues, nor contrary advice from a lawyer or anyone else that they were violating any of ATI’s copyrights or improperly disclosing test information. Defendant felt “exceedingly confident,” based on the positive feedback Bill Parkes had communicated to her from Pontes, “that we were doing the right thing and doing so with the full support of, and validation from, ATI.”⁶⁹

Bill Parkes did not hear from Pontes again until December 3, 2018, when she notified him by email that Level Up RN’s Privacy Policy, Terms of Services, and YouTube channel still

⁶⁷ Doc. 337-7 at 1.

⁶⁸ Doc. 337-9.

⁶⁹ Doc. 337-2 ¶ 7.

included references to “Pass the ATI,” and she requested that he remove them. Her email indicated that “various customers . . . think the website is somehow affiliated with ATI and/or violating copyrights.”⁷⁰ Bill Parkes replied to Pontes on the same day to inform her that he had removed the remaining references to ATI in the Privacy Policy and Terms of Services—he had missed those references in the initial rebranding. He further noted that he had reviewed the Privacy Policy and Terms of Service on CDA’s YouTube channel and had not found any references to ATI. He requested that Pontes “let me know where any reference remains on YouTube.”⁷¹ After December 3, 2018, Bill Parkes did not receive any further communications from Pontes. Pontes kept Erickson apprised of her communications with Bill Parkes.

After changing the name of the business to Level Up RN, Defendant created for sale the following sets of study cards under the Level UP RN brand: (1) Nursing Fundamentals, (2) Nutrition for Nursing, (3) Community Health Nursing, (4) Pharmacology for Nursing, (5) Pediatric Nursing, (6) Mental Health Nursing, (7) Medical Surgical Nursing, (8) Nursing Leadership, and (9) Maternal Newborn Nursing. For sets originally branded “Pass the ATI,” the only change Defendant made before selling them under the Level Up RN brand was to change the branding from Pass the ATI to Level Up RN— “content-wise they were all the same before and after the rebrand.”⁷² Defendant also created approximately 90 additional videos that were posted on Level Up RN’s YouTube channel. During that same time period, CDA invested over \$900,000 in creating, marketing, advertising, selling, and fulfilling orders for the study card decks Defendant created. Defendant spent hundreds of hours creating these additional study cards and videos.

⁷⁰ Doc. 337-10 at 1.

⁷¹ *Id.*

⁷² Doc. 305-17 at 204:8–22.

2019 Customer Reports About Level Up RN's Products

By February 2019, Wood still had only reviewed five or six of Defendant's videos. She continued to field questions from ATI customers about Defendant's videos. On January 17, January 28, and February 5, 2019, Wood wrote internal emails indicating that she reviewed "many of the videos" and characterized them as fair use. In her January 28 email, Wood stated that "[n]othing myself nor Legal has found indicates Cathy Parkes' videos are anything other than good study tools."⁷³ She indicated that the analytics "we performed" on one of the topic areas did not reveal "group preknowledge" that would be "suspect."⁷⁴ She also stated that "we've already examined" the study cards "and they're general nursing notes."⁷⁵

Other ATI employees relayed similar findings to customers who inquired about Defendant's products. Kristi Burgess responded to a customer's email on December 4, 2018, that "Our Legal and Security teams are both aware. As of now, they are not violating copyright, but we are monitoring closely."⁷⁶ On February 7, 2019, Fiorucci-Hughes responded to an email from a customer stating: "Legal has determined that what she covers is simply test taking strategies and content areas not copyright infringement. . . . Watching Cathy's video's [sic] would have no impact on student proficiency level outside of understanding ways to prepare."⁷⁷ The next day, Fiorucci-Hughes sent a similar email to another customer.

Marsh also sent several internal emails explaining that the legal team had reviewed the videos and could not find that they were infringing, or exposed ATI content that gave students an

⁷³ Doc. 336-18 at 1.

⁷⁴ *Id.*

⁷⁵ Doc. 336-17.

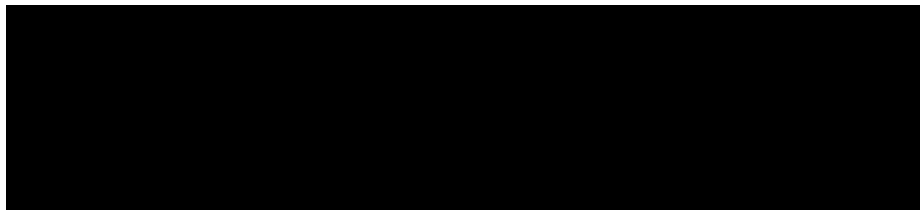
⁷⁶ Doc. 336-16.

⁷⁷ Doc. 336-20.

advantage on the proctored exams. For example, on May 6, 2019, Marsh sent an email to a member of ATI's nursing education department, stating in part:

Last year when we first learned about Cathy, we had our Legal team look at all of her videos, and they could not find anything infringing upon our Copyrights. At that time, we also had some nursing content experts for ATI look at the videos, and they determined that they do not take any of our direct content, and they actually are a very good learning tool for students without giving away any proprietary information.

Since that time last year, we have been monitoring Cathy and watching any new videos that come out, and we also have contact with her. It was ascertained that her intentions are only to help nursing students study and not provide anyone with an unfair advantage. If at any point we notice that this changes, we'll work with the Legal department to perform the proper actions in relation to her videos or channel.



Four days later, Defendant received a letter from Lawrence Robins, outside counsel for ATI, alleging that her YouTube videos infringed ATI's copyrights. On behalf of ATI, Robins requested that Defendant "immediately remove all videos from your YouTube page and website that contain material taken or derived from ATI's works."⁷⁹ Yet, after this letter was sent, Marsh sent an email to an ATI nursing school customer that there was "no copyrightable ATI content" in the videos, and "[w]e have determined that she is a fairly good study tool, similar to a test prep company."⁸⁰

⁷⁸ Doc. 336-25.

⁷⁹ Doc. 337-11 at 3.

⁸⁰ Doc. 336-26.

Defendant's Revised Videos

On June 27, 2019, Level UP RN removed “videos of concern” from its YouTube channel and uploaded over 200 new videos created by Defendant that do not explicitly reference ATI (“the revised videos”). The revised videos were recorded between May and September 2019. In these revised videos, Defendant provides tips to her viewers about what they will see on their “exams,” but omits explicit references to “ATI” or ATI’s proctored exams. Instead, she tells the audience to “definitely remember” certain facts, or that a certain piece of information was “important,” “super important,” or “key” to remember. Defendant created these videos extemporaneously, without a script. By this time, Defendant did not independently remember any of the proctored exam questions from the exams she took in 2015.

Defendant had been receiving comments on her YouTube channel, including suggestions for topics for her to cover and users’ ways of remembering information to share with her and her YouTube community. In May or June 2019, Defendant created a document summarizing these comments, in order to be sure that she covered the suggested topics when she revised her videos. She used the list to help create her revised videos.

The videos created by Defendant have always been available to the public at no charge. Plaintiff filed this lawsuit on August 27, 2019, alleging claims based on the videos and seven of the nine study card decks Defendant created. On December 9, 2019, after this Court enjoined Defendant from selling these seven study card decks, CDA stopped selling them. By July 2020, CDA stopped selling the other two study decks.

III. Discussion

Plaintiff asserts the following claims for relief in this matter: (1) copyright infringement; (2) misappropriation of trade secrets under the DTSA and the KUTSA; (3) unfair competition

under Kansas law; and (4) breach of contract under Kansas law. Plaintiff moves for partial summary judgment on liability as to all claims. Defendant responds that there are genuine issues of material fact on the elements of each claim, and submits evidence in support of several affirmative defenses. Defendant separately moves for summary judgment on Plaintiff's trade secrets claims, the unfair competition claim, and the damages element of Plaintiff's breach of contract claim. The Court considers each of Plaintiff's claims in turn before turning to Defendant's affirmative defenses.

A. Copyright Infringement

Plaintiff moves for summary judgment on its copyright infringement claim, which alleges that Plaintiff owns a valid copyright for its 2013 and 2016 review modules, and that Defendant copied protectable elements of the review modules with her (1) initial YouTube videos; (2) Level Up RN study cards; and (3) revised YouTube videos. As an initial matter, the Court notes that it is not bound by its preliminary injunction finding that Plaintiff was likely to succeed on the merits of its claim that Defendant copied the protectable elements of Plaintiff's review modules. The Court addresses this claim anew in light of a different and more robust record, new legal authority in the Tenth Circuit,⁸¹ arguments raised by the parties in their summary judgment briefs, and different standards.⁸²

⁸¹ The Tenth Circuit's decision in *Craft Smith, LLC v. EC Design, LLC*, which extensively discusses the elements of a copyright infringement claim in the context of a compilation, was decided after the preliminary injunction order. 969 F.3d 1092, 1101–05 (10th Cir. 2020).

⁸² At the preliminary injunction phase, Plaintiff only needed to demonstrate a likelihood of success on the merits. As the moving party that also bears the burden of proving its copyright claim at trial, Plaintiff must demonstrate that no reasonable trier of fact could find other than for the moving party. See *Navajo Health Found.-Sage Mem'l Hosp., Inc. v. Burwell*, 256 F. Supp. 3d 1186, 1197 n.10 (D.N.M. 2015) (“[F]indings of fact for the purposes of issuing a preliminary injunction . . . do not bind the Court at the summary judgment stage.” (citing *Malletier v. Dooney & Bourke, Inc.*, 561 F. Supp. 2d 368, 382 (S.D.N.Y. 2008))).

The elements of a copyright infringement claim are: “(1) ownership of a valid copyright and (2) ‘copying of constituent elements of the work that are original.’”⁸³ A certificate of registration of a copyright is prima facie evidence of the validity of the copyright and facts stated in its certificate.⁸⁴ It is uncontroverted that ATI owns valid copyright registrations for its 2013 and 2016 review modules, and Defendant concedes that Plaintiff has established this element as a matter of law.⁸⁵

But Defendant challenges whether Plaintiff can establish the second element of its copyright infringement claim. To prove this second element, Plaintiff must demonstrate both “(1) that [Defendant], as a factual matter, copied portions of [Plaintiff’s] work; and (2) that those elements of the work that were copied were ‘protected expression and of such importance to the copied work that the appropriation is actionable.’”⁸⁶ Plaintiff maintains that the evidence demonstrates Defendant copied its review modules, and that the material copied from the review modules constitutes original, protected expression. Defendant responds that there are genuine issues of material fact on these issues that preclude summary judgment.

1. Factual Copying

To prove factual copying, Plaintiff must demonstrate that Defendant copied portions of its review modules through direct or indirect proof.⁸⁷ Direct evidence is “evidence, which if

⁸³ *Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292, 1299 (10th Cir. 2014) (quoting *TransWestern Publ’g Co. v. Multimedia Mktg. Assocs.*, 133 F.3d 773, 775 (10th Cir.1998)) .

⁸⁴ 17 U.S.C. § 410(c).

⁸⁵ See *Craft Smith, LLC*, 969 F.3d at 1103 (“[C]opyright infringement’s first element . . . requires only the existence of a valid copyright in the allegedly infringed compilation work as a whole.”).

⁸⁶ *La Resolana Architects, PA v. Reno, Inc.*, 555 F.3d 1171, 1178 (10th Cir. 2009) (quoting *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 832 (10th Cir. 1993)) (citations omitted).

⁸⁷ *Enter. Mgmt. Ltd. v. Warrick*, 717 F.3d 1112, 1120 (10th Cir. 2013).

believed, proves the existence of a fact in issue without inference or presumption.”⁸⁸ While “[d]irect proof of copying is often hard to come by,” a plaintiff can indirectly prove copying “by establishing that Defendant[] had access to the copyrighted work and that there are probative similarities between the copyrighted material and the allegedly copied material.”⁸⁹

Plaintiff argues that there is direct, uncontroverted evidence of copying because Defendant admitted using the review modules in the initial videos themselves, encouraging her viewers to follow along with their review modules, and during discovery admitted using her highlighted copies of the ATI review modules to make the initial videos and study cards. Defendant responds that notwithstanding these admissions, there is a genuine issue of material fact about whether she “copied” the material because she “jumped around” to cover only material she believed was important, and she added her own material, including tips, tricks, and hints for remembering certain information. Plaintiff also offers evidence of Plaintiff’s highlighted copies of the review modules, which she admitted to using as a template while she prepared her study cards. The Court agrees that there is strong evidence of factual copying given Defendant’s admissions, but need not resolve whether there is a genuine issue of material fact on this issue. As described below, assuming Plaintiff can establish factual copying as a matter of law, it cannot demonstrate the absence of a genuine issue of material fact about whether Defendant copied the protected expression in Plaintiff’s review modules.

⁸⁸ *Punt v. Kelly Servs.*, 862 F.3d 1040, 1048 (10th Cir. 2017) (quoting *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999)).

⁸⁹ *La Resolana Architects, PA*, 555 F.3d at 1178 (quoting *Country Kids ‘N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1284 (10th Cir. 1996)) (citations omitted).

2. Protected Expression

To establish the protected expression component of the second element of Plaintiff's copyright claim, "a court must determine (1) which elements of the copyrighted work are protectable, and (2) whether these elements are substantially similar to the accused work."⁹⁰ This component is a mixed question of law and fact and determines whether a defendant's factual copying constitutes actionable copyright infringement.⁹¹

a. Protectable Elements—Compilation

Plaintiff asserts that its review modules are protected as compilations. Under the Copyright Act, a "compilation" is defined as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."⁹² As the Tenth Circuit recently explained: "This definition contains the following three criteria: '(1) the collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an "original" work of authorship.'"⁹³

To meet the third criteria of a compilation, Plaintiff's selection, coordination, or arrangement of nursing facts "must be (1) original and (2) a work of authorship."⁹⁴ Defendant argues that Plaintiff's arrangement of nursing facts is not original. The originality requirement

⁹⁰ *Craft Smith, LLC*, 969 F.3d at 1101 (quoting *Savant Homes, Inc. v. Collins*, 809 F.3d 1133, 1138 (10th Cir. 2016)).

⁹¹ *Blehm v. Jacobs*, 702 F.3d 1193, 1199 (10th Cir. 2012).

⁹² 17 U.S.C. § 101.

⁹³ *Craft Smith, LLC*, 969 F.3d at 1102 (quoting *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 357 (1991)).

⁹⁴ *Id.*

involves the compiler’s “choices as to selection and arrangement, so long as they are made independently . . . and entail a minimum degree of creativity.”⁹⁵ It is the compiler’s choices of “which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers” that are protected, so long as they are sufficiently original.⁹⁶ The Supreme Court has explained the originality requirement for a compilation as follows:

A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (*i.e.*, without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Presumably, the vast majority of compilations will pass this test, but not all will.⁹⁷

The Court previously determined in its December 9, 2019 Order that Plaintiff curated, digested, and presented nursing facts in a unique way while retaining the accuracy of the underlying public information. The summary judgment record reaffirms this finding. On this record, it is uncontroverted that the selection, organization, and arrangement of nursing information in each ATI review module was developed by many ATI employees across different ATI departments. While the underlying nursing facts in the review modules are not protectable, Plaintiff’s choice of which facts to include, the order in which to include them, and how they are arranged are original. Defendant points to no evidence demonstrating that Plaintiff copied the exact selection and arrangement of its nursing facts from another source or that there is but one

⁹⁵ *Feist Publ’ns*, 499 U.S. at 348.

⁹⁶ *Id.* (citations omitted).

⁹⁷ *Id.* at 358–59 (citation omitted).

way to arrange and collect the nursing facts covered by the review modules.⁹⁸ Thus, the review modules are an original work of authorship and qualify as a compilation.

However, Plaintiff’s “protectable expression is ‘limited to the selection, coordination, and/or arrangement of *that specific content*, and [does] not apply to the format and layout itself.’”⁹⁹ For this reason, Defendant correctly asserts that the protection associated with Plaintiff’s review modules, which are indisputably fact-based works, is “thin.”¹⁰⁰ As the Supreme Court has explained, this is because

a subsequent compiler remains free to use the facts contained in another’s publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement. . . . “[T]he very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas.”¹⁰¹

The extent to which Defendant copied Plaintiff’s protectable expression—its organization, selection, and arrangement of nursing facts—is at the center of the parties’ dispute in this case. The finder of fact must determine whether Defendant’s videos and study cards feature the particular selection and arrangement of nursing facts that Plaintiff used in the review modules,

⁹⁸ Defendant purports to controvert this fact by arguing that certain nursing facts “are presented . . . in a standard order that is medically defined and not unique to ATI.” Doc. 337-2 ¶ 12. But Defendant presents only examples of a handful of nursing facts, such as the vaccination schedule for infants, that are medically defined and standard. *See, e.g., id.* and Doc. 337-22. While this may demonstrate that certain nursing facts are medically defined, it does not demonstrate that ATI’s decision to *organize and select nursing facts* in the review module as it did is medically dictated or unoriginal. Moreover, the Court considered evidence at the preliminary injunction stage about how other nursing texts organized the same nursing facts covered in the review modules and found that the review modules’ overall organization is unique among nursing-education resources. Doc. 59 at 12–13.

⁹⁹ *Craft Smith, LLC*, 969 F.3d at 1103–04 (quoting U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 313.3(E) (3d ed. 2017)).

¹⁰⁰ *See Feist Publ’ns*, 499 U.S. at 349 (describing as “thin” the protection associated with compilation copyrights); *Craft Smith, LLC*, 969 F.3d at 1103–04 (same); *TransWestern Pub. Co. v. Multimedia Mktg. Assocs.*, 133 F.3d 773, 776 (10th Cir. 1998) (same); *cf. Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1198 (2021) (“[C]ourts have held that in some circumstances, say when copyrightable material is bound up with uncopyrightable material, copyright protection is ‘thin.’” (citations omitted)).

¹⁰¹ *Feist Publ’ns*, 499 U.S. at 349 (quoting Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 Colum. L. Rev. 1865, 1868 (1990)).

or, instead, whether Defendant only copied raw facts and “restated and reshuffled” them in such a way that is distinguishable from the review modules. To determine whether Defendant copied not just raw facts, but the specific selection and arrangement of nursing facts used by Plaintiff, the Court next turns to the second part of the protected expression inquiry—whether the two works are substantially similar.

b. Substantial Similarity

Substantial similarities are present where “the accused work is so similar to the plaintiff’s work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff’s protectible expression by taking material of substance and value.”¹⁰² In a compilation case, “the court must compare the allegedly infringing work as a whole’ when determining whether the two works are substantially similar.”¹⁰³ The Tenth Circuit cautions against breaking the compilation up into protected and unprotected elements when undertaking this inquiry.¹⁰⁴

Plaintiff urges that the following evidence demonstrates substantial similarity: (1) Defendant uses the same organization, structure, and arrangement of nursing facts in her products; (2) Defendant uses many of the same illustrative examples in her products; (3) the

¹⁰² *Country Kids ‘N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1288 (10th Cir. 1996) (quoting *Atari, Inc. v. N. Am. Philips Consumer Elec. Corp.*, 672 F.2d 607, 614 (7th Cir. 1982)).

¹⁰³ *Craft Smith, LLC*, 969 F.3d at 1104 (quoting *TransWestern Pub. Co. v. Multimedia Mktg. Assocs.*, 133 F.3d 773, 777 (10th Cir. 1998)). The Court declines Defendant’s invitation to apply a “supersubstantial similarity” test. She is simply incorrect that the Tenth Circuit applied this test in its most recent compilation decision. *See id.* at 1105 & n.17 (applying above-quoted substantial similarity test to factual compilation and, after finding no similarities, stating “we do not decide whether the district court erred by applying a ‘supersubstantial similarity’ test”). Moreover, Defendant is incorrect that a supersubstantial similarity test applies to all fact-based works; the Tenth Circuit has explicitly disclaimed this: “We do not read *TransWestern* so broadly as to require us to apply a supersubstantial similarity test to all fact-based works. Rather *TransWestern* merely reaffirmed ‘the measure of how substantial a “substantial similarity” must vary according to circumstances.’” *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 944 (10th Cir. 2002) (quoting 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03[A], at 13–28 (2000)).

¹⁰⁴ *Craft Smith, LLC*, 969 F.3d at 1104 & n.16.

study cards use similar phraseology, word choice, titles, and groupings of facts; (4) Defendant used the review modules as a template and guide when creating her initial videos; and (5) Defendant used her study cards to create the revised videos.

Defendant responds that her products contain substantial differences in the selection, organization, and sequence of material as compared to the review modules. She also maintains that the nursing facts included in the review modules are presented in a standard order and structure used by all nursing textbooks, and that the nine subjects organized by ATI are standard subject areas of nursing facts. Defendant further asserts that she used many sources to create the study cards, including the review modules, and that many of the nursing facts in her study cards are also included in the other research sources she used. Finally, Defendant maintains that the illustrative examples Plaintiff claims were copied are not unique or original to ATI, and are instead standard illustrative examples.

As described below, the Court finds there is a genuine issue of material fact on the issue of substantial similarity. To be sure, there is uncontroverted evidence that Defendant utilized the same subject areas as the review modules when creating her products, and that she used several of the same illustrative examples for nursing facts as the review modules. But it is controverted whether, when the compilations are viewed as a whole, Defendant's organization, arrangement, selection of nursing facts, and copying of illustrative examples demonstrate substantial similarity.

i. Organization, Structure, and Arrangement

Like Plaintiff's review modules, Defendant's study cards and videos are divided into nine broad subject areas. And Defendant named her nine subject areas the same as or substantially similar to Plaintiff's review modules. Defendant explicitly stated in her initial videos that she

organized her videos so that the viewer could follow along with the review modules. However, a reasonable jury could determine that the structure and arrangement of nursing facts within these subject areas are not substantially similar. Plaintiff's products are textbooks containing highly detailed information. Defendant's products are videos and study cards that contain far less detail, and are designed to be used as quick study tools for exams.

Moreover, Defendant offers evidence of differences in organization and sequence. The first comparison offered by Plaintiff, Unit 2–Chapter 7 in the Pharmacology review module, is instructive and representative. Defendant created six study cards by allegedly copying information in this chapter dealing with medications for anxiety, trauma, and stressor-related disorders. While Plaintiff organized these medications by body system and then disorder, Defendant organized by body system and then drug class, creating one card for each of six drug classes covered in this review module chapter.¹⁰⁵ The front of each card contains the name of the category and type of medication (e.g., Anxiety and Depression, SSRIs), and the back of each card lists the names of the medications, and information such as “indications,” “mode of action,” “side effects,” and “key points.”¹⁰⁶ The information on the back of each card is brief, often in list form. A reasonable jury could conclude that these are more than “minor” differences in structure and arrangement, as urged by Plaintiff, and that they weigh against a finding of substantial similarity.

Defendant's initial videos contain more information than the study cards, but still less information than the review modules, and there is a genuine issue of material fact about the similarities between the products' substructures. For example, while Defendant utilized some of

¹⁰⁵ See Doc. 337-8 at 1.

¹⁰⁶ See Doc. 34-7 at 1–11.

the substructure of the Fundamentals for Nursing review module in her Nursing Fundamental videos, she skipped over a large swath of information, and retitled several chapters to emphasize facts she wanted to cull out and emphasize. The Fundamentals of Nursing review module contains 42 chapters, yet Defendant created only 24 Nursing Fundamentals videos that skipped over much of ATI's subject matter, and that did not replicate ATI's naming conventions.¹⁰⁷ It is also controverted that Defendant's videos follow the same order as the review modules. Defendant offers evidence that her study cards eliminate repetition from the review modules, and reorder nursing facts in certain sections.¹⁰⁸ A reasonable jury could conclude that Defendant's omissions and changes in sequence weigh against a finding of substantial similarity.

The basis for Plaintiff's argument that the revised videos are infringing is that Defendant relies on her study cards. For the reasons discussed above, the Court finds a genuine issue of material fact about whether the revised videos, which are based on the study cards, are substantially similar to the organization, structure, and arrangement of nursing facts in Plaintiff's review modules.

ii. Selection of Nursing Facts

Next, Plaintiff maintains there is no genuine issue of material fact that Defendant copied Plaintiff's selection of nursing facts when she created her products. As already discussed in the context of organization, structure, and arrangement, Defendant's products do not include the level of detail included in Plaintiff's review modules, and she omitted entire chapters of information from the review modules in her products. This was deliberate—Defendant attests that she set out to create products that contained only the key facts for nursing students to learn

¹⁰⁷ As but one example, Plaintiff includes a chapter on "Medical and Surgical Asepsis," while Defendant created a video entitled "Hand Hygiene and Sterile Fields." Doc. 297-44 at 2.

¹⁰⁸ Doc. 337-36 at 1-3.

while studying for their nursing exams, including tips, tricks, and mnemonic devices. Defendant also offers evidence that she used not only the review modules, but many other sources of nursing facts to create her products, including her own nursing experience and other nursing textbooks.¹⁰⁹

The parties each offer numerous lengthy exhibits comparing and highlighting the similarities and differences between the content of their products. And the Court can confirm upon reviewing these exhibits that there are both similarities and differences in the selection of nursing facts. However, the Court is mindful that any side-by-side comparison of these products must be tempered by the Tenth Circuit’s direction to compare them as a whole, a task in which neither party sufficiently engaged in their briefs.¹¹⁰ Accordingly, the Court finds that the extent to which Defendant selected the same nursing facts as Plaintiff did in its review modules, when viewed as a whole, is a genuine issue of material fact.

iii. Illustrative Examples

Finally, Plaintiff argues that Defendant’s use of several of the same illustrative examples utilized by Plaintiff in its review modules establishes substantial similarity. The Court previously found at the preliminary injunction phase that Defendant’s copying of these examples

¹⁰⁹ Docs. 337-2 ¶ 9; 329-13

¹¹⁰ See *Craft Smith, LLC*, 969 F.3d at 1104 & n.16 (“For this reason, non-compilation cases that discuss “protected elements” of a copyright can mislead in the compilation context. A compilation copyright must be viewed ‘as a whole,’ not broken up into protected/unprotected elements.”); *TransWestern Pub. Co. v. Multimedia Mktg. Assocs.*, 133 F.3d 773, 777 (10th Cir. 1998) (discussing the differences between two directories as a whole, such as their appearances, how they are indexed, where and how advertisements appear, and how they are organized); see also *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 71–72 (2d Cir. 1999) (engaging in quantitative and qualitative comparison in compilation case; finding substantial similarity in instances where the defendant used about two-thirds of the plaintiff’s protectable material and tracked the plaintiff’s information “sentence by sentence, in sequence” and used “the exact same structure and organization of the facts” as the plaintiff); *Med. Educ. Dev. Servs., Inc. v. Reed Elsevier Grp., PLC*, No. 05 Civ. 8665(GEL), 2008 WL 4449412, at *8–10 (S.D.N.Y. Sept. 30, 2008) (“[A]ccepting defendants’ invitation to parse the parties’ works in the manner advocated would ignore the principle that infringement should be determined by comparing the total concept and feel of the protected work to the total concept and feel of the allegedly infringing work.”).

was highly probative of substantial similarity because they constitute part of the “selection” of nursing facts that is protected as part of Plaintiff’s compilation. But in opposition to summary judgment, Defendant submits detailed information about all of these examples, explaining why she chose the examples she did and identifying other sources that include the same examples.¹¹¹ In many instances, Defendant maintains that she merely used examples for certain concepts that are the most commonly used examples in the field. Thus, she maintains that the examples are not unique to ATI. Moreover, Defendant attests that she used many examples that were different from examples used by ATI. Given this competing evidence, Defendant’s use of some of the same examples utilized by Plaintiff in the review modules is not sufficient to meet Plaintiff’s substantial summary judgment burden as the moving party that bears the burden of proof at trial.

In sum, the Court finds that even if it assumes that Defendant engaged in factual copying of Plaintiff’s review modules when she created her videos and study cards, there is a genuine issue of material fact about whether she copied Plaintiff’s protected expression. A reasonable jury could conclude that the many differences between the two works prohibit a finding that Defendant’s products are so similar to the review modules that an ordinary person would conclude that she unlawfully appropriated Plaintiff’s original organization, selection, and arrangement of nursing facts when viewed as a whole. Because a reasonable jury could determine that “the accused work is [not] so similar to the plaintiff’s work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff’s protectible expression by taking material of substance and value,”¹¹² Plaintiff’s motion for summary judgment on its copyright infringement claim must be denied.

¹¹¹ Docs. 337-2 ¶ 15; 337-46, 337-47

¹¹² *Country Kids ‘N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1288 (10th Cir. 1996) (quoting *Atari, Inc. v. N. Am. Philips Consumer Elec. Corp.*, 672 F.2d 607, 614 (7th Cir. 1982)).

3. Derivative Works

Plaintiff argues that Defendant’s initial videos, revised videos, and study cards also violate Plaintiff’s exclusive right to prepare derivative works based on its review modules under 17 U.S.C. § 106(2). That provision states in relevant part that “the owner of copyright under this title has the exclusive rights . . . to prepare derivative works based upon the copyrighted work.”¹¹³ A derivative work is:

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”.¹¹⁴

Plaintiff spends no time in its brief acknowledging the definition of derivative work or explaining why, as a matter of law, Defendant’s products constitute derivative works. This alone requires the Court to deny summary judgment. Moreover, whether Defendant’s products “transformed, adapted or recast the original work into a new and different one” is a genuine issue of material fact for many of the same reasons outlined above.¹¹⁵ Defendant has come forward with evidence that she used many sources, including her own experience, to create her products and that, to the extent she relied on the review modules, she relied only on their nonprotectable elements. For these reasons, summary judgment is denied on Plaintiff’s derivative works copyright infringement claim.

¹¹³ 17 U.S.C. § 106(2).

¹¹⁴ *Id.* § 101.

¹¹⁵ *Paramount Picture Corp. v. Video Broad. Sys., Inc.*, 724 F. Supp. 808, 821 (D. Kan. 1989).

B. Misappropriation of Trade Secrets

The parties cross-move for summary judgment on Counts 3 and 4, which allege misappropriation of trade secrets under the DTSA and KUTSA. The elements required to establish this claim are almost identical under the two statutes: (1) existence of a trade secret; (2) the acquisition, use, or disclosure of the trade secret without consent; and (3) that the individual acquiring, using, or disclosing the trade secret knew or should have known the trade secret was acquired by improper means.¹¹⁶ “Under the DTSA, the trade secret must also ‘relate[] to a product or service used in, or intended for use in, interstate or foreign commerce.’”¹¹⁷ The Court considers below the first two elements of Plaintiff’s misappropriation of trade secrets claim as applied to the proctored exams and practice exams. Because these two elements are dispositive, the Court need not separately address the knowledge element.

1. Existence of a Trade Secret

Plaintiff claims that its proctored exams and practice exams are trade secrets. Trade secrets under the DTSA are “all forms and types of financial, business, scientific, technical, economic, or engineering information” if the owner takes “reasonable measures to keep such information secret” and “the information derives independent economic value . . . from [that information] not being generally known to, and not being readily ascertainable through proper means by, another person.”¹¹⁸ Similarly, under the KUTSA, a trade secret

means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable

¹¹⁶ See, e.g., *API Ams. Inc. v. Miller*, 380 F. Supp. 3d 1141, 1148 (D. Kan. 2019) (citation omitted).

¹¹⁷ *Id.* at 1148 n.4 (quoting 18 U.S.C. § 1836(b)(1)) (citations omitted).

¹¹⁸ 18 U.S.C. § 1839(3)(A)–(B).

by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.¹¹⁹

Whether a trade secret exists is a question for the trier of fact.¹²⁰ The proponent of the claim must come forward with some evidence showing that the information alleged to be a trade secret meets the definition.¹²¹

a. Proctored Exams

Defendant argues that the proctored exams are not trade secrets because they constitute nursing facts and concepts that are generally known or reasonably ascertainable through legitimate means. Specifically, Defendant urges that the same nursing facts are available through the publicly available review modules and practice exams. The Court finds no genuine issue of material fact about whether the proctored exams, as defined by Plaintiff, are trade secrets.

First, Defendant's assertion that ATI makes its practice exams available online to the public without first establishing an ATI account and agreeing to certain terms and conditions is not supported by the summary judgment record. The Court finds no evidence that the practice exams are generally available to the public.¹²² Although some of ATI's quizzes are available for purchase, it is uncontroverted that the practice exams can only be accessed by account holders

¹¹⁹ K.S.A. § 3320(4).

¹²⁰ *Dodson Int'l. Parts, Inc. v. Altendorf*, 347 F. Supp. 2d 997, 1010 (D. Kan. 2004).

¹²¹ *Id.*

¹²² Defendant cites to William-Abrams' deposition, but he testified that while he believed there were certain materials sold by ATI that are available for purchase by the public, he was not sure which products, and that the head of marketing would know the answer to that question. Doc. 298-2 at 50:7–25. Dr. Gorham states in his declaration that users can only access ATI's products by agreeing to the Terms and Conditions. Doc. 14-9 ¶ 13. Defendant does not controvert this fact.

who first agree to ATI's Terms and Conditions, which include nondisclosure and confidentiality provisions. And Defendant's comparison chart between the allegedly misappropriated proctored exam test items and practice exam test items do not reflect that they are identical. Therefore, even if the proctored exams questions Defendant allegedly misappropriated are asked in a similar way on the practice exam, it does not take away from the protected status of the proctored exam test items.

Second, Plaintiff does not claim that the nursing facts within its proctored exams constitute trade secrets; it claims that the exams themselves are trade secrets. While it is true that the proctored exams test students on their understanding of nursing facts, Defendant wholly fails to support her claim that the proctored exams themselves are publicly available. Plaintiff claims trade secret protection in "the specific *test items* on the ATI Proctored Exams, *i.e.*, the specific combinations of *questions and answers*, and the presentation of those question/answer sets, in the ATI Proctored Exams."¹²³ Defendant offers no evidence that the allegedly misappropriated questions and answers from the proctored exams are published in either the review modules or the practice exams.

The uncontroverted facts establish that Plaintiff maintains security controls regarding the storage of its proctored exam materials and regarding the use and administration of its proctored exam in a controlled testing environment, that students who sit for administrations of the exam must expressly agree to the ATI Proctored Exam Terms that prohibit disclosure of any information contained within the proctored exam, and that test takers must agree to ATI's Terms and Conditions, which prohibit use of any information contained in the proctored exams, for any purpose other than those allowed under those ATI Terms and Conditions.

¹²³ Doc. 321 at 14 (emphasis in original).

Moreover, it is uncontroverted that proctors undergo training regarding the proper procedures to administer the exam and are required to review and agree to the ATI Proctor Oath. It is uncontroverted that the setting within the testing room itself is controlled and that proctors must remain present during the entire test administration. It is uncontroverted that proctors enforce rules regarding test administration, including restricting the use of any unauthorized electronic device, restricting the items that students may take into the testing center, and monitoring and reporting any instances of unauthorized disclosure of ATI's proctored exam information. These uncontroverted facts establish as a matter of law that Plaintiff's proctored exams—the specific test items—are trade secrets under the DTSA and Kansas law.

b. Practice Exams

Plaintiff recently amended its trade secret claims to add allegations that Defendant misappropriated its practice exams.¹²⁴ Specifically, in an interrogatory response submitted toward the end of discovery, Plaintiff identified twelve specific practice exams that it claims were filed confidentially with the Copyright Office in response to Defendant's request that it identify each trade secret it claims Defendant disclosed. Defendant argues that the practice exams are not trade secrets because (1) they were registered with the Copyright Office and are therefore publicly available; and (2) Plaintiff makes them available for sale without taking sufficient measures to assure the questions and answers remain confidential.

i. Copyright Registration

Defendant first argues that the practice exams are not trade secrets because Plaintiff made them part of the public record when it deposited them with the Copyright Office at the time of copyright registration. Although it is undisputed that Plaintiff filed its practice exams with the

¹²⁴ Docs. 289, 293.

Copyright Office, the parties dispute whether the practice exams were filed under regulations governing registration of secure tests, which allows a copyright applicant to maintain the confidentiality of test materials submitted to the Copyright Office (the “secure test rule”).¹²⁵ As part of its argument that the practice tests were publicly disclosed when registered with the Copyright Office, Defendant argues that the practice exams would not meet the definition of secure tests under the 37 C.F.R. § 202.20(b)(4) because they were not administered under supervision at a specified test center like the proctored exams.

Plaintiff submitted with its reply the declaration of Lawrence Robins, its copyright attorney who registered the practice exams’ copyrights, stating that he deposited the twelve attached practice exams identified in Plaintiff’s earlier interrogatory response under the secure test rule in 2015.¹²⁶ Robins further states that “[i]n all cases where I have submitted an ATI Proctored or Practice Exam to the Copyright Office for registration, I have done so under the applicable rules for registering “Secure Tests” . . . to maintain the confidentiality of ATI’s Proctored and Practice Exams.”¹²⁷

Defendant’s motion for leave to file a surreply on this limited issue is granted for the reasons prescribed by the Court in its earlier Order denying without prejudice her request to file a surreply.¹²⁸ Defendant submitted with her proposed surreply excerpts from Robins’ deposition, which she urges demonstrates that he lacks personal knowledge about whether the twelve practice exams were filed as secure tests. Robins’ declaration is not inadmissible for lack of

¹²⁵ See 37 C.F.R. § 202.13.

¹²⁶ Doc. 342-2.

¹²⁷ *Id.* ¶ 3.

¹²⁸ See Doc. 349. Because both Robins’ declaration and the practice exam certificates were presented for the first time with Plaintiff’s reply, and because Robins had not been previously disclosed as a witness, the Court finds a surreply warranted on both topics covered in Defendant’s brief surreply. See *Green v. New Mexico*, 420 F.3d 1189, 1196 (10th Cir. 2005) (citing *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998)).

personal knowledge. Robins represented Plaintiff with respect to the registration of its copyrighted works since at least 2013. He was and continues to be responsible for registering Plaintiff's proctored and practice exams. He signed all of the copyright certificates for the twelve practice exams attached to his declaration. Robins has sufficient personal knowledge to testify about the documents on which his name appears, about his practice with respect to applying for copyright registration for Plaintiff's products, and about whether he recalls specifically registering these exams under the secure test rule.

Defendant essentially asks the Court to give Robins' declaration little weight on the basis of his deposition testimony. To be sure, Robins testified in the deposition that he does not have a specific recollection of registering the twelve practice exams at issue, and that he does not "really recall" his general procedure for filing under the secure test rule prior to 2018.¹²⁹ On the other hand, Robins testified that he is confident that secure test copyrights issued for the practice exams because "for purposes of this litigation, I have never filed an application for this client that was not filed under the Secure Test process."¹³⁰ While this witness may not have a specific recollection of reviewing and submitting copyright applications for each of the twelve specific practice exams in 2015, Defendant provides the Court with no reason to question Robins' personal knowledge that all exams he submitted for copyright registration in 2015 were submitted under the secure test rule. The Court must not weigh the credibility of the witness on summary judgment. A reasonable jury could believe Robins' testimony that he filed all exams under the secure test rule, or alternatively, it could disregard his testimony based on his limited specific recollection as to these twelve tests and the fact that the tests do not meet the definition

¹²⁹ Doc. 351-2 at 21:5–24:25, 29:7–16.

¹³⁰ *Id.* at 25:7–12; *see also id.* at 28:18–19 ("I know for a fact that all of those tests were registered under the Secure Test Rule.").

of secure tests in the regulation. In the absence of some other documentary evidence showing how the practice exams were filed, a genuine issue of material fact exists about whether the practice exams were publicly filed with the Copyright Office in 2015 when they were registered.¹³¹

ii. Terms and Conditions

Defendant next argues that even if the practice exams were filed under the secure test rule, they do not qualify as trade secrets because Plaintiff otherwise did not take reasonable measures to keep them secret. It is uncontroverted that Plaintiff used a substantially similar process for creating, developing, reviewing, editing, and finalizing items for its practice exams as for the proctored exams. But certain important measures are not taken with the administration of practice exams that are taken with the proctored exams; namely, the practice exams are not administered in a controlled environment with a proctor. And unlike proctored exams, it appears that users can take practice tests an unlimited number times—Defendant took 240 tests as a student and 43 tests after graduation.

Plaintiff maintains that it took reasonable measures to protect the confidentiality of its practice exams by limiting access to account holders who must log in to a secure online portal and agree to Plaintiff's Terms and Conditions, which include confidentiality and nondisclosure requirements. Defendant responds that a confidentiality agreement, standing alone, is insufficient proof of taking reasonable means to protect the practice exam's confidentiality. Defendant argues further that Plaintiff has hundreds of thousands of customers with online

¹³¹ Plaintiff identified several proctored exams and practice exams in its Complaint, and attached those copyright registration certificates. None of the certificates specify whether they are filed under the secure test rule. Doc. 1-3. The Court notes that Plaintiff specifically alleged in the Complaint that the proctored exams were filed under the secure test regulations; it did not allege that the practice exams were filed under the secure test regulations. Doc. 1 ¶¶ 19–23, 32–35.

accounts, so asking them to click a checkbox online to agree to its terms and conditions is not enough to prove that it took measures to protect the practice exams' confidentiality absent a showing that Plaintiff enforced those terms and conditions.

In considering this element of Plaintiff's trade secret claim, the Court is mindful that "Kansas law does not require the holder of a trade secret to maintain its complete secrecy; rather Kansas law requires merely that the holder of a trade secret exercise reasonable efforts under the circumstances to maintain its secrecy."¹³² The Court finds a genuine issue of material fact remains about whether Plaintiff took reasonable measures to maintain the practice exams' confidentiality. As already discussed, Plaintiff is correct that there is no evidence that it made the practice exams available to the public by publishing them.¹³³ Rather, it is uncontroverted that the practice exams can only be accessed by account holders who first agree to ATI's Terms and Conditions, which include nondisclosure and confidentiality provisions.

The parties cite to competing caselaw from outside of this district about whether nondisclosure and confidentiality agreements, standing alone, confer trade secret protection.¹³⁴ However, several cases within this district have found that confidentiality and nondisclosure provisions support a party's claim that it took reasonable measures to protect the confidentiality

¹³² *Bradbury Co. v. Teissier-duCros*, 413 F. Supp. 2d 1209, 1222 (D. Kan. 2006) (quoting *Fireworks Spectacular, Inc. v. Premier Pyrotechnics, Inc.*, 107 F. Supp. 2d 1307, 1310 (D. Kan. 2000)).

¹³³ See *Gal-Or v. United States*, 113 Fed. Cl. 540, 554 (2013) ("[B]road-based public disclosure, such as when a person places their 'ideas in the public domain by publishing them,' eliminates trade secret protection." (quoting *Sterner v. United States*, 434 F.2d 656, 657 (Ct. Cl. 1970))).

¹³⁴ *Compare Bison Advisors LLC v. Kessler*, No. 14-3121 (DSD/SER), 2016 4361517, at *4 (D. Minn. Aug. 12, 2016) ("The law is clear that the mere existence of a confidentiality agreement is insufficient to establish that the covered information is a trade secret."), with *Pre-Paid Legal Servs., Inc. v. Harrell*, No. Civ-06-019-JHP, 2008 WL 111319, at *11 (E.D. Okla. Jan. 8, 2008) ("Confidentiality agreements provide evidence of reasonable efforts to maintain secrecy."), and *Dick Corp. v. SNC-Lavalin Constructors, Inc.*, No. 04 C 1043, 2004 WL 2967556, at *10 (N.D. Ill. Nov. 24, 2004) (citation omitted) (same).

of its alleged trade secrets, albeit in the employment context.¹³⁵ The Court follows this case law in concluding that confidentiality and nondisclosure agreements, like those in Plaintiff’s Terms and Conditions, constitute evidence that Plaintiff took reasonable measures to protect the confidentiality of its products that could only be accessed through its online portal by account holders, including the practice exams. Although Plaintiff has met its summary judgment burden of submitting evidence that its practice exams meet the definition of trade secret, the Court cannot find on this record that no reasonable trier of fact could find other than for Plaintiff on this issue. A reasonable jury could determine that the sheer number of times account holders have accessed the practice exams outside of a controlled, proctored environment demonstrates that it did not take reasonable efforts under these circumstances to maintain their confidentiality, despite the requirement that account holders agree to its terms and conditions online.¹³⁶

2. Acquisition, Use, or Disclosure Without Consent

Plaintiff asserts that Defendant misappropriated ATI’s proctored exams and twelve practice exams by disclosing them in her videos. Defendant disputes disclosing the questions and answers from either the proctored exams or the practice exams.

a. Proctored Exams

Plaintiff first argues that Defendant “acquired” the proctored exams “repeatedly” when she took three proctored exams in 2015 as a nursing student. It is uncontroverted that Defendant

¹³⁵ See, e.g., *API Ams. Inc. v. Miller*, 380 F. Supp. 3d 1141, 1148 (D. Kan. 2019) (finding trade secret element met because employees were required to sign nondisclosure and confidentiality agreements); *Sprint Commc’ns Co. v. Charter Commc’ns, Inc.*, No. 20-2161-JWB, 2020 WL 4734836, at *9 (D. Kan. Aug. 14, 2020) (finding sufficient allegations of reasonable efforts to maintain secrecy where the plaintiff alleged it had employment policies regarding confidential information, required the execution of confidentiality agreements, labeled documents as confidential, and used security systems for documents); *Guang Dong Light Headgear Factory Co. v. ACI Int’l, Inc.*, 521 F. Supp. 2d 1153, 1173–74 (D. Kan. 2007) (relying in part on confidentiality agreement in finding issue of fact on summary judgment about existence of trade secret).

¹³⁶ These facts also bear on another component of the trade secret definition—whether the practice exams derive independent economic value from not being generally known.

took the proctored exams three times in 2015, that each administration of the ATI proctored exams followed the standard secure procedure that applies to all of ATI's proctored exams, and that a CSUSM faculty member proctored all of the ATI proctored exams Defendant took in 2015 under strict protocols to make sure students did not take notes or take anything out of the exam room.

Defendant states in her declaration that she was not allowed to and did not take any notes or attempt to copy exam questions during those proctored exams. She also states that she did not recall the questions and answers from proctored exams she took in 2015 when she created her videos. Plaintiff responds that Defendant's declaration is self-serving and constitutes hearsay. As already explained, these objections are overruled and denied. Defendant has firsthand knowledge about whether she copied exam questions and a finder of fact is entitled to find her credible. The fact that the statements are self-serving does not render them inadmissible. Nor are these statements made by third-party declarants, so there is no basis for a hearsay objection. Plaintiff offers no evidence that controverts Defendant's testimony that she did not take notes or otherwise remember the exam questions and answers from the proctored exams she took in 2015 when she created her videos in 2017–2019.

Next, Plaintiff argues that Defendant accessed the exam questions by soliciting proctored exam questions and answers from customers on her YouTube channel and incorporating that information into the revised videos. Plaintiff argues that Defendant "continued to receive ATI Proctored Exam and/or ATI Practice Exam questions and answers from nursing students."¹³⁷ To support this contention, Plaintiff cites Defendant's deposition testimony and Exhibit 2 to the Schuman Declaration, submitted with its response to Defendant's motion for summary

¹³⁷ Doc. 317 at 23.

judgment.¹³⁸ Defendant identified the exhibit as a summary she created of comments on her YouTube channel with suggestions for topics to cover or “[the commenters’] ways of remembering information that they were sharing with the community and with me.”¹³⁹ She selected the comments that were included in the document; she “didn’t add all the ‘love your videos’ or ‘thank you so much’ or anything of that stuff; right? If there were suggestions on topics, then— or, like, tricks or mnemonics for remembering stuff, then that’s really what I was gleaning from the YouTube channel.”¹⁴⁰ Defendant prepared Exhibit 2 before making the revised videos in order to incorporate topics that her viewers suggested she cover.

A reasonable jury could find that Exhibit 2 does not show that Defendant disclosed test items—questions and answers—from the proctored exams in her revised videos. First, the comments do not include specific questions and answer sets from proctored exams. Second, while the document includes topics that the commenters noticed on an “exam” or “test,” none of the comments specify whether they came from ATI proctored or practice exams.¹⁴¹ For example, several comments stated that there were questions about certain topics, or identified general nursing facts that they remembered from a test.¹⁴² Comments that seemingly include

¹³⁸ Doc. 322-2.

¹³⁹ Doc. 322-1 at 266:3–10.

¹⁴⁰ *Id.* at 268:8–14.

¹⁴¹ See *Am. Registry of Radiologic Technologists v. Bennett*, 939 F. Supp. 2d 695, 712 (W.D. Tex. 2013) (denying the plaintiff’s motion for summary judgment where nothing in emails from students to the defendant showed that they had recently taken the exams that defendant was alleged to have disclosed and there was no evidence that the students had registered for or taken the plaintiff’s examination).

¹⁴² Doc. 322-2 at 2 (“There [were] some questions about gonorrhea. . . . I saw a lot questions about trichomoniasis. There was a question about what the main priority is when baby is born to HIV positive mother. I selected wash the baby, which was the incorrect answer. . . . I found there were so many more questions on float nurse delegation, which diseases to report to the state (some Ive [sic] never even heard of) as well as quite a few questions on TB. There were a few on chemical spills and what the nurse would do as well.”), 3 (“Trach suctioning was a huge part of the exam, diets, common procedures such as how to use crutches, ADPIE, and how to take out a glass eye and clean it were on there. Lastly, wound care, and oxygen use were in there.”), 6 (“Edition 10.0 also includes Gout and Fibromyalgia that Cathy doesn't cover, but I recommend you study for the proctored”).

part of a question or answer do not make clear what type of test the commenter took, nor does Plaintiff offer evidence that they were made part of Defendant's alleged video disclosures.¹⁴³ There is no evidence in the record about the identities of the commenters, or whether they in fact took ATI's proctored exams.

Plaintiff's misappropriation of trade secret theory relating to its proctored exams is internally inconsistent. On the one hand, Plaintiff argues that the specific question and answer test items from the proctored exams constitute its trade secret. Plaintiff invokes trade secret protection for the specific combinations of questions and answers (including the "distractor" answers), and the presentation of those question/answer sets, in its proctored exams. And it disclaims that the specific proctored exam questions and answers are replicated in the practice exams, taking pains to distinguish questions that appear similar, on the basis that substantially-similar questions have different distractor answers. Indeed, Dr. Gorham testified that the purpose of the practice exams "is to give the student a flavor for the kind of content they're going to see on a proctored exam, give them a sense for the kind—the topic areas they're going to encounter, have them become comfortable with formats."¹⁴⁴

On the other hand, Plaintiff contends that Defendant misappropriated not the specific questions and answers on the proctored exams, but the topics and concepts tested on either the proctored exams or the practice exams. In other words, Plaintiff claims that its specific questions and answers are trade secrets, yet Defendant misappropriated those trade secrets not by revealing

¹⁴³ *Id.* at 3 ("[P]atient who has AIDS with stomatitis, a nurse should include 'the following' in the teaching One of the answer choices was 'Use a straw to drink liquids' (in which also indicates to try straws in the ATI book) but the answer choice was 'Suck on popsicles to numb the mouth.'"), 5 ("I just want to point out I had a question that asked which medication would prevent the migraine headache. For my test the answer was a beta blocker."), 6 ("Hi while taking my ati practice I did see a couple questions on hemolytic blood transfusions reactions and of course Flank pain is a huge one.").

¹⁴⁴ Doc. 307-2 at 132:19–23.

specific questions and answers from the proctored exams, but by disclosing concepts regularly tested on the proctored exams—concepts that it explicitly disclaims constitute its trade secrets. Given Plaintiff’s specific position that it is the question and answer sets from the proctored exams that constitute trade secrets, Plaintiff’s more generic evidence of misappropriation is insufficient to show that the trade secrets themselves were disclosed by Defendant.¹⁴⁵

Plaintiff argues that Defendant cannot avoid liability by arguing that she disclosed only part of Plaintiff’s trade secrets, relying in part on the fact that Defendant’s terms and conditions included a provision that: “You agree that . . . you will not disclose any portion of ATI Products to any other person or entity.”¹⁴⁶ But Plaintiff fails to submit evidence that Defendant disclosed even a portion of the alleged trade secret—the specific test questions or answers—in her videos. Merely identifying topic areas and nursing facts about which Plaintiff tends to test does not amount to disclosure of a portion of the trade secret as defined by Plaintiff.

In an apparent attempt to resolve this inconsistency, Plaintiff argues that Defendant disclosed test items on the proctored exams by “tipping off” her viewers to questions and answers. To support this claim, Plaintiff relies on Dr. Gorham’s lay opinion testimony, and on

¹⁴⁵ To the extent this finding is inconsistent with the Court’s preliminary injunction ruling, the Court reconsiders and clarifies its ruling at this time. The summary judgment record is far more robust than the record at the preliminary injunction hearing, the parties’ theories on this claim are clearer, and the Court has had time to conduct further research on this issue. *See Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1224–25 (10th Cir. 2007) (explaining that district courts remain free to reconsider their earlier interlocutory rulings made before the entry of judgment); *Navajo Health Found.-Sage Mem’l Hosp., Inc. v. Burwell*, 256 F. Supp. 3d 1186, 1197 n.10 (D.N.M. 2015) (explaining that a district court is not bound by its findings of fact from a preliminary injunction order on summary judgment). In its preliminary injunction order, the Court considered and rejected authority cited by Defendant for the proposition that it must compare the original and misappropriated materials side-by-side. Doc. 59 at 32–34. The Court found that the cases cited by Defendant were inapposite because they discussed copyright infringement, and not misappropriation of trade secrets. *See Am. Registry of Radiologic Technologists v. Bennett*, 939 F. Supp. 2d 695 (W.D. Tex. 2013); *Educ. Testing Serv. v. Simon*, 95 F. Supp. 2d 1081 (C.D. Cal. 1999); *Nat’l Conf. of Bar Exam’rs v. Saccuzzo*, No. 03CV0737BTM (NLS), 2003 WL 21467772 (S.D. Cal. June 10, 2003). While the Court stands by this discussion of those particular cases, it has been unable to find authority to support Plaintiff’s position that “disclosure” of Plaintiff’s trade secrets can be accomplished by disclosing test concepts or question topics rather than specific test items, given Plaintiff’s definition of its protected trade secrets in this case as the test items themselves.

¹⁴⁶ Doc. 14-10 at 2–3.

an exhibit documenting incidents where it claims Defendant emphasized in her videos question and answer test items from its proctored exams.¹⁴⁷ This exhibit presents quoted excerpts from Defendant’s videos next to proctored exam question and answer items. These are the same instances presented to the Court at the preliminary injunction hearing. The exhibit includes Defendant’s statements in certain videos about information being “important,” “super important,” a “key one,” or “a big one” to know, or that her viewers should “be familiar with” or “definitely remember” certain nursing facts “for your exam.”¹⁴⁸ Dr. Gorham testified in his deposition that Defendant’s language in these instances signaled to the viewer that she was flagging a test item, which he called “teaching to the test.”¹⁴⁹

None of statements identified by Plaintiff in the comparison chart include test items from the proctored exams. Defendant does not present questions and answers at all. The closest Defendant comes to referencing specific exam questions in the comparison chart are six instances where she references a “test.” For example, on the Medical Surgical Nursing Video (Video 22), at 5:07–5:14, Defendant discusses “some important points in terms of nursing care of patients who have pacemakers. . . . You should always assess for hiccups, and this is super important for the test.”¹⁵⁰ The corresponding proctored exam question asks [REDACTED]

[REDACTED]

[REDACTED] While Defendant’s tip indicated [REDACTED]

[REDACTED] her video did not reveal the question, nor the distractor answers.

¹⁴⁷ Doc. 34-28.

¹⁴⁸ *Id.*

¹⁴⁹ *See, e.g.*, Doc. 322-3 at 97:3–25.

¹⁵⁰ *Id.* at 3 (emphasis omitted).

As another example, on the Medical Surgical Nursing Video (Video 14) at 1:17–1:32, when discussing chest tubes, Defendant states that “if you see a test question with these different findings for a patient and you see a drainage level of like 120 mL over the last hour, that is not expected—that’s really high.”¹⁵¹ The actual proctored exam question asks about [REDACTED]

[REDACTED]¹⁵² While Defendant certainly predicted a test question dealing with [REDACTED] the number was not identical, nor did she disclose the actual question or distractor answers.

As another example, on the Maternal Newborn Nursing Video (Video 12) at 3:03–3:25, Defendant discusses magnesium in the context of gestational hypertension. She states that watching for several specific signs of magnesium toxicity is “a key one that you need to be familiar with,” and that “whenever you see that on a test, that is usually—you know, your priority patient.”¹⁵³ The corresponding proctored exam question identified by Plaintiff asks [REDACTED]

Plaintiff’s comparison chart does not demonstrate that Defendant misappropriated Plaintiff’s proctored test items from Plaintiff’s proctored exam in her videos. Neither Exhibit 2

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 17 (emphasis omitted).

nor the comparison chart include disclosures of specific proctored exam questions and answers.¹⁵⁴

Defendant also submits evidence that she used the “tipping” terminology identified by Plaintiff throughout her videos, well beyond the incidents documented in Plaintiff’s comparison chart. She provides an explanation in her declaration for each incident of misappropriation identified in Plaintiff’s comparison chart, and attests that she did not know that they were in fact tested on the proctored exam. Finally, the evidence demonstrates that Marsh performed a statistical analysis on at least one school’s proctored exams to determine if Defendant was teaching to the test and found no evidence of impropriety. Accordingly, Plaintiff’s motion for summary judgment is denied on its proctored exam trade secret claim. Defendant’s motion for summary judgment is granted because Plaintiff has failed to submit evidence from which a reasonable jury could conclude that Defendant misappropriated its proctored exam test items.

b. Practice Exams

Defendant does not move for summary judgment on the misappropriation element of Plaintiff’s practice exam claim, which is largely based on certain admissions by Defendant that any similarities between her videos and ATI’s products are to the practice exams and not the proctored exams.

It is uncontroverted that Defendant disclosed in the initial videos information she learned from taking ATI’s practice exams.¹⁵⁵ And Defendant admits that she included information in her initial videos based on the questions she saw on ATI’s practice exams.¹⁵⁶ In response to

¹⁵⁴ See, e.g., *State Regul. Registry, LLC v. Bartholomew*, No. 17-cv-0834-PAB-NRN, 2019 WL 7290934, at *14 (D. Colo. Sept. 27, 2019) (granting summary judgment in favor of plaintiff where the defendant obtained test questions by improper means and sold for profit).

¹⁵⁵ See, e.g., Doc. 308, Hard Drive § I(F)(001) at 00:15–00:36.

¹⁵⁶ See, e.g., Doc. 305-17 at 166:25–167:20; 190:22–192–13; 194:9–196:2.

Plaintiff's motion for summary judgment, Defendant argued that Plaintiff failed to demonstrate that she disclosed information from the twelve practice exams it claims are trade secrets. This argument was based on the fact that Plaintiff failed to submit the twelve practice exams with its summary judgment motion, or otherwise show particular disclosures from those twelve exams. In reply, citing this as a "circular attorney argument," Plaintiff again pointed to Defendant's admissions from her deposition.

As part of Defendant's surreply, which this Court allows to address the new Robins' declaration and attached practice exams disclosed and attached for the first time to Plaintiff's reply, she argues that Plaintiff still fails to identify the questions, answers, or other specific information in the practice exams that it claims Defendant disclosed. She addresses in the surreply the specific deposition citations in Plaintiff's reply brief that it maintains evidence disclosure. The Court has reviewed that deposition testimony and agrees that none of Defendant's admissions reference specific exam questions and answers, nor do they reference the twelve specific practice tests that Plaintiff alleges are trade secrets. It is uncontroverted that Defendant took over 200 practice exams. Her statements in the videos and deposition testimony explaining those statements make clear that she was referencing the types of questions or trends she has noticed from taking so many exams, not specific test items or even specific tests.

For example, Plaintiff's first citation discusses the following "disclosure" Defendant made in her video about the Community Health practice exam: "So one is that when you take your Community Health Nursing exam, you'll find that ATI will be asking you questions that aren't necessarily specific to the community."¹⁵⁷ When asked about this statement and whether she was referring to proctored or practice exams, Defendant testified:

¹⁵⁷ *Id.* at 150:4-7.

I took a lot of practice exams including multiple ATI Community Health practice exam[s]. And if you take those practice exams, it's very clear that the type of questions they ask you actually aren't all focused on Community Health Nursing. They're kind of like questions on medications or pediatrics or other things kind of disguised as community health questions.¹⁵⁸

Defendant similarly testified elsewhere that her statements about students being “likely to see” certain concepts on the tests were based on her experience taking many practice exams where “certain facts or concepts, like, constantly reinforced through those practice exams and through my reading, and so I would definitely tell my viewers some of the key facts I would definitely know because I had seen them so many times on practice exams.”¹⁵⁹

Another specific disclosure cited by Plaintiff is from the Medical Surgical Nursing video, where Defendant stated that “[a]n example of a black tag situation would be a penetrating head wound A patient is not really going to come back from that. And so if they're not dead, they will likely die soon. So there's an example there. So just know those classifications because I have seen questions on ATI about those.”¹⁶⁰ When asked where the statement came from, Defendant testified that she was “referring to the ATI practice exams that [she] took” before graduation.¹⁶¹ Again, there is no disclosure identified that involves test questions or answers, and Defendant does not refer to any specific practice exam in the admissions cited by Plaintiff.

¹⁵⁸ *Id.* at 150:12–19.

¹⁵⁹ *Id.* at 145:5–10; *see also id.* at 146:23–147:2 (“I’m saying that I would know these things in preparation for your proctor exam because I’ve seen them emphasized a great deal in the practice exams.”), 157:20–24 (“I took [the practice exams] so that I could get kind of tuned up on the key concepts that are emphasized and so that I can make sure to explain those facts and concepts to students in the videos.”), 158:6–10 (“I would note the types of questions or topics that showed up on the ATI practice exam, so my advice is always to be well informed about those things in case they come up again on the proctored exam.”).

¹⁶⁰ *Id.* at 166:25–167:4 (quoting from transcript of video).

¹⁶¹ *Id.* at 167:5–16.

Accordingly, the Court denies Plaintiff's motion for summary judgment on this element of Plaintiff's practice exam claim. Defendant does not separately move on this element of the practice exam trade secrets claim; she only moves for summary judgment on whether the practice exams constitute trade secrets. Because the Court finds that a genuine issue of material fact exists on the first element of that claim, Defendant's motion for summary judgment is denied.

C. Unfair Competition

Plaintiff moves for summary judgment on its unfair competition claim that arises under Kansas law. Defendant moves for summary judgment on the basis that this claim is preempted by both the Copyright Act and the KUTSA.

Plaintiff's unfair competition claim in the Pretrial Order is alleged as follows:

Parkes wrongfully accessed ATI's proprietary content; reproduced, displayed, and distributed that content; and created derivative works from that content, in violation of her contractual obligations under ATI's Terms and Conditions. Parkes further wrongfully created and promoted content using ATI's goodwill without ATI's consent, and unjustly profited therefrom. Parkes' wrongful actions are likely to cause mistake, confusion, or deception as to Parkes' affiliation, connection, or association with ATI, or as to the origin, sponsorship, or approval by ATI of Parkes' infringing works. Parkes' wrongful actions constitute unfair competition.¹⁶²

Kansas law recognizes a claim for unfair competition.¹⁶³ Courts in this district have predicted that Kansas would adopt the Restatement (Third) of Unfair Competition for this tort,¹⁶⁴ which provides the following guidance:

¹⁶² Doc. 293 at 18.

¹⁶³ *BHMC, LLC v. Pom of Kan., LLC*, No. 20-2609-DDC-ADM, 2021 WL 1909639, at *9 (D. Kan. May 12, 2021).

¹⁶⁴ *Id.*; *Airport Sys. Int'l, Inc. v. Airsys ATM, Inc.*, 144 F. Supp. 2d 1268, 1271 (D. Kan. 2001).

One who causes harm to the commercial relations of another by engaging in a business or trade is not subject to liability to the other for such harm unless:

- (a) the harm results from acts or practices of the actor actionable by the other under the rules of this Restatement relating to
- (1) deceptive marketing, as specified in Chapter Two
 - (2) infringement of trademarks and other indicia of identification, as specified in Chapter Three;
 - (3) appropriation of intangible trade values including trade secrets and the right of publicity, as specified in Chapter Four;

or from other acts or practices of the actor determined to be actionable as an unfair method of competition, taking into account the nature of the conduct and its likely effect on both the person seeking relief and the public¹⁶⁵

Comment g to the Restatement discusses the residual clause of liability in subsection (a), and advises: “A competitor who diverts business from another . . . through the wrongful use of confidential information, for example, may in some circumstances be subject to liability for unfair competition even if the conduct is not specifically actionable under the rules relating to deceptive marketing or the appropriation of trade secrets.”¹⁶⁶

As Judges Vratil and Crabtree have explained, Kansas views this common law claim broadly:

Unfair competition . . . does not describe a single course of conduct or a tort with a specific number of elements; it instead describes a general category into which a number of new torts may be placed when recognized by the courts. The category is open-ended, and nameless forms of unfair competition may be recognized at any time for the protection of commercial values.¹⁶⁷

¹⁶⁵ Restatement (Third) of Unfair Competition § 1 (1995).

¹⁶⁶ *Id.*, cmt. g.

¹⁶⁷ *AgJunction LLC v. Agrian Inc.*, No. 14-CV-2069-DDC-KGS, 2014 WL 2557704, at *7 (D. Kan. June 6, 2014) (quoting *Airport Sys. Int’l, Inc.*, 144 F. Supp. 2d at 1271); *see also BHCMC, LLC*, 2021 WL 1909639, at *9.

Having explained the scope of an unfair competition claim under Kansas law, the Court turns to Defendant's preemption arguments.

1. Copyright Act Preemption

First, Defendant argues that the Copyright Act preempts enforcement of state common law or statutory claims within the scope of the Act.¹⁶⁸ To determine whether the Copyright Act preempts Plaintiff's state-law unfair competition claim, the Court must determine whether the rights asserted by Plaintiff in that claim "are equivalent to any of the exclusive rights within the general scope of the copyright, as specified in 17 U.S.C. § 106."¹⁶⁹ Section 106 "grants to the copyright owner the exclusive rights to (1) reproduce the copyrighted work; (2) prepare derivative works; (3) distribute copies of the work; (4) perform the work publicly; and (5) display the work publicly."¹⁷⁰ However, "when a state law violation is predicated upon an act incorporating elements beyond mere reproduction or the like, the rights involved are not equivalent and preemption will not occur."¹⁷¹

Plaintiff argues that its unfair competition claim is predicated upon an additional element beyond a copyright violation—violation of a confidential relationship—because the claim is premised on Defendant's violation of ATI's Terms and Conditions. Because confidentiality is not an element of a copyright claim, Plaintiff argues that preemption should not apply. The Court agrees. The Restatement (Third) of Unfair Competition contains a residual clause that permits unfair competition claims premised on a breach of confidential information. Plaintiff's claim as alleged in the Pretrial Order is so premised—Plaintiff claims that Defendant violated her

¹⁶⁸ 17 U.S.C. § 301(a).

¹⁶⁹ *R.W. Beck, Inc. v. E3 Consulting, LLC*, 577 F.3d 1133, 1147 (10th Cir. 2009).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (quoting *Ehat v. Tanner*, 780 F.2d 876, 878 (10th Cir. 1985)).

contractual obligations under ATI's Terms and Conditions by accessing, using, and reproducing Plaintiff's proprietary content. Breach of a confidential relationship is an extra element that keeps Plaintiff's claim from being preempted by the Copyright Act.¹⁷²

2. KUTSA Preemption

Next, Defendant argues that the unfair competition claim is preempted by the KUTSA. Plaintiff again responds that because it asserts an extra element that a confidential relationship was breached, its unfair competition claim is not preempted. The KUTSA contains a preemption provision that is identical to Section 7 of the Uniform Trade Secrets Act: "Except as provided in subsection (b), this act displaces conflicting tort, restitutionary and other law of this state providing civil remedies for misappropriation of a trade secret."¹⁷³ This provision explicitly "does not affect 'other civil remedies that are not based on misappropriation of a trade secret.'"¹⁷⁴

In 2011, the Kansas Supreme Court made clear in *Wolfe Electric, Inc. v. Duckworth* that the KUTSA does not prohibit misappropriation of "confidential information" that does not meet the statutory definition of a trade secret.¹⁷⁵ "[O]nly such defined 'misappropriation,' *i.e.*, limited to trade secrets, can serve as the basis for recovery under KUTSA for compensatory and exemplary damages, injunctive relief, and attorney fees."¹⁷⁶ The Kansas Supreme Court found errors with jury instructions that were overly inclusive on the KUTSA claims; they erroneously

¹⁷² *Kindergartners Count, Inc. v. Demoulin*, 171 F. Supp. 2d 1183, 1190 (D. Kan. 2001); *see also R.W. Beck, Inc.*, 577 F.3d at 1147 (distinguishing cases finding preemption with *Gates Rubber*, where the court "held that this third element, proof of a breach of trust or confidence, 'qualitatively distinguish[ed] such trade secret causes of action from claims for copyright infringement . . . based solely on copying.'" (quoting *Gates Rubber Co.*, 9 F.3d at 848)).

¹⁷³ K.S.A. § 60-3326(a); *see also* Unif. Trade Secrets Act § 7, 14 U.L.A 651 (2005).

¹⁷⁴ K.S.A. § 60-3326(b)(2).

¹⁷⁵ 266 P.3d 516, 523 (Kan. 2011).

¹⁷⁶ *Id.* at 524 (citing K.S.A. §§ 60-3321 through -3323).

instructed the jury that the plaintiff could recover under the KUTSA for misappropriated trade secrets *and* “mere confidential information.”¹⁷⁷ The court also found instructional error with business tort instructions that allowed the plaintiff to recover for misuse of trade secrets, despite the fact that the KUTSA is the exclusive remedy for such recovery.¹⁷⁸ However, the court explicitly refrained from ruling on the issue of whether the KUTSA “displace[s] other tort causes of action for recovery of damages for nontrade secrets,” because the defendants had not previously raised the issue.¹⁷⁹

In attempting to resolve this state law issue, the Court “must look to the rulings of the state’s highest court and, where no controlling state decision exists, the Court must endeavor to predict how the state’s highest court would rule.”¹⁸⁰ In making that determination, the Court may consider “analogous decisions by the state Supreme Court, the decisions of the lower courts in the state, the decisions of the federal courts and of other state courts, and the general weight and trend of authority.”¹⁸¹ Here, the state’s highest court has not decided the operative question: whether the KUTSA preempts an unfair competition claim seeking recovery for misappropriation of confidential information that does not meet the definition of a trade secret.

There is a split of authority regarding the scope of the UTSA’s preemption provision. The first line of cases “holds that the UTSA preempts only those civil claims based upon trade secrets as defined in the statute, but does not preempt civil claims based on information that fails

¹⁷⁷ *Id.* at 533.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Reorganized FLI, Inc. v. Williams Cos.*, 410 F. Supp. 3d 1213, 1217–18 (D. Kan. 2019) (citation omitted).

¹⁸¹ *MidAmerica Constr. Mgmt., Inc. v. MasTec N. Am., Inc.*, 436 F.3d 1257, 1262 (10th Cir. 2006) (quoting *Progressive Cas. Ins. Co. v. Engemann*, 268 F.3d 985, 987 (10th Cir. 2001)).

to meet that statutory definition.”¹⁸² Under this approach, the plaintiff may present alternative theories of relief, in the event that certain information does not qualify as a trade secret under the Act.¹⁸³ The second line of cases holds that “determining whether the allegedly misappropriated information constitutes a trade secret is irrelevant for preemption purposes because the UTSA preempts all claims based upon the unauthorized use of information, even if the information does not meet the statutory definition of a trade secret.”¹⁸⁴ Another line of cases applies a “same facts” standard that asks whether the Plaintiff’s claim is “merely a restatement of the same operative facts” of the UTSA claim.¹⁸⁵

Although the Kansas Supreme Court withheld ruling on the preemption issue in *Wolfe Electric*, it repeatedly cited with approval *First Advantage Background Services Corp. v. Private Eyes, Inc.*, where the Northern District of California considered whether the California Uniform Trade Secret Act (“CUTSA”) preempts a state law claim based on disclosure of confidential information.¹⁸⁶ That case held that because the CUTSA only provides a remedy for misappropriation of trade secrets, the plaintiff’s fraud claim premised on disclosure of confidential information was preempted “[i]f the confidential information [the defendant] allegedly disclosed was in fact a protectible trade secret.”¹⁸⁷ However, the court concluded that:

[The defendant] may continue to pursue the claim for false promise, so long as the confidential information at the foundation

¹⁸² *Mediware Info. Sys., Inc. v. McKesson Info. Sols., LLC*, No. 06-2391-JWL, 2007 WL 926142, at *2 (D. Kan. Mar. 26, 2007) (collecting cases).

¹⁸³ See, e.g., *Stone Castle Fin., Inc. v. Friedman, Billings, Ramsey & Co.*, 191 F. Supp. 2d 652, 659 (D. Vt. 2002).

¹⁸⁴ *Mediware Info. Sys., Inc.*, 2007 WL 926142, at *2 (collecting cases); see, e.g., *Opteum Fin. Servs., LLC v. Spain*, 606 F. Supp. 2d 1378, 1380–81 (N.D. Ga. 2005).

¹⁸⁵ E.g., *Office Depot, Inc. v. Impact Office Prods., LLC*, 821 F. Supp. 2d 912, 921 (N.D. Ohio 2011) (quoting *Allied Erecting & Dismantling Co. v. Genesis Equip. & Mfg.*, 649 F. Supp. 2d 702, 722 (N.D. Ohio 2009)) (collecting cases).

¹⁸⁶ 569 F. Supp. 2d 929 (N.D. Cal. 2008).

¹⁸⁷ *Id.* at 942.

of the claim is not a trade secret, as that term is defined in CUTSA. If, in subsequent pleadings or briefs, or at trial, it is established that the disclosures on which [the plaintiff] bases this claim were trade secrets, the claim will be dismissed with prejudice.¹⁸⁸

The *First Advantage* decision is in accord with the Kansas Court of Appeals' unpublished decision in *LendingTools.com, Inc. v. Bankers' Bank, N.A.*¹⁸⁹ There, the court considered whether the KUTSA displaces other tort claims as an alternative theory of recovery for misappropriation of nontrade secrets.¹⁹⁰ After considering the plain language of the statute, the court held that the KUTSA "does not preempt tort claims based on the misappropriation of information that falls outside of the statutory definition of a trade secret."¹⁹¹

This Court predicts that the Kansas Supreme Court would follow *First Advantage* and *LendingTools.com* and find that the KUTSA does not displace common law torts based on the misappropriation of confidential information that falls short of meeting the definition of trade secret. This Court has already granted summary judgment in favor of Defendant on Plaintiff's misappropriation of trade secrets claim based on the proctored exams because Plaintiff has not submitted evidence that Defendant misappropriated those trade secrets as Plaintiff defined them. The Court denied summary judgment on the practice exams claim because a genuine issue of material fact exists about whether the practice exams are trade secrets under the DTSA and KUTSA; Defendant did not move for summary judgment on the misappropriation element of that claim. To the extent Plaintiff's unfair competition claim is premised on use or disclosure of information that is ultimately found to constitute trade secrets, it is preempted by the KUTSA, and the claim must be dismissed. However, to the extent Plaintiff's claim seeks to recover for

¹⁸⁸ *Id.*

¹⁸⁹ No. 116,382, 2018 WL 4655902 (Kan. Ct. App. Sept. 28, 2018).

¹⁹⁰ *Id.* at *16.

¹⁹¹ *Id.* at *17.

disclosure of confidential information that is ultimately found to fall short of constituting trade secrets, Plaintiff may continue to pursue the claim. Therefore, Defendant's summary judgment motion is denied on its preemption defense; Plaintiff may continue to pursue its unfair competition claim based on the misappropriation of confidential information that does not meet the definition of trade secret.

3. Plaintiff's Motion for Summary Judgment

Plaintiff argues that the Court should grant summary judgment in its favor on the liability component of its unfair competition claim, incorporating by reference its arguments on the copyright and misappropriation of trade secrets claims. For substantially the same reasons explained in the Court's analysis of the copyright and misappropriation of trade secrets claims, summary judgment is not warranted in Plaintiff's favor. Genuine issues of material fact exist on issues of substantial similarity between the products, whether the practice exams constitute trade secrets, and whether Defendant disclosed confidential information from the proctored exams that falls short of trade secrets—an argument not formally addressed by either party. As such, Plaintiff's motion for summary judgment on its unfair competition claim is denied.

D. Breach of Contract

Plaintiff moves for summary judgment on the liability component of its breach of contract claim. Defendant moves for summary judgment solely on the basis that because Plaintiff does not seek monetary damages, it cannot maintain a breach of contract claim under Kansas law.

Under Kansas law, a party establishes breach of contract by proving five elements: "(1) the existence of a contract between the parties; (2) sufficient consideration to support the contract; (3) the plaintiff's performance or willingness to perform in compliance with the

contract; (4) the defendant's breach of the contract; and (5) damages to the plaintiff caused by the breach."¹⁹²

It is uncontroverted that the first three elements of Plaintiff's claim are met. Plaintiff submitted evidence that a contract exists between the parties. Defendant agreed to ATI's Terms and Conditions three different times when she was an ATI-account holder. The Court has overruled Defendant's authentication objections to those exhibits, which is the only argument Defendant offers to controvert the existence of a contract. Defendant received consideration because she accessed and used Plaintiff's products between 2013 and 2019 in exchange for her agreement to abide by Plaintiff's Terms and Conditions. Plaintiff performed under the contract by giving Defendant access to its products.

There is a genuine issue of material fact however about whether Defendant breached the agreement by "copying and distributing ATI's copyrighted works," or "by accessing ATI's online content for purposes not authorized by ATI."¹⁹³ As discussed earlier in this Order, the Court finds a genuine issue of material fact exists about whether Defendant copied Plaintiff's materials and about whether she created derivative works. According to Defendant, she taught nursing facts that are not proprietary to Plaintiff. A genuine issue of material fact exists about the extent to which the parties' products are similar beyond publicly-available nursing facts.

Plaintiff argues that Defendant breached the agreement by admitting to using the practice exams to create her videos. As the Court discussed on the misappropriation of trade secrets claims, Plaintiff oversells these admissions. Plaintiff admitted taking many practice exams and using her overall knowledge of the nursing concepts and question topics, as well as other

¹⁹² *Steckschulte v. Jennings*, 298 P.3d 1083, 1098 (Kan. 2013) (citing *Com. Credit Corp. v. Harris*, 510 P.2d 1322, 1325 (Kan. 1973)).

¹⁹³ Doc. 293 at 17.

sources, to create her videos. But a reasonable jury could conclude that these admission do not show that she “used” the practice exams in violation of the Terms and Conditions. Thus, summary judgment in favor of Plaintiff is not appropriate.

Defendant moves for summary judgment on the fifth element of this claim because Plaintiff did not suffer actual damages; it only seeks injunctive relief. According to Defendant, Plaintiff must seek monetary damages to prevail on its breach of contract claim. The Court agrees with Plaintiff that it is not required to prove monetary damages in order to recover. Instead, “if damages at law cannot adequately compensate the injury sustained from the breach or cannot be reasonably measured, then the remedy at law is inadequate and injunctive relief . . . may be appropriate because of irreparable injury.”¹⁹⁴

Defendant replies that if Plaintiff’s claim involves loss of goodwill, customers, and competitive advantage, it has failed to submit evidence to support these components of its claim.¹⁹⁵ The Court disagrees. The same evidence Defendant relies on in support of its affirmative defenses—the many emails sent to Plaintiff by customers and sales representatives asking whether Defendant was affiliated with ATI—demonstrates loss of goodwill and competitive advantage. Defendant’s motion for summary judgment on this claim is therefore denied.

E. Affirmative Defenses

In response to Plaintiff’s motion for summary judgment, Defendant asserts several affirmative defenses. Plaintiff contends Defendant’s affirmative defenses fail because she did not raise them in her own motion for summary judgment. As discussed under the summary

¹⁹⁴ *API Ams., Inc. v. Miller*, 380 F. Supp. 3d 1141, 1152 (D. Kan. 2019) (quoting *Tri-State Generation & Transmission Ass’n v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1353–54 (10th Cir. 1989)).

¹⁹⁵ *Id.* (collecting cases).

judgment standard, the Court disagrees. While the Court cannot *grant* summary judgment in favor of Defendant on these affirmative defenses since they were not raised as part of Defendant's motion, the Court must *deny* Plaintiff's motion for summary judgment if it finds genuine issues of material fact on these affirmative defenses. The Court has already denied Plaintiff's motion for summary judgment on the elements of its claims; thus, the Court provides the following brief analysis of Defendant's affirmative defenses as additional support for denying Plaintiff's motion for summary judgment.

1. Equitable Estoppel

First, Defendant raises equitable estoppel as a defense to all claims raised by Plaintiff.

As a defense to a copyright claim, courts typically require the following showing:

(1) the plaintiff must know the facts of the defendant's infringing conduct; (2) the plaintiff must intend that its conduct shall be acted on or must so act that the defendant has a right to believe that it is so intended; (3) the defendant must be ignorant of the true facts; and (4) the defendant must rely on the plaintiff's conduct to its injury.¹⁹⁶

Defendant has submitted evidence in support of each element. Defendant's evidence demonstrates that both ATI's Test Security Department and Legal Department were aware of Defendant's products. Defendant points to a series of emails beginning in April 2018 from customers and sales representatives to ATI's Test Security Department about Defendant's videos. The oft-repeated responses from ATI's Test Security Department indicated that Plaintiff had reviewed the videos, that Defendant was not doing anything "illegal," that her products were "like Cliff's Notes," and that she was doing Plaintiff's clients a service. Many of these emails indicate that the legal department had reviewed the emails. By September 6, 2018, ATI

¹⁹⁶ *Viper Nürburgring Rec. LLC v. Robbins Motor Co.*, No. 5:18-CV-04025-HLT, 2019 WL 4256372, at *10 (D. Kan. Sept. 9, 2019) (citing *Carson v. Dynegy, Inc.*, 344 F.3d 446, 453 (5th Cir. 2003)).

employee Kendra Darigan was instructed to purchase Defendant's study cards to review.

Although ATI's legal team sent Defendant a letter demanding that she remove its trademarks from her products, the letter conveys that Plaintiff was aware of Defendant's products and does not raise concerns about copyright infringement.

Bill Parkes took contemporaneous notes during an October 18, 2018 phone call with Pontes, indicating that Pontes told him: (1) ATI believed that Defendant was helping students greatly; (2) ATI knew that Defendant was not using ATI's content; (3) ATI thought what Defendant was doing was "awesome"; (4) Defendant taught to the curriculum and not the tests; (5) ATI had reviewed the study cards and had no copyright concerns; (6) Pontes had listened to a dozen of Defendant's videos and thought Defendant was "great" and ATI would love to have her as an instructor; (7) after ATI started looking at Defendant's work product, it concluded that Defendant was helping people and it was "wonderful"; (8) Pontes loved the new name, Level Up RN; (9) ATI did not see any copyright issues; and (10) he should tell his wife that she is doing a "fantastic job."¹⁹⁷ These comments are consistent with Plaintiff's emails to customers and employees asking about Defendant's products.

After this call, Bill Parkes copied his notes into a text message and sent them to Defendant. Defendant responded that she was relieved to hear that ATI did not have any concerns with the content she had created. Defendant had no prior experience with copyright issues, nor contrary advice from a lawyer or anyone else that they were violating any of ATI's copyrights or improperly disclosing test information. Defendant felt "exceedingly confident," based on the positive feedback Bill Parkes had communicated to her from Pontes, "that we were

¹⁹⁷ Doc. 337-9.

doing the right thing and doing so with the full support of, and validation from, ATI.”¹⁹⁸ After receiving this feedback, and removing trademark concerns identified by ATI, Defendant did not receive any further communication from Pontes. Defendant proceeded to spend hundreds of hours and approximately \$900,000 creating new study cards and video content.

Plaintiff responds to this evidence by arguing that Wood only reviewed five or six videos when she wrote her emails disclaiming illegal conduct by Defendant, and that Pontes only reviewed two or three snippets from the videos before she spoke to Parkes. It argues further that Pontes’ discussion with Parkes only addressed trademark infringement. A reasonable jury could conclude that regardless of how many videos Wood and Pontes claim to have watched, their outward statements convey that Plaintiff had reviewed all of Plaintiff’s products and was aware of Defendant’s allegedly infringing conduct in 2018. Moreover, a reasonable jury could rely on Bill Parkes’ call notes with Pontes and credit his recollection that the call also addressed copyright issues. Because there are genuine issues of material fact on this affirmative defense, it is an additional reason to deny Plaintiff’s motion for summary judgment on the copyright claim.

Plaintiff’s state law claims may also be subject to an equitable estoppel affirmative defense. “Equitable estoppel is the effect of the voluntary conduct of a party whereby it is precluded, both at law and in equity, from asserting rights against another person relying on such conduct.”¹⁹⁹ To demonstrate equitable estoppel under Kansas law, Defendant must demonstrate

that another party, by acts, representations, admissions, or silence when that other party had a duty to speak, induced the party asserting estoppel to believe certain facts existed. The party asserting estoppel must also show that the party reasonably relied

¹⁹⁸ Doc. 337-2 ¶ 7.

¹⁹⁹ *Gillespie v. Seymour*, 823 P.2d 782, 788 (Kan. 1991).

and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts.²⁰⁰

The same facts outlined above are sufficient to raise a genuine issue of material fact on this affirmative defense under Kansas law.

2. Implied Consent by Waiver and Acquiescence

Defendant next asserts an affirmative defense to Plaintiff's copyright claim on the basis that she was granted an implied license by waiver or acquiescence to use Plaintiff's products. There is no Tenth Circuit authority for determining when a copyright owner conveys an implied license, but other jurisdictions have construed the defense narrowly: "implied non-exclusive licenses should be found only in narrow circumstances where one party created a work at the other's request and handed it over, intending that the other copy and distribute it."²⁰¹ The defense applies "[w]hen an owner's conduct 'clearly' manifests 'a consent to . . . use' of copyrighted material."²⁰² Some courts have held that an implied license can arise "where the totality of the parties' conduct supported such an outcome," in the absence of a work-for-hire agreement.²⁰³ Similarly, "[u]nder Kansas law, '[w]aiver is ordinarily the intentional relinquishment of a known right and is a voluntary act.' Although waiver must be knowing and intentional, *intent may be inferred from conduct*, and the knowledge may be actual or constructive, but 'both knowledge and intent are essential elements.'"²⁰⁴

²⁰⁰ *Steckline Commc'ns, Inc. v. Journal Broad. Grp. of Kan., Inc.*, 388 P.3d 84, 91–92 (Kan. 2017) (quoting *Owen Lumber Co. v. Chartrand*, 157 P.3d 1109, 1120 (Kan. 2007)).

²⁰¹ *Otto v. Hearst Commc'ns, Inc.*, 345 F. Supp. 3d 412, 434 (S.D.N.Y. 2018) (quoting *Psihoyos v. Pearson Educ., Inc.*, 855 F. Supp. 2d 103, 120 (S.D.N.Y. 2012)).

²⁰² *MidlevelU, Inc. v. ACI Info. Grp.*, 989 F.3d 1205 (11th Cir.), *cert. denied*, 141 S. Ct. 2863 (2021).

²⁰³ *Baisden v. I'm Ready Prods., Inc.*, 693 F.3d 491, 501–02 (5th Cir. 2012) (collecting cases); *see also* 3 Melville B. Nimmer & David Nimmer, *Nimmer On Copyright* § 10.03[A], at 10–41 (1997).

²⁰⁴ *Lyons ex rel. Lawing v. Holder*, 163 P.3d 343, 349 (Kan. Ct. App. 2007) (quoting *Sultani v. Bungard*, 131 P.3d 1264, 1267 (Kan. Ct. App. 2007)).

For the reasons stated above on the estoppel defense, Defendant offers evidence that raises a genuine issue of material fact about whether Plaintiff's conduct manifested an intent for Defendant to use Plaintiff's materials. There is a genuine issue of material fact about whether Plaintiff's statements to Bill Parkes on October 18, 2018 were made with knowledge and intent to waive their claims in this case.

3. Fair Use

Finally, Defendant argues that the fair use defense precludes summary judgment on the copyright claim. Section 107 of the Copyright Act provides in relevant part:

[T]he fair use of a copyrighted work, . . . 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.²⁰⁵

As the Supreme Court recently explained, this list of factors is not exhaustive, and some factors may prove more important in some contexts than in others.²⁰⁶ For example, “copyright’s protection may be stronger where the copyrighted material is fiction, not fact, where it consists

²⁰⁵ 17 U.S.C. § 107.

²⁰⁶ *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197–98 (2021) (citations omitted).

of a motion picture rather than a news broadcast, or where it serves an artistic rather than a utilitarian function.”²⁰⁷ Fair use is a mixed question of law and fact.²⁰⁸

Defendant has offered sufficient evidence that raises a genuine issue of material fact about whether the fair use defense bars Plaintiff’s copyright claim. Plaintiff argues that the uncontroverted evidence shows that Defendant copied the review modules for her own for-profit business. But as already discussed, there is a genuine issue of material fact about whether Defendant copied the protectable elements of Plaintiff’s copyright. In fact, the central issue on the copyright claim is whether she copied protectable rather than the nonprotectable elements of the compilation copyrights. And while it is true that Defendant’s sale of study cards is commercial in nature, the videos are available to the public free of charge. And this is but one factor relevant to the fair use inquiry. The nature of the copyrighted work, which is purely informational, and the fact that Defendant did not reproduce the review modules in their entirety weigh in favor of Defendant. Some of the emails Plaintiff sent to customers and employees indicate that Plaintiff considered Defendant’s videos fair use. The Court will not conduct an extensive analysis of the fair use factors for purposes of summary judgment given that Plaintiff barely addresses it in the reply. However, the Court concludes that Defendant has come forward with evidence that raises a genuine issue of material fact on this affirmative defense and provides additional support for denying Plaintiff’s motion for summary judgment on the copyright claim.

IT IS THEREFORE ORDERED BY THE COURT that Plaintiff ATI’s Motion for Partial Summary Judgment (Doc. 295) is **denied** and Defendant Cathy Parke’s Motion for Summary Judgment (Doc. 298) is **granted in part and denied in part**. Defendant’s motion is

²⁰⁷ *Id.* (citations omitted).

²⁰⁸ *Id.* at 1199–1200.

granted on the misappropriation of trade secrets claim relating to Plaintiff's proctored exams.
The motion is otherwise denied.

IT IS FURTHER ORDERED THAT Defendant's Motion for Leave to File Sur-Reply in Opposition to Plaintiff's Motion for Partial Summary Judgment (Doc. 351) is **granted**. Defendant is directed to file the proposed surreply attached to the motion forthwith.

IT IS FURTHER ORDERED THAT the deadline set in the Amended Pretrial Order for Plaintiff to file a motion seeking a bench trial is modified as follows: any such motion shall be filed on or before **February 1, 2022**, and shall not exceed ten (10) pages in length. Defendant's response shall be filed on or before **February 15, 2022**, and shall not exceed ten (10) pages in length. Plaintiff may file a reply on or before **February 22, 2022** that shall not exceed five (5) pages in length.

IT IS SO ORDERED.

Dated: January 5, 2022

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE