

Defendant iParadigms, LLC (“iParadigms”), by and through its attorneys, Stephen R. Pickard, P.C. and Satterlee Stephens Burke & Burke LLP, respectfully submits this memorandum of points and authorities in support of iParadigms’ motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss plaintiffs’ Amended Complaint.

**PRELIMINARY STATEMENT**

This action arises from the alleged grievance that four students have against their high schools in Virginia and Arizona, which require assigned papers for certain classes to be submitted to the Turnitin® plagiarism detection service (“Turnitin”). Instead of pursuing this school matter through the proper channels, plaintiffs have instead concocted a purported copyright claim against iParadigms, which owns the Turnitin service. Plaintiffs allege in their Amended Complaint (hereinafter, the “complaint”) that because the service archives all submitted papers (for the sole purpose of detecting whether others have plagiarized from them), their alleged copyrights in six student papers (the “Papers”) have been infringed and they are entitled to statutory damages and injunctive relief.

On its face, this claim is barred by the plaintiffs’ own admitted agreement to contractual terms that exempt iParadigms from any liability. The Complaint itself does not deny – indeed, explicitly acknowledges – that each plaintiff affirmatively assented to the terms of iParadigms’ “clickwrap” agreement by clicking “I agree.” Indeed, the Complaint admits that iParadigms could not have had access to the Papers unless each plaintiff had agreed to these terms – which indisputably include a provision precluding liability either for damages of any kind “arising out of or in any way connected with the use of this web site” or “otherwise arising out of the use of this website.” Moreover, by making use of the Turnitin service, each plaintiff assented to the

site's "Usage Policy," which explicitly provides that plaintiffs' "sole remedy" for dissatisfaction with the Turnitin service is to "stop using the site."<sup>1</sup>

Thus, plaintiffs' claim constitutes a blatant attempt to obtain the benefits of using the Turnitin service (including the compliance with school rules needed to pass courses) while avoiding the reciprocal obligations undertaken under the clickwrap agreement and Usage Policy. Well aware of the contractual bar to their claims, plaintiffs evidently seek to avert prompt dismissal by including allegations in the Complaint – referring to "duress" and the plaintiffs' "infancy" – that they presumably intend to rely on as grounds for repudiating the terms they agreed to. Both of these disingenuous attempts at circumventing clear contractual obligations fail as a matter of law.

First, plaintiffs' repeated assertions of "duress" and "coercion" are based, preposterously, on nothing more than the allegation that their high schools told them that they would get a "zero" on their assignments if they didn't use Turnitin. There is – and could be – no allegation of any kind that iParadigms said or did anything that constitutes duress. Under the law of Virginia, like that of other jurisdictions, there can be no duress defense of any kind where, as here, the party seeking enforcement of the contract is not the alleged source of any purported pressure or coercion. Indeed, plaintiffs' allegations of "coercion" merely point up the fact that the students' real dispute is with the schools, not iParadigms.<sup>2</sup> Moreover, pressure cannot in any event be

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deemed “duress” unless it involves a wrongful or unlawful threatened act, and a school requirement that a student submit a paper for plagiarism review cannot possibly meet this standard.

Plaintiffs’ suggestion that they can somehow renege on their agreement because they are “minors” is equally untenable. It is well-settled that when an infant enters into any contract subject to conditions or stipulations, he cannot take the benefit of the contract without the burden of the conditions or stipulations. Here, in bald contravention of this precept, plaintiffs seek to disavow their contractual obligations only after they have submitted the Papers to Turnitin and taken the benefit obtained by entering into the agreement – i.e., meeting the requirements established by their schools for receiving grades in their respective classes. Indisputably, that benefit now cannot be surrendered by the plaintiffs, and they do not suggest otherwise. Under these circumstances, there is no basis for voiding the contract or permitting plaintiffs to renounce particular provisions. Moreover, plaintiffs obtained another benefit from entering the agreement and being allowed to submit the Papers – i.e., standing to bring this action. That benefit can, and must be, surrendered if plaintiffs now claim that the agreement is void.<sup>3</sup>

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Given the contractual limitations on iParadigms' liability in this action, and plaintiffs' lack of any valid basis for disavowing their agreement to those limitations, iParadigms respectfully requests that the Court dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

### **STATEMENT OF FACTS**

#### **I. INTRODUCTION**

iParadigms is the owner and operator of a plagiarism detection system accessible over the Internet through the website Turnitin.com. See Compl. at ¶ 6. According to the complaint, Turnitin is used by hundreds of institutional clients in more than 70 countries. See id at ¶ 7.<sup>4</sup>

In July 2003, iParadigms and the Fairfax County Public Schools ("FCPS") entered into a contract implementing Turnitin in Fairfax County. See Klein Decl., at Ex. D; see also Compl. at

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<sup>4</sup> All of the facts herein are derived from the complaint. Although the details of the Turnitin service, and opinions about its effectiveness, are not relevant for purposes of resolving this motion, it should be noted that the complaint is larded with factual inaccuracies and baseless characterizations concerning Turnitin. A full description of Turnitin is provided at [http://turnitin.com/static/pdf/tii\\_brochurev2.pdf](http://turnitin.com/static/pdf/tii_brochurev2.pdf) Turnitin.com, which is appended to the Klein Decl. for the Court's convenience. See Klein Decl., at Ex. C.

¶ 10.<sup>5</sup> In reaching its determination to implement Turnitin in Fairfax County, the Fairfax County Schools Office of Instructional Technology Services (“FCSITS”) included findings in the contract that provided in relevant part:

iParadigm’s plagiarism prevention system has been helping educators identify and deter digital plagiarism since 1996. . . Used alone or in conjunction with plagiarism prevention, the additional online solutions help educators and student [sic] make the most of the web. Peer review makes it easy for educators to let their students anonymously critique and evaluate each other’s work, and Research Resources teach the ins and outs of plagiarism, research, and citation in the information age.

See FCPS contract with findings, annexed to the Klein Decl., at Ex. D.

Thereafter, in or around September 2006, McLean High School (“McLean”) indicated that it would implement Turnitin. See Compl. at ¶ 10. Despite a campaign to protest the implementation of Turnitin in McLean that was spearheaded by plaintiffs’ attorney, McLean determined that it was in the School and its students’ best interests to implement Turnitin. See Compl. at ¶ 12. Likewise, this school year Desert Vista High School (“Desert Vista”) determined that it was in the School’s and its students’ best interests to implement Turnitin. See Compl. at ¶ 13.

After deciding to implement Turnitin, plaintiffs’ allege that [McLean High School] “required all freshmen and sophomores (all of whom are minors) to submit unpublished manuscripts written in response to various class assignments to the Turnitin system” and “[i]f a student refused he/she was given two choices: get a Zero on the assignment, or ‘go’ to a different school that didn’t use the Turnitin system.” See Compl. at ¶ 10. Likewise, according to

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<sup>5</sup> Because the complaint refers to the FCPS contract with iParadigms at ¶ 2, the Court may rely on the contract for purposes of this 12(b)(6) motion. See e.g. Darcangelo v. Verizon Commc’ns, Inc., 292 F.3d 181, 195 (4th Cir. 2002); New Beckley, supra, 18 F.3d at 1164, citing Cortec Indus. v. Sum Holding L.P., supra, 949 at 47-48; Gasner v. County of Dinwiddie, 162 F.R.D. 280, 282 (E.D. Va. 1995), aff’d on other grounds, 103 F.3d 351 (4th Cir. 1996).

the complaint, Desert Vista “required students to submit their unpublished manuscripts to Turnitin.com, or get a zero on any related class assignment, or be ineligible for literary contests.” See Compl. at ¶ 13. Tellingly, plaintiffs do not allege that they actually submitted the Papers to either McLean or Desert Vista.<sup>6</sup> See Compl. at 14-17.

## **II. THE USAGE POLICY, AND THE CLICKWRAP AGREEMENT**

In order to access Turnitin.com, a student is required to sign in and click on an “I agree” icon, signifying agreement to the Turnitin contract. See Compl. at ¶ 11. Alternatively, the student can click on the link stating “I disagree – cancel profile” and he will not be able to access Turnitin. See id.

In relevant part, the Contract provides:

Turnitin and its services are maintained by iParadigms, LLC [“Licensor”], and offered to you, the user [“User”], conditioned on your acceptance without modification of the terms, conditions, and notices contained herein. Your use of this web site constitutes your agreement to all such terms, conditions, and notices.

\* \* \*

In no event shall iParadigms, LLC and/or its suppliers be liable for any direct, indirect, punitive, incidental, special, or consequential damages arising out of or in any way connected with the use of this web site or with the delay or inability to use this web site, or for any information, software, products, and services obtained through this web site, or otherwise arising out of the use of this web site, whether based n [sic] contract, tort, strict liability or otherwise, even if iParadigms, inc. Or [sic] any of its suppliers has been advised of the possibility of damages.

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A printed version of this agreement and of any notice given in electronic form shall be admissible in judicial or administrative

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proceedings based upon or relating to this agreement to the same extent and subject to the same conditions as other business documents and records originally generated and maintained in printed form.

See Klein Decl., at Ex. G (emphasis added)<sup>7</sup>.

In addition, every student who uses the Turnitin website is governed by the Usage Policy and the Terms and Conditions contained therein.

#### USAGE POLICY

#### IMPORTANT NOTICE:

THIS SITE AND RELATED SERVICES ARE PROVIDED SUBJECT TO THESE TERMS AND CONDITIONS. PLEASE READ THE FOLLOWING INFORMATION CAREFULLY. YOUR CONTINUED USE OF THIS SITE WILL INDICATE YOUR AGREEMENT TO BE BOUND BY THE TERMS AND CONDITIONS SET FORTH BELOW. IF YOU DO NOT AGREE TO THESE TERMS AND CONDITIONS, PROMPTLY EXIT THIS SITE.

These Terms and Conditions of Use (the "Terms and Conditions") govern your use of the Turnitin.com web site provided by iParadigms, LLC, including without limitation use of all services, content, data, images, information and other materials posted on or available through this Site (collectively, the "Site"). These Terms and Conditions are in addition to any other agreement you may have with iParadigms, LLC., including any agreement governing your use or your organization's use of iParadigms' products or services (e.g., iParadigms Registration Agreement).

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Limitation of Liability: NEITHER IPARADIGMS, NOR ITS LICENSORS OR SUPPLIERS, WILL BE LIABLE UNDER ANY THEORY FOR DAMAGES OF ANY KIND (INCLUDING WITHOUT LIMITATION DIRECT, INDIRECT, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY DAMAGES OR DAMAGES RESULTING FROM LOST PROFITS, LOST DATA, OR BUSINESS INTERRUPTION) ARISING FROM THE [SIC]

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<sup>7</sup> Because the complaint refers to the clickwrap agreement (hereinafter the "Contract" or "Clickwrap agreement") at ¶¶ 11, 12, and 18, the Court may rely on the Contract for purposes of this 12(b)(6) motion. See Citations in footnote 5, supra.

YOUR USE OF THE SITE AND THE INFORMATION CONTAINED THEREIN, HOWEVER ARISING, EVEN IF IPARADIGMS OR ITS REPRESENTATIVE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THIS LIMITATION DOES NOT APPLY TO THE EXTENT IT IS PROHIBITED BY LAW.

YOUR SOLE REMEDY FOR DISSATISFACTION WITH THE SITE, SITE-RELATED SERVICES, AND/OR HYPERLINKED WEB SITES IS TO STOP USING THE SITE AND/OR THOSE SERVICES.

See Klein Decl., at Ex. H(emphasis in original).

### **III. THE STUDENTS**

According to the complaint, A.V. and K.W. reside in public school districts in Fairfax County, Virginia and are both underclassmen at McLean in McLean Virginia. See Compl. at ¶ 1. In addition, E.N. and M.N. reside in Arizona and are underclassmen at the Desert Vista in the Tempe Union High School District in Phoenix, Arizona. *Id.* According to the complaint, no plaintiff is enrolled at the University of California, San Diego; the University of Dallas, Texas; the University of Minnesota, Twin Cities, the University of Indiana, Bloomington, and/or Freie Universitat, Berlin. See Compl. at ¶ 1.

### **IV. THE PAPERS**

There are six (6) papers at issue in this action for which plaintiffs have sought statutory damages. See Compl. at ¶¶ 14-17. Three of the papers, "Under A Pear Tree," "Golden Heart," and "Day is Weary," were allegedly submitted to Turnitin by the two Arizona students, E.N. and M.N. See *id.* at ¶¶ 16-17.<sup>8</sup>

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According to the complaint, the remaining three papers at issue in this litigation, “DBQ1: Ancient Greek Contributions,” “What Lies Beyond The Horizon,” and “Scenes of Realism were submitted to Turnitin by K.W. and A.V.”<sup>9</sup> See Compl. at ¶¶ 14-15. The third paper, “Scenes of Realism,” was submitted to the University of San Diego, California by A.V. See Klein Decl., at Ex. E.

### ARGUMENT

#### I. STANDARD ON A MOTION TO DISMISS

In considering a Rule 12(b)(6) motion, a court must “take the facts in the light most favorable to the plaintiff,” but the court “need not accept the legal conclusions drawn from the facts,” and “need not accept as true unwarranted inferences, unreasonable conclusions, or arguments.” Jordan v. Alternative Res. Corp., 458 F.3d 332, 338 (4th Cir. 2006) (citing E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P’ship, 213 F.3d 175, 180 (4th Cir. 2000)); see Field Auto City, Inc. v. Gen. Motors Corp., No. 1:06cv1174, 2007 WL 657402, at \*10 n.2 (E.D. Va. Feb.

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26, 2007) (“Of course, conclusory allegations, unwarranted deductions of fact, unreasonable or unwarranted inferences, or bare conclusions of law, which are legion in this complaint, are not required to be accepted as true on a motion to dismiss for failure to state a claim”); see also Bass v. E.I. DuPont de Nemours & Co., 324 F.3d 761, 765 (4th Cir. 2003), cert. denied, 540 U.S. 940 (2003). Indeed, conclusory allegations unsupported by any specific factual allegations are insufficient to survive a motion to dismiss. See, e.g., Simpson v. Welch, 900 F.2d 33 (4th Cir. 1990).

## **II. PLAINTIFFS ENTERED INTO VALID AND ENFORCEABLE AGREEMENTS THAT CONTAIN LIMITATION OF LIABILITY CLAUSES PRECLUDING LIABILITY IN THIS ACTION**

### **A. Plaintiffs Entered Valid and Enforceable Agreements**

In Virginia, the essential elements of a contract are offer and acceptance, with consideration. See Montagna v. Holiday Inns, Inc., 221 Va. 336, 346 (Va. 1980); see also Legal Servs. Corp. v. Client Centered Legal Servs. of Sw., 217 F. Supp. 2d 706, 712 (W.D. Va. 2002)(same).<sup>10</sup> With this standard in mind, there can be no doubt that plaintiffs assented to and entered into binding contracts with iParadigms.

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<sup>10</sup> Plaintiffs allege that Virginia law applies in this action despite the fact that two of the four plaintiffs reside in Arizona and, as far as the complaint provides, have absolutely no contact with Virginia. See Compl. at ¶ 25. iParadigms does not concede that Virginia law applies in this action, as opposed to Arizona law or California law as provided in the Contract. However, because contract law appears to be substantially similar in each jurisdiction, iParadigms will, for purposes of this motion only, reference Virginia law. See Brewster of Lynchburg, Inc. v. Dial Corp., 33 F.3d 355, 362 (4th Cir. 1994) (applying Arizona law) (“Under Arizona law, ‘for an enforceable contract to exist, there must be an offer, an acceptance, consideration, and sufficient specification of terms so that [the] obligations involved can be ascertained.’” (internal citation omitted); Division of Labor Law Enforcement v. Transpacific Transp. Co., 69 Cal. App. 3d 268, 275, 137 Cal. Rptr. 855, 859 (Cal. App. 1977) (“As frequently underlined, the vital elements of a cause of action based on contract are mutual assent (usually accomplished through the medium of an offer and acceptance) and consideration.”).

i. The Clickwrap agreement

In order to submit a paper to Turnitin and have standing to bring this lawsuit, each of the plaintiffs, and their lawyer, necessarily clicked “I Agree” acknowledging their acceptance of the terms of the Clickwrap agreement. See Compl. at ¶ 11; Klein Decl. at Ex. G (“Turnitin and its services are maintained by iParadigms, LLC [“Licensor”], and offered to you, the user [“User”], conditioned on your acceptance without modification of the terms, conditions, and notices contained herein”)(emphasis added). By clicking “I agree,” plaintiffs entered into a valid and enforceable agreement over the Internet. See Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d. Cir. 2004) (internal citations omitted) (“While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract); see also Treiber & Straub, Inc. v. U.P.S., Inc., 474 F.3d 379, 385 (7th Cir. 2007) (same); Forrest v. Verizon Commc’ns, Inc., 805 A.2d 1007, 1011 (D.C. Cir. 2002) (“[a] contract is no less a contract simply because it is entered into via a computer”); cf. Atlantic Asset Mgmt Group, Inc. v. Csira, 328 F. Supp. 2d 614, 618 (E.D. Va. 2004) (recognizing that the assertion of personal jurisdiction over a non-resident defendant was constitutional if contracts were entered on the defendant’s website).

In fact, courts routinely find clickwrap agreements, like the Contract at issue here, enforceable. See Forrest, 805 A.2d at 1010-11 (holding that clickwrap agreement was enforceable and that adequate notice was provided of clickwrap agreement terms where users had to click “Accept” to agree to the terms in order to subscribe); DeJohn v. The .TV Corp. Int’l., 245 F. Supp. 2d 913, 919 (N.D. Ill. 2003) (“click-wrap” agreement valid and enforceable contract and “[t]he fact that the contract is electronic does not affect this conclusion”); Koresko v. RealNetworks, Inc., 291 F. Supp. 2d 1157, 1162-63 (E.D. Cal. 2003) (clicking box on the screen marked, “I agree” on website evinced express agreement to terms); i.Lan Systems, Inc. v.

Netscout Serv. Level Corp., 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (clicking “I agree” box an appropriate way to form enforceable contract); Stomp, Inc. v. NeatO, LLC, 61 F. Supp. 2d 1074, 1081 (C.D. Cal. 1999) (enforcing assent to terms by clicking “accept” button); see also Microstrategy, Inc. v. Netsolve, Inc., 368 F. Supp. 2d 533, 537 n.1 (E.D. Va. 2005) (following the choice of law provision in a clickwrap agreement when choice of law was not questioned by parties).<sup>11</sup>

ii. The Usage Policy

Likewise, each time plaintiffs accessed the Turnitin website, they consented to the Terms and Conditions of the Usage Policy. See Klein Decl., at Ex. H (“YOUR CONTINUED USE OF THIS SITE WILL INDICATE YOUR AGREEMENT TO BE BOUND BY THE TERMS AND CONDITIONS SET FORTH BELOW. IF YOU DO NOT AGREE TO THESE TERMS AND CONDITIONS, PROMPTLY EXIT THIS SITE”) (emphasis in original). Terms and conditions on a website usage policy are enforceable. See Register.com, 356 F.3d at 403 (holding that terms of use imposed upon an internet user who made information queries on a domain name

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<sup>11</sup> To the extent that plaintiffs rely on the fact that they included a disclaimer at the bottom of each paper indicating that they did not consent to the archiving of their papers, such reliance is misplaced. Indeed, a party confronted with a clickwrap agreement can either click “I agree” and accept the terms of the agreement or exit the site. There is no third option to modify the terms of the agreement. See Register.com, 356 F.3d at 403 (“Each was offered access to information subject to terms of which they were well aware. Their choice was either to accept the offer of contract, taking the information subject to the terms of the offer, or, if the terms were not acceptable, to decline to take the benefits.”). In fact, the Usage Policy and the Clickwrap agreement provide that the terms could not be modified. See Klein Decl., at Ex. G (“Turnitin and its services are maintained by iParadigms, LLC [“Licensor”], and offered to you, the user [“User”], conditioned on your acceptance without modification of the terms, conditions, and notices contained herein”) and Ex. H (“YOUR CONTINUED USE OF THIS SITE WILL INDICATE YOUR AGREEMENT TO BE BOUND BY THE TERMS AND CONDITIONS SET FORTH BELOW. IF YOU DO NOT AGREE TO THESE TERMS AND CONDITIONS, PROMPTLY EXIT THIS SITE.”). In addition, plaintiffs and their attorney are, of course, well aware of the fact that nobody at iParadigms reads the submitted papers and that therefore, nobody would have seen the purported “disclaimer.”

registration website after learning of the terms constituted an acceptance of the terms, and reasoning that the user's explicit agreement to the terms were not a prerequisite to their enforceability); see also Fru-Con Const. Corp. v. County of Arlington, No. 1:06CV1, 2006 WL 273583, at \*2 (E.D. Va. Jan. 30, 2006) (citing Register.com with approval).

Here, because plaintiffs were well aware of the Terms and Conditions and the terms of the Clickwrap agreement since at least November 2006, see Compl. at ¶ 12, and they, nonetheless, continued to use Turnitin in order to submit the papers at issue for a grade and to commence this lawsuit, they are bound by both the Clickwrap agreement and the Terms and Conditions. See Register.com, 356 F.3d at 401-02.

**B. The Clickwrap Agreement and the Usage Policy Contain Express Limitation of Liability Clauses**

In Virginia, limitation of liability clauses, such as those found in the Clickwrap agreement and the Usage Policy, are enforceable. See Regency Photo & Video, Inc. v. Am. Online, Inc., 214 F. Supp. 2d 568, 573 (E.D. Va. 2002) ("In Virginia, waivers and limitations of liability in contracts are enforceable") (citing Blue Cross of Sw. Va. and Blue Shield of Sw. Va. v. McDevitt & St. Co., 234 Va. 191, 360 S.E.2d 825 (Va. 1987); Silver v. JTH Tax, Inc., No. Civ.A. 2:05CV126, 2005 WL 1668060, at \*7 (E.D. Va. June 21, 2005) (same). Both the Usage Policy and the Contract provided limitations of liability in favor of iParadigms.

Indeed, the Clickwrap agreement in relevant part provided that iParadigms would not be liable: (1) for any damages "arising out of or in any way connected with the use of this web site;" (2) for any "services obtained through this website;" or (3) "otherwise arising out of the use of this web site." See Klein Decl., at Ex. G (emphasis supplied). Likewise, the Usage Policy contained a limitation of liability clause that in relevant part provided that iParadigms would not be liable under any theory of damages "ARISING FROM [ ] YOUR USE OF THE SITE" and

that plaintiffs' "SOLE REMEDY FOR DISSATISFACTION WITH THE SITE [AND/OR] SITE-RELATED SERVICES, IS TO STOP USING THE SITE AND/OR THOSE SERVICES . . . ." See Klein Decl., at Ex. H (emphasis in original).

Accordingly, because the click-wrap agreement and the Usage Policy both provide that iParadigms shall not be liable for damages, or otherwise, arising out of plaintiffs' use of the Turnitin website, and because the Usage Policy provides that plaintiffs' sole remedy for dissatisfaction with Turnitin was to discontinue using Turnitin – not to deliberately use the site to bring this lawsuit – plaintiffs are precluded from seeking relief in this action arising out of their submission of papers to Turnitin. Cf. Combs v. Va. Elec. & Power Co., 259 Va. 503, 509, 525 S.E.2d 278, 282 (Va. 2000) (holding that the phrase "arising out of" in the context of a worker's compensation claim "pertains to the origin or cause of an injury") (internal citations omitted)).

### **III. THE COURT SHOULD IGNORE PLAINTIFFS' BASELESS ATTEMPTS TO AVOID THE CONTRACT AND USAGE POLICY**

In obvious recognition of the implications of the limitation of liability clauses in both the Usage Policy and the Click-wrap agreement, plaintiffs have preemptively pled two untenable contract defenses to avoid their obligations under those agreements. Plaintiffs are, in effect, asking this Court to validate their efforts to obtain the benefits of the bargain but disavow the corresponding obligations that come with the benefits. Indeed, plaintiffs seek to disaffirm their contractual obligations only after they have submitted papers to Turnitin and: (1) received grades in their respective classes; and (2) created standing to bring their copyright infringement claim. This Court should not condone plaintiffs' efforts.

#### **A. Plaintiffs' Duress Defense is Frivolous**

In Virginia, duress is defined as the "overbearing of a person's free will by an unlawful or wrongful act or by threat such that the party's consent to a contractual agreement is

involuntary.” Freedlander v. NCNB Nat. Bank of N.C., 921 F.2d 272 (4th Cir. 1990); Bond v. Crawford, 193 Va. 437, 444, 69 S.E.2d 470, 475 (Va. 1952). Furthermore, duress is not readily accepted as an excuse. Seward v. Am. Hardware Co., 161 Va. 610, 639, 171 S.E. 650, 662 (Va. 1933). It is with this standard in mind that plaintiffs’ duress claim must be scrutinized and rejected.

First, plaintiffs do not – nor could they – allege that iParadigms was the source of any duress or that iParadigms coerced them into registering for Turnitin. Instead, plaintiffs’ allege that McLean and Desert Vista required plaintiffs to submit class assignments to Turnitin, or get a zero on the assignment. See Compl. at ¶¶ 10 and 13. Even if the “threat” of receiving a zero on a paper could arguably be grounds for a duress defense – it is not – the source of the duress is not iParadigms and there is simply no support in Virginia law for the invalidation of a contract based on a claim of duress or undue influence of a third party. See Nelson v. Nelson, Record No. 0603-05-2, 2005 WL 1943248, at \*2 (Va. Ct. App. Aug. 16, 2005) (“[appellant] provides no support in Virginia law for the invalidation of a contract based on a claim of ‘duress or undue influence of a third party,’ and we know of none”); see e.g., Norfolk Div. of Soc. Servs. v. Unknown Father, 2 Va. App. 420, 435, 345 S.E.2d 533, 541 (Va. 1986) (“[t]he general rule is that ‘duress must have been exercised upon him or her who sets it up as a defense, by him who claims the benefit of the contract, or by someone acting in his behalf or with his knowledge.’”).

Second, even assuming plaintiffs could properly assert a third-party duress claim, there is no allegation in the complaint that iParadigms, Mclean, and/or Desert Vista did anything unlawful or wrongful to induce the plaintiffs to enter into the agreement. See Freedlander, 921 F.2d at 272; Bond, 69 S.E.2d at 475 (“[t]he authorities are in accord that the threatened act must be wrongful to constitute duress”). Here, the only potential allegation concerning duress is that

McLean and Desert Vista told the students that they could either submit their papers through Turnitin, or they would get a “zero” on the assignment. Even if this were true, it certainly does not rise to the level of an unlawful or wrongful threatened act. Tellingly, plaintiffs do not allege that they actually submitted the Papers to either McLean or Desert Vista.<sup>12</sup> See Compl. at ¶¶ 14-18.

Third, plaintiffs are precluded from claiming duress because they have retained the benefit of the bargain. See Freedlander, 921 F.2d at 272 (stating that the fact that the appellant received the benefit of the bargain belied any duress claim); 28 WILLISTON ON CONTRACTS § 71:9 (4th ed.) (“[t]he right of the injured party to avoid or rescind a contract entered into as a result of duress is a defeasible one which may be lost not only by affirmative acts in ratification of the transaction but, as in the case of fraud and most other invalidating causes, at least where any advantage has been obtained from the transaction by the injured party, by the failure promptly to surrender the advantage and manifest an election to avoid the transaction”). Here, the plaintiffs have received both the benefit of a grade on the Papers and they have also received the “benefit” of standing to bring this lawsuit.

Finally, plaintiffs have waived any right to assert a duress defense. Indeed, after submitting their Papers the first time under alleged “duress,” at least two of the remaining three plaintiffs, or their attorney, have subsequently resubmitted their papers to Turnitin in classrooms

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<sup>12</sup> This is not surprising because at least one plaintiff, A.V., voluntarily submitted his paper to a class at the University of California, San Diego where he was not enrolled. See Klein Decl. at Exs. E and F. In addition, it appears that A.V. has submitted E.N.’s paper to the University of Texas, Dallas where he was not enrolled. Because A.V. improperly used a class id and password to submit papers through Turnitin to public universities where he is not enrolled, it is not clear why he should be permitted to proceed in this action. Indeed, the only reason A.V.’s paper is archived in Turnitin is because he willfully misused the Turnitin system in order to bring this lawsuit. Accordingly, regardless of all other arguments, the Court should dismiss A.V. from this action.

at public universities in which they are not enrolled.<sup>13</sup> Accordingly, these plaintiffs have each waived any right to disaffirm the contract because they have deliberately used Turnitin again, after the initial submission, to purportedly bolster their claims in this action. Accordingly, for all of these reasons, plaintiffs' preemptive allegations relating to duress should be ignored and the Clickwrap agreement and Terms and Conditions should be enforced.

**B. Plaintiffs' Infancy Claim is Disingenuous**

In Virginia, "a contract with an infant is not void, only voidable by the infant upon attaining the age of majority." Zelnick v. Adams, 263 Va. 601, 608, 561 S.E.2d 711, 715 (Va. 2002) citing Mustard v. Wohlford's Heirs, 56 Va. (15 Gratt.) 329, 337 (Va. 1859); see Zelnick v. Adams, 269 Va. 117, 117, 606 S.E.2d 843, 844 (Va. 2005) (same). Once a contract is disaffirmed, "it is made void ab initio by relation, and the parties revert to the same situation as if the contract had not been made." Mustard, 56 Va. (15 Gratt.) 329, 1859 WL 4580, at \*7. In yet another effort to avoid their obligations under the Clickwrap agreement, plaintiffs disingenuously aver that because they are minors, the Clickwrap agreement is voidable. See Compl. at ¶¶ 1, 7, 10, 12, 14 – 18 and 25 (plaintiffs allege that Virginia law should govern "all aspects" of this case, including "voidability of a contract by a minor").

Indeed, the plaintiffs have received, and continue to receive benefits under the Clickwrap agreement and they can not now avoid the liability limitation in the Click-wrap agreement. See e.g., 5 WILLISTON ON CONTRACTS § 9:14 (4th ed.) ("If an infant enters into any contract subject to conditions or stipulations, he cannot take the benefit of the contract without the burden of the conditions or stipulations"); see Harden v. Am. Airlines, 178 F.R.D. 583, 587 (M.D. Ala. 1998)

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<sup>13</sup> As noted supra at footnotes 8 and 9, it appears that plaintiffs' counsel has been improperly logging on to Turnitin under a variety of identities and has been improperly submitting plaintiffs' papers to classes at public schools around the world where none of the plaintiffs are enrolled.

("[i]f the minor chooses benefits under the contract, he may not avoid his obligations thereunder") ("An infant who asserts contractual rights is bound by reciprocal obligations"); see also Morrow v. Norwegian Cruise Line Ltd., 262 F. Supp. 2d 474, 476 (M.D. Pa. 2002) (holding that because a minor plaintiff could "not give back, or in any way disgorge, the benefit of her contract, it would be inequitable to now release her from the obligations and consequences attached to that benefit"); Paster v. Putney Student Travel, Inc., No. CV 99-2062, 1999 WL 1074120, at\*2 (C.D. Cal. June 9, 1999) (holding that plaintiff could not "accept the benefits of a contract and then seek to void [based on her infancy] it in an attempt to escape the consequences of a clause that do not suit her").<sup>14</sup>

In addition to the benefit of receiving a grade, here, plaintiffs have egregiously retained the benefits of the Clickwrap agreement by filing this lawsuit. Indeed, if the plaintiffs hadn't clicked "I agree," then their registrations would not have been complete and they would have been unable to submit the papers at issue in this litigation. Thus, the plaintiffs are using the contract when it suits them, but seeking to avoid any reciprocal obligations when it creates a burden. Accordingly, the Court should reject plaintiffs' blatant effort to use their age as both a sword and a shield. See Sheller by Sheller v. Frank's Nursery & Crafts, Inc., 957 F. Supp. 150, 153 (N.D. Ill. 1997) (citing Shepherd v. Shepherd, 408 Ill. 364, 97 N.E.2d 273, 282 (Ill. 1951)).

This case is virtually on all fours with Sheller where the United States District Court for the Northern District of Illinois held that the plaintiffs, who were minors when they entered an employment agreement with defendant that contained an arbitration clause, could not bring suit in federal court alleging discrimination arising from the employment relationship and at the same time seek to void the arbitration clause on the grounds of infancy. 957 F. Supp. at 153-54.

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<sup>14</sup> For the same reasons stated supra in the discussion of duress and waiver, plaintiffs have waived any right to an infancy defense.

Indeed, the Sheller court recognized the axiom that “the privilege of minority ... is to be used as a shield and not as a sword.” Id. at 153 (citing Shepherd, 97 N.E.2d at 282. Specifically, the Sheller Court held:

The fundamental reason Plaintiffs are able to bring this lawsuit is because they were employed by Defendant. Had they not been employed by Defendant, they would not be eligible to maintain the instant Title VII suit, obviously. Had they not signed the employment application which contained the arbitration clause, they would not have been hired by Defendant. Thus, if the Court were to allow the minor Plaintiffs to disaffirm the contract, Plaintiffs would be retaining the advantage of employment-which entitled them to bring the instant Title VII suit-while repudiating their entire basis of employment-the employment application. In other words, Plaintiffs would be retaining the advantage of the contract-employment, which entitled them to bring this suit-while repudiating that very same contract.

Id. at 153-54. The holding in Sheller is plainly applicable in this case, a fortiori, given that the Contract and plaintiffs’ use of Turnitin plainly serves as the basis of this lawsuit.

Likewise, in Harden the United States District Court for the District of Alabama held that minor plaintiffs, who were cruise passengers who signed the back of their cruise tickets containing a forum selection clause, could not sue the cruise company to recover based on the cruise ticket and at the same time avoid their contractual obligations, including the forum selection clause. 178 F.R.D. 583. Indeed, despite plaintiffs’ status as minors, the Harden court found that the forum selection clause was enforceable based on the fact that the minors had sued to recover under the very contract they were seeking to void. Id. at 587. Specifically, the Court held that “[i]f the minor chooses benefits under the contract, he may not avoid his obligations thereunder.” Id. Similarly, here, plaintiffs have willfully taken the benefit of the Clickwrap agreement in order to bring this lawsuit and receive a grade on the Papers, and the Court should not condone their effort to avoid their reciprocal obligations.

