

Roger L. Zissu (rzissu@fzlj.com)
David Donahue (ddonahue@fzlj.com)
Jason D. Jones (jjones@fzlj.com)
Alexander L. Greenberg (agreenberg@fzlj.com)
FROSS ZELNICK LEHRMAN & ZISSU, P.C.
866 United Nations Plaza
New York, New York 10017
Tel.: (212) 813-5900
Fax: (212) 813-5901

Attorneys for Defendant Boundless Learning, Inc.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

PEARSON EDUCATION, INC.; CENGAGE
LEARNING, INC.; and BEDFORD FREEMAN
& WORTH PUBLISHING GROUP, LLC d/b/a
MACMILLAN HIGHER EDUCATION,

Plaintiffs,

v.

BOUNDLESS LEARNING INC. and
DOES 1-10,

Defendants.

Civil Action No. 1:12-cv-1986 (ALC)

JURY TRIAL DEMANDED

(Corrected)

**DEFENDANT’S AMENDED ANSWER TO FIRST AMENDED COMPLAINT AND
COUNTERCLAIMS FOR DECLARATION OF NON-INFRINGEMENT**

Defendant Boundless Learning, Inc. (“Boundless”), by its undersigned counsel, for its Amended Answer to the First Amended Complaint (“the Amended Complaint”) of Plaintiffs Pearson Education, Inc., Cengage Learning, Inc., and Bedford Freeman & Worth Publishing Group, LLC d/b/a Macmillan Higher Education (collectively “Plaintiffs”) and its Counterclaims herein, states as follows:

ANSWER

1. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1 of the Amended Complaint.

2. Denies the allegations of Paragraph 2 of the Amended Complaint, but alleges that Boundless provides a digital learning platform comprising curated, high-quality, open-licensed educational content in a multitude of subject areas (hereinafter the “Boundless Service”). Boundless further states that the Boundless Service was previously provided at the website www.boundlessnow.com, but has been provided on the website www.boundless.com since August 2012.

3. Denies the allegations of Paragraph 3 of the Amended Complaint.

4. Denies the allegations of Paragraph 4 of the Amended Complaint.

5. Denies the allegations of Paragraph 5 of the Amended Complaint.

6. Denies the allegations of Paragraph 6 of the Amended Complaint.

7. Denies the allegations of Paragraph 7 of the Amended Complaint.

8. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 8 of the Amended Complaint.

9. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 9 of the Amended Complaint.

10. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 10 of the Amended Complaint.

11. Denies the allegations of Paragraph 11 of the Amended Complaint, except admits that Boundless is a Delaware corporation and states that Boundless’s address is 207 South Street, Boston, MA 02111.

12. Denies the allegations of Paragraph 12 of the Amended Complaint.

13. Denies the allegations of Paragraph 13 of the Amended Complaint, which constitute conclusions of law as to which no response is required, except admits that Plaintiffs

purports to rely on 28 U.S.C. §§ 1331 and 1338 for purposes of establishing subject matter jurisdiction in this action.

14. Denies the allegations of paragraph 14 of the Amended Complaint, which constitute conclusions of law as to which no response is required, but states that Boundless does not contest the claim of personal jurisdiction over it in this Court.

15. Denies the allegations of paragraph 15 of the Amended Complaint, which constitute conclusions of law as to which no response is required, except admits that Plaintiffs purport to rely on 28 U.S.C. § 1391 for purposes of establishing venue in this action.

16. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 16 of the Amended Complaint.

17. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 17 of the Amended Complaint.

18. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 18 of the Amended Complaint.

19. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 19 of the Amended Complaint.

20. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 20 of the Amended Complaint, and respectfully refers the Court to Plaintiffs' works for their content.

21. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 21 of the Amended Complaint.

22. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 22 of the Amended Complaint.

23. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 23 of the Amended Complaint.

24. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 24 of the Amended Complaint.

25. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 25 of the Amended Complaint.

26. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 26 of the Amended Complaint, and respectfully refers the Court to Plaintiff Pearson's work for its content.

27. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 27 of the Amended Complaint, and respectfully refers to the document cited in Paragraph 27 for its contents.

28. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 28 of the Amended Complaint.

29. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 29 of the Amended Complaint.

30. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 30 of the Amended Complaint.

31. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 31 of the Amended Complaint.

32. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 32 of the Amended Complaint, and respectfully refers the Court to Plaintiff Cengage's work for its content.

33. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 33 of the Amended Complaint, and respectfully refers the Court to the document cited in Paragraph 33 for its contents.

34. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 34 of the Amended Complaint.

35. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 35 of the Amended Complaint.

36. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 36 of the Amended Complaint.

37. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 37 of the Amended Complaint.

38. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 38 of the Amended Complaint, and respectfully refers the Court to Plaintiff Macmillan's work for its content.

39. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 39 of the Amended Complaint, and respectfully refers the Court to the document cited in Paragraph 39 for its contents.

40. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 40 of the Amended Complaint.

41. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 41 of the Amended Complaint.

42. Denies the allegations of Paragraph 42 of the Amended Complaint, except admits that Boundless was founded by Ariel Diaz, Aaron White, and Brian Balfour, states that

Boundless was incorporated in 2011, and respectfully refers the Court to Boundless's website at www.boundless.com for its contents.

43. Denies the allegations of Paragraph 43 of the Amended Complaint.

44. Denies the allegations of Paragraph 44 of the Amended Complaint.

45. Denies the allegations of Paragraph 45 of the Amended Complaint, but admits that at such time Boundless had access to the editions of the textbooks titled *Biology*, *Principles of Economics*, and *Psychology* referred to in Paragraph 45 of the Amended Complaint.

46. Denies the allegations of Paragraph 46 of the Amended Complaint, but admits that Boundless consulted the 9th edition of textbook titled *Biology*, the 6th edition of the textbook titled *Principles of Economics*, and 9th edition of the textbook titled *Psychology* in creating the Boundless Service.

47. Denies the allegations of Paragraph 47 of the Amended Complaint.

48. Denies the allegations of Paragraph 48 of the Amended Complaint.

49. Denies the allegations of Paragraph 49 of the Amended Complaint.

50. Denies the allegations of Paragraph 50 of the Amended Complaint.

51. Denies the allegations of Paragraph 51 of the Amended Complaint, and respectfully refers the Court to the documents and advertising cited in Paragraph 51 for their contents.

52. Denies the allegations of Paragraph 52 of the Amended Complaint.

53. Denies the allegations of Paragraph 53 of the Amended Complaint, except admit that the Boundless Service comprises high-quality, open-licensed educational content culled by Boundless from open education resources and respectfully refers the Court to the documents cited in Paragraph 53 for their contents.

54. Denies the allegations of Paragraph 54 of the Amended Complaint, and respectfully refers the Court to the document cited in Paragraph 54 for its contents.
55. Denies the allegations of Paragraph 55 of the Amended Complaint.
56. Denies the allegations of Paragraph 56 of the Amended Complaint, and respectfully refers the Court to the parties' respective works for their contents.
57. Denies the allegations of Paragraph 57 of the Amended Complaint, and respectfully refers the Court to the parties' respective works for their contents.
58. Denies the allegations of Paragraph 58 of the Amended Complaint.
59. Denies the allegations of Paragraph 59 of the Amended Complaint.
60. Denies the allegations of Paragraph 60 of the Amended Complaint.
61. Repeats and realleges paragraphs 1 through 60 above as though fully set forth herein.
62. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 62 of the Amended Complaint.
63. Denies the allegations of Paragraph 63 of the Amended Complaint.
64. Denies the allegations of Paragraph 64 of the Amended Complaint.
65. Denies the allegations of Paragraph 65 of the Amended Complaint.
66. Repeats and realleges paragraphs 1 through 65 above as though fully set forth herein
67. Denies having knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 67 of the Amended Complaint.
68. Denies the allegations of Paragraph 68 of the Amended Complaint.
69. Denies the allegations of Paragraph 69 of the Amended Complaint.

70. Denies the allegations of Paragraph 70 of the Amended Complaint.

71. Repeats and realleges paragraphs 1 through 70 above as though fully set forth herein

72. Denies the allegations of Paragraph 72 of the Amended Complaint.

73. Denies the allegations of Paragraph 73 of the Amended Complaint.

74. Denies the allegations of Paragraph 74 of the Amended Complaint.

75. Denies the allegations of Paragraph 75 of the Amended Complaint.

76. Repeats and realleges paragraphs 1 through 75 above as though fully set forth herein.

77. Denies the allegations of Paragraph 77 of the Amended Complaint.

78. Denies the allegations of Paragraph 78 of the Amended Complaint.

79. Denies the allegations of Paragraph 79 of the Amended Complaint.

80. Denies the allegations of Paragraph 80 of the Amended Complaint.

81. Repeats and realleges paragraphs 1 through 81 above as though fully set forth herein.

82. Denies the allegations of Paragraph 82 of the Amended Complaint.

83. Denies the allegations of Paragraph 83 of the Amended Complaint.

84. Denies the allegations of Paragraph 84 of the Amended Complaint.

85. Denies the allegations of Paragraph 85 of the Amended Complaint.

86. Denies that Plaintiffs are entitled to any of the relief sought in their Prayer for Relief, ¶¶ 1-10, contained on pages 23-24 of the Amended Complaint.

AFFIRMATIVE COMPLETE AND/OR PARTIAL DEFENSES

FIRST DEFENSE: FAILURE TO STATE A CLAIM

Plaintiffs' Amended Complaint fails to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6).

SECOND DEFENSE: VIOLATION OF RULE 8(a)

Plaintiffs' Amended Complaint violates Fed. R. Civ. P. 8(a), which requires a "short and plain statement of the claims showing that the pleader is entitled to relief." As such, Boundless is not required to separately admit or deny each of the multiple allegations contained in each enumerated paragraph of the Amended Complaint.

THIRD DEFENSE: NON-INFRINGEMENT

The Boundless Service does not currently infringe and has never previously infringed any copyright claimed to be owned by Plaintiffs in their textbooks or any other work.

FOURTH DEFENSE: NON-COPYRIGHTABLE MATERIAL

The alleged similarities between the parties' works at issue relate to material that is not original with Plaintiffs, not protected by copyright, and/or is in the public domain.

FIFTH DEFENSE: COPYRIGHT FAIR USE

The fair use doctrine provides Boundless a complete defense to any claim by Plaintiffs for copyright infringement.

SIXTH DEFENSE: UNCLEAN HANDS AND INEQUITABLE CONDUCT

Any claim by Plaintiffs for copyright infringement is barred by their own unclean hands and inequitable conduct.

SEVENTH DEFENSE: COPYRIGHT MISUSE

Any claim by Plaintiffs for copyright infringement is barred by the doctrine of copyright misuse and Plaintiffs' abuse of the copyright monopoly.

EIGHTH DEFENSE: TRADEMARK FAIR USE

The fair use doctrine provides Boundless a complete defense to Plaintiffs' claims for unfair competition/false designation of origin and false advertising under the Lanham Act.

COUNTERCLAIMS

NATURE OF COUNTERCLAIMS

1. Defendant and Counterclaim-Plaintiff Boundless Learning, Inc. ("Boundless") hereby seeks a declaratory judgment pursuant to 28 U.S.C. § 2201, Fed. R. Civ. P. 57, and The Copyright Act of 1976, 17 U.S.C. § 101, *et seq.* that (1) Boundless Aligned Textbooks and (2) Boundless Concepts (each defined below), as they are currently available on Boundless's website, *www.boundless.com*, do not violate any copyright of Plaintiffs and Counterclaim-Defendants Pearson Education, Inc., Cengage Learning, Inc. and Bedford, Freeman & Worth Publishing Group, LLC d/b/a Macmillan Higher Education. Boundless also seeks its attorneys' fees and costs, and such other relief as the Court deems appropriate.

PARTIES TO THE COUNTERCLAIMS

2. Boundless is a Delaware corporation with its principal place of business located at 207 South Street, Boston, MA 02111.

3. Upon information and belief, Plaintiff and Counterclaim-Defendant Pearson Education, Inc. ("Pearson") is a Delaware corporation with its principal place of business located at One Lake Street, Upper Saddle River, NJ 07458.

4. Upon information and belief, Plaintiff and Counterclaim-Defendant Cengage Learning, Inc. (“Cengage”) is a Delaware corporation with its principal place of business located at 200 First Stamford Place, 4th Floor, Stamford, CT 06902.

5. Upon information and belief, Plaintiff and Counterclaim-Defendant Bedford, Freeman & Worth Publishing Group, LLC d/b/a Macmillan Higher Education (“Macmillan”) is a New York limited liability company with its principal place of business located at 41 Madison Avenue, New York, NY 10010.

JURISDICTION AND VENUE FOR THE COUNTERCLAIMS

6. This Court has subject-matter jurisdiction of this action under 28 U.S.C. §§ 2201, 2202, 1331 and 1338.

7. This Court has personal jurisdiction over each of the Plaintiffs and Counterclaim-Defendants (hereinafter, “Plaintiffs”) because, upon information and belief, they each do and/or transact substantial business in the State of New York out of which Boundless’s counterclaims arise. N.Y. C.P.L.R. §§ 301 and 302.

8. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and 1400(a).

FACTUAL ALLEGATIONS OF COUNTERCLAIMS

Boundless’s Mission

9. Founded in March 2011, Boundless is a company active in the rapidly growing sector of education technology—a sphere of business that leverages the latest developments of the digital age to improve the American education system.

10. The Internet abounds with openly-accessible information on nearly every subject, most of which is made available on reference sites, such as Wikipedia.org, government and

research sites, such as those of U.S. Geological Survey (usgs.gov) and the National Institutes of Health (nih.gov), and via other open educational resources (“OER”) created primarily by faculty engaged in course development and collaborative teaching and research.

11. Despite such relevant information being freely available, according to an article published by The Huffington Post in January 2013, “[c]ollege textbook prices are 812 percent higher than they were a little more than three decades ago,” more than tripling the rate of inflation over the same period of time. Tyler Kingkade, *College Textbook Prices Increasing Faster Than Tuition and Inflation*, The Huffington Post, http://www.huffingtonpost.com/2013/01/04/college-textbook-prices-increase_n_2409153.html (last updated Jan. 4, 2013, 5:39 PM). The article also cites research by the College Board stating that a student’s “annual cost of books and materials [averages] at \$1,168.” *Id.*

12. Part of the reason for the increase in prices of traditional textbooks despite the rapid decrease in the cost of obtaining educational content is the oligopolistic character of the textbook market. According to a 2009 article published in *Businessweek*, citing a 2006 report by the U.S. Department of Education Advisory Committee on Student Financial Assistance, “five publishers—Thomson [now known as Cengage], Wiley, Houghton-Mifflin, Pearson and The McGraw-Hill Companies—control the market, putting out about 80% of all college texts.” Rachel Z. Arndt, *Paying for College: Textbooks for Tightwads*, BusinessWeek.com, http://www.businessweek.com/bschools/content/aug2009/bs20090826_069900.htm (last visited Mar. 5, 2013).

13. Because the existing market for college textbooks did not take advantage of the efficiencies of the digital age, namely, the wealth of OER content freely available to students, Boundless took upon itself the mission of adapting and distributing this wealth of high-quality

free and openly licensed content for use by students as educational materials for their college courses—at no cost to the students.

Boundless Content and Boundless Service

14. To fulfill its mission, Boundless engages in a process of searching for and assembling openly licensed educational content available on the Internet, selecting the highest quality of such materials relevant to a particular subject, synthesizing disparate concepts into coherent units on each particular topic within that subject, and editing and illustrating the resulting narrative into a concise and consistent format. At this time, Boundless offers educational content covering eighteen academic subjects. Hereinafter, as it relates to introductory biology, economics and psychology, such content will be referred to as the “Boundless Content.”

15. Boundless devoted substantial resources to creating the Boundless Content, both financially and measured in the number of individuals who performed the work, including those with advanced degrees in relevant subject matter and other significant academic qualifications and professional experience.

16. Boundless also created, and has since been continually improving, software that allows users—students, faculty and anyone else with access to the Internet—to view and interact with Boundless Content via Boundless’s website and mobile application (the “Boundless Service”).

17. The Boundless Service allows for rapid searching, highlighting, annotation and creation of custom summaries of the Boundless Content. It also includes such value-added features as study guides, flashcards, quizzes and SmartNotes, a feature unique to the Boundless

Service that distills long-form content into key points and terms to enable students to study more effectively.

The Launch of BoundlessNow.com and Boundless Aligned Textbooks

18. It is a common practice among the traditional textbook publishers to ensure that their textbooks cover the same subject matter as a competitor’s textbook.

19. Given the industry practice and in order to offer the Boundless Content in a way that is useful for the students who enroll in classes with assigned textbooks, Boundless, in addition to offering other educational materials, aligns its Boundless Content to the material presented in existing, traditional textbooks, including Plaintiffs’ textbooks at issue in this case.

20. In August 2011, in preparation for the Fall semester, Boundless launched the first version of the Boundless Service on its website at *www.boundlessnow.com* (“BoundlessNow.com”).

21. Among the first materials to be offered on BoundlessNow.com were digital textbooks featuring Boundless Content aligned to the content of *Biology* 9th edition by Jane Reece, *et al.*, published by Pearson, *Principles of Economics* 6th edition by Gregory Mankiw, published by Cengage, and *Psychology* 9th edition by David Myers, published by MacMillan (together, “Plaintiffs’ Textbooks”). Boundless Content aligned to Plaintiffs’ Textbooks will hereinafter be referred to as “Boundless Aligned Textbooks.”

22. As is true for all the rest of the materials published via the Boundless Service to date, the Boundless Aligned Textbooks were offered to students—and any other users of BoundlessNow.com—free of charge.

The Launch of Boundless.com and the New Versions of Boundless Aligned Textbooks

23. In August 2012, Boundless launched a new version of the Boundless Service accessible at *www.boundless.com* (“Boundless.com”). Any visitor to Boundless.com could—and still can—sign up and gain access to the Boundless Service and the concomitant Boundless Content free of charge by simply sharing their name and email address with Boundless and selecting a password.

24. At approximately the same time, BoundlessNow.com was phased out and is no longer accessible to the general public.

25. In the ensuing months, Boundless made significant changes to the Boundless Content available on Boundless.com. As a result, Boundless.com currently boasts a completely re-designed user interface, additional features, additional content and alignments and revised and improved versions of previously-existing Boundless Content.

26. The Boundless Content that is currently accessible at Boundless.com includes revised versions of the Boundless Aligned Textbooks.

27. However, the currently available versions of the Boundless Aligned Textbooks are different in many significant respects, including text, illustrations, length and visual presentation, from the since-discontinued versions found on BoundlessNow.com.

Boundless Concepts

28. With time, Boundless recognized that its high-quality, carefully selected Boundless Content was being used by visitors to its site in lieu of other reference materials.

29. To facilitate the use of Boundless Content for reference purposes, in February 2012 Boundless launched a new product, “All Concepts,” that provides visitors to Boundless.com, without a need to log in, access to an alphabetically arranged library of concepts

in any given subject. Boundless’s “All Concepts” materials in biology, economics and psychology will hereinafter be referred to as the “Boundless Concepts.”

30. Boundless Concepts include all of the Boundless Content used in the Boundless Aligned Textbooks as well as some additional Boundless Content in each subject.

Plaintiffs’ Lawsuit

31. On March 16, 2012, Pearson, Cengage and MacMillan filed the current lawsuit against Boundless alleging, among other claims, that the then-existing versions of the Boundless Aligned Textbooks infringe the copyright in Plaintiffs’ Textbooks by “copying the original selection, arrangement and other protected expression.” Am. Comp. (Dkt. No. 24) at ¶ 7.

32. At the time of the filing of the lawsuit in March 2012, Boundless.com had not yet been launched and only BoundlessNow.com and the now-discontinued versions of the Boundless Aligned Textbooks were in existence.

33. Nevertheless, as the case has progressed, it has become clear, despite the many differences between BoundlessNow.com and Boundless.com, that the scope of Plaintiffs’ pursuit and development of their claims, including the remedies sought, encompasses both Boundless’s former and current websites.

34. Plaintiffs’ conduct during this litigation, including their discovery requests, indicates that Plaintiffs consider the Boundless Content, as it is currently incorporated into the variety of Boundless’s products on Boundless.com, to infringe their respective copyrights in Plaintiffs’ Textbooks.

35. Upon information and belief, Plaintiff’s consider that the Boundless Aligned Textbooks and Boundless Concepts, as both are currently available on Boundless.com, infringe or violate Plaintiffs’ rights under copyright in their respective Plaintiffs’ Textbooks.

36. Boundless cannot—and should not have to—operate its business under a threat or calculated cloud of uncertainty as to Plaintiffs’ claims relating to Boundless’s current products.

37. Accordingly, on February 21, 2013, Boundless’s counsel sent a letter to Plaintiffs’ counsel inquiring whether Plaintiffs contend that the Boundless Aligned Textbooks and the Boundless Concepts accessible at Boundless.com infringe Plaintiffs’ rights in Plaintiffs’ Textbooks. *See Exhibit A.*

38. On March 4, 2013, Plaintiffs responded and declined to answer Boundless’s question “at this time,” but nevertheless made clear their intention to utilize their claims in this action to interfere with and deter Boundless from offering the Boundless Content as embodied in its current and future products. In an effort to avoid the scope of the issues they have pursued in this case, Plaintiffs’ counsel proclaimed that Plaintiffs are focused only “on proceeding on the claims that are currently before the Court,” but at the same time inconsistently asserted that they “have little doubt that the Court’s resolution of Plaintiffs’ claims will inform [Boundless’s] current and future business practices” and that Boundless’s “concern about a ‘cloud of uncertainty’ will be addressed by this case moving forward” *See Exhibit B.*

39. In light of Plaintiffs’ lawsuit, Plaintiffs’ conduct in the course of this case and Plaintiffs’ response to Boundless’s February 21 letter, Boundless now seeks a declaratory judgment against each of the Plaintiffs to establish that (i) the Boundless Aligned Textbooks as they currently exist on Boundless.com do not infringe or violate any copyrights that any of the Plaintiffs owns in Plaintiffs’ Textbooks, and (ii) the Boundless Concepts do not infringe or violate any copyrights that any of the Plaintiffs owns in Plaintiffs’ Textbooks.

40. Such a declaration is necessary to resolve the substantial controversy described above between Boundless and each of the Plaintiffs with respect to such Boundless Aligned

Textbooks and Boundless Concepts, which clearly have adverse legal interests with respect thereto.

41. The substantial and real controversy between these adverse parties is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment, as evidenced by the fact that Plaintiffs have already filed this lawsuit.

COUNT I: DECLARATION OF NON-INFRINGEMENT OF COPYRIGHT

The Boundless Aligned Textbooks on Boundless.com

42. Boundless realleges and incorporates by reference each of the allegations set forth in paragraphs 1-41 above as if fully set forth herein.

43. The Boundless Aligned Textbooks as they currently exist on Boundless.com do not infringe or violate any rights under copyright that any of the Plaintiffs owns in Plaintiffs' Textbooks because, *inter alia*, the Boundless Aligned Textbooks as they currently exist on Boundless.com do not copy any protectable elements of Plaintiffs' Textbooks and because there is no actionable similarity of protectable material between the Boundless Aligned Textbooks and the respective Plaintiffs' Textbooks and there is no other violation of rights under copyright in Plaintiffs' Textbooks by reason of the Boundless Aligned Textbooks.

44. Accordingly, Boundless seeks a declaration that the Boundless Aligned Textbooks as they currently exist on Boundless.com do not violate any rights in copyright that any of the Plaintiffs owns in Plaintiffs' Textbooks.

COUNT II: DECLARATION OF NON-INFRINGEMENT OF COPYRIGHT

The Boundless Concepts on Boundless.com

45. Boundless realleges and incorporates by reference each of the allegations set forth in paragraphs 1-44 above as if fully set forth herein.

46. The Boundless Concepts do not infringe or violate any rights under copyright that any of the Plaintiffs owns in Plaintiffs' Textbooks because, *inter alia*, the Boundless Concepts do not copy any protectable elements of Plaintiffs' Textbooks and because there is no actionable similarity of protectable material between the Boundless Concepts and the respective Plaintiffs' Textbooks and there is no other violation of rights under copyright in Plaintiffs' Textbooks by reason of the Boundless Concepts.

47. Accordingly, Boundless seeks a declaration that the Boundless Concepts do not do not violate any rights in copyright that any of the Plaintiffs owns in Plaintiffs' Textbooks.

PRAYER FOR RELIEF

WHEREFORE, Boundless prays for judgment as follows:

- A. Dismissing Plaintiffs' First Amended Complaint with prejudice;
- B. Declaring and adjudging that the Boundless Aligned Textbooks as they currently exist on Boundless.com do not infringe any copyrights that any of the Plaintiffs owns in Plaintiffs' Textbooks;
- C. Declaring and adjudging that the Boundless Concepts do not infringe any copyrights that any of the Plaintiffs owns in Plaintiffs' Textbooks;
- D. Permanently enjoining each Plaintiff from asserting claims or filing actions against Boundless arising out of Boundless's creation, use, distribution or display of the Boundless Aligned Textbooks and the Boundless Concepts;
- E. Awarding Boundless its reasonable attorney's fees and costs incurred in defending against Plaintiffs' First Amended Complaint and in pursuing its counterclaims pursuant section 505 of the Copyright Act, 17 U.S.C. § 505; and

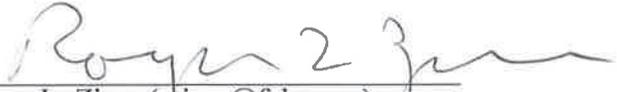
F. Granting Boundless such other and further relief as the Court may deem just and proper.

JURY DEMAND

Boundless demands a trial by jury of all issues so triable.

Dated: New York, New York
March 6, 2013

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: 

Roger L. Zissu (rzissu@fzlj.com)
David Donahue (donahue@fzlj.com)
Jason D. Jones (jjones@fzlj.com)
Alexander L. Greenberg (agreenberg@fzlj.com)
866 United Nations Plaza
New York, NY 10017
Tel: (212) 813-5900
Fax: (212) 813-5901

*Attorneys for Defendant
Boundless Learning, Inc.*