

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

SPEAR MARKETING, INC.

Plaintiff,

v.

BANCORPSOUTH BANK and
ARGO DATA RESOURCE CORPORATION

Defendants.

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CIVIL ACTION NO. _____

NOTICE OF REMOVAL

Defendants ARGO Data Resource Corporation and BancorpSouth Bank (collectively, “Defendants”), without waiving any challenges to jurisdiction, venue, or lack of proper service, file this Notice of Removal pursuant to 28 U.S.C. § 1446 and state as follows:

I.

STATEMENT OF THE CASE

On August 10, 2012, Plaintiff Spear Marketing, Inc. (“SMI”) filed its Original Petition in the 68th District Court of Dallas County, Texas, Cause No. 12-8901 (the “State Court Action”), asserting claims for violation of the Texas Theft Liability Act, misappropriation of trade secrets, unjust enrichment, fraud, constructive fraud, breach of contract, tortious interference, unfair competition, and civil conspiracy. *See* Ex. E, Orig. Pet. The Original Petition is premised on allegations that Defendants copied, communicated, and transmitted writings and other materials belonging to SMI to create a cash inventory optimization software solution that SMI alleges competes with its Internet-based VaultWorks software system. *See, e.g.* Ex. E. Orig. Pet. at ¶¶ 35-38, 42-43, 48, 77, 81-82. SMI served the Original Petition on Defendants on August 10,

2012. *See* Exs. C, D, Citations to Defendants. This Notice of Removal is therefore timely filed pursuant to 28 U.S.C. §1446(b) within thirty days of Defendants' receipt of SMI's Original Petition. Defendants did not file an answer to the Original Petition in the State Court Action, but intend to file a responsive pleading within seven days of filing this Notice of Removal in compliance with Rule 81(c)(2) of the Federal Rules of Civil Procedure.

II.

GROUND FOR REMOVAL

Removal to this Court is proper pursuant to 28 U.S.C. §§ 1331, 1338(a), (b), and 1441(a), (c) because the claims asserted in SMI's Original Petition are completely preempted by the United States Copyright Act. *See* 17 U.S.C. § 301(a); *Aldridge v. The Gap, Inc.*, 866 F. Supp. 312, 313-14 (N.D. Tex. 1994); *Gemcraft Homes v. Sumurdy*, 688 F. Supp. 289, 294-95 (E.D. Tex. 1988). Although the Original Petition does not specifically state a claim for copyright infringement, the preemptive force of section 301(a) of the Copyright Act transforms preempted state-law claims into federal claims for purposes of the well-pleaded complaint rule. *See Globberanger Corporation v. Software AG*, ___ F.3d ___, 2012 WL 3538494, at *3 (5th Cir. Aug. 17, 2012). State-law claims are preempted by the Copyright Act when the claims (i) fall within the subject matter of copyright and (ii) seek to protect rights equivalent to one or more of the exclusive rights protected by the Copyright Act, as set forth in 17 U.S.C. 106. *See id.* at *4; *Daboub v. Gibbons*, 42 F.3d 285, 288-89 (5th Cir. 1995).

Copyrightable subject matter consists of "original works of authorship fixed in any tangible medium of expression," such as literary works (including software and computer programs), pictorial works, and graphic works. 17 U.S.C. § 102; *Quantlab Techs. Ltd. v. Godlevsky*, 719 F. Supp. 2d 766, 773 (S.D. Tex. 2010)("computer code is among the types of

works subject to copyright protection”)(citing *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255, 259 (5th Cir. 1988). Additionally, cases involving non-copyrightable subject matter, such as ideas, still fall within the subject matter of copyright since preemption bars state law claims involving copyrightable as well as non-copyrightable matter. See *Synercom Tech., Inc. v. University Computing Co.*, 474 F. Supp. 37, 43-44 (N.D. Tex. 1979); *Keane v. Fox Television Station, Inc.*, 297 F. Supp. 2d 921, 944-45 (S.D. Tex. 2004). The exclusive rights protected by the Copyright Act include the rights to (i) reproduce, (ii) create derivative works, (iii) distribute, (iv) perform, and (v) display the material at issue. 17 U.S.C. § 106.

SMI's Original Petition alleges, among other things, that Defendants “*copied* objects, *materials*, devices or substances, *including writings*” belonging to SMI and then “*communicated and transmitted*” the copied materials. See Ex. E. Orig. Pet. at ¶¶ 42, 43 (emphasis added). Such allegations, alone, meet the test for preemption since writings indisputably fall within the subject matter of copyright, and copying, communicating, and transmitting are rights equivalent to those protected by copyright. See 17 U.S.C. §§ 102, 106; *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 789 (5th Cir. 1999). Moreover, in addition to writings and other materials falling within the subject matter of copyright, the subject matter at issue is indisputably SMI's Internet-based cash management software program and ARGO's cash management software program. See Ex. E, Orig. Pet. at ¶¶ 13-14, 18-19, 28, 35-38. Each of SMI's claims hinges on the allegation that Defendants copied and in some way used or reproduced its writings, software, and “ideas” (see generally Ex. E, Orig. Pet.), and the claims are therefore preempted by the Copyright Act.

Courts in the Fifth Circuit have repeatedly held that claims such as those asserted by SMI, when falling within the subject matter of copyright, are preempted. See *Alcatel*, 166 F.3d

at 785-88 (unfair competition by misappropriation preempted); *Daboub*, 42 F.3d at 289-90 (conversion and misappropriation claims preempted); *M-I LLC v. Stelly*, 733 F. Supp. 2d 759, 788-792 (S.D. Tex. 2010)(tortious interference, Texas Theft Liability Act, conspiracy, and conversion claims preempted); *Keane*, 297 F. Supp. 2d at 945 (S.D. Tex. 2004)(misappropriation of trade secrets, unfair competition, and breach of implied contract claims preempted); *Tavormina v. Evening Star Productions, Inc.*, 10 F. Supp. 2d 729, 733-34 (S.D. Tex. 1998)(unjust enrichment and breach of contract claims preempted); *Gemcraft Homes*, 688 F. Supp. at 294-95 (tortious interference and conversion claims preempted). And, preemption is appropriate even when non-copyrightable subject matter, such as ideas, are at issue. *See Synercom*, 474 F. Supp. at 43-44; *Keane*, 297 F. Supp. 2d at 944-45 (S.D. Tex. 2004). Since the Original Petition and the causes of action asserted therein are based upon the copying of both copyrightable writings and software and non-copyrightable ideas, SMI's claims are completely preempted by the Copyright Act, and removal is proper. *Aldridge*, 866 F. Supp. 313-14 (finding removal proper based on complete copyright preemption and denying motion to remand); *Gemcraft Homes*, 688 F. Supp. at 294-95 (same).

III.

ATTACHMENT OF STATE COURT FILINGS

A certified copy of the docket sheet in the State Court Action, together with all pleadings filed in the State Court Action, is attached to this Notice of Removal at Exhibits A-E.

IV.

NOTICE OF REMOVAL GIVEN TO STATE COURT

Notice of Defendants' removal to federal court will be filed in the 68th Judicial District Court of Dallas County, Texas, on this same date (the "State Court Notice"). A copy of the State Court Notice to be provided to the state court is attached at Exhibit F.

V.

PRAYER

WHEREFORE, Defendants respectfully request that further proceedings in the State Court Action be discontinued and that Cause No. 12-8901 in the District Court of Dallas County, Texas, 68th Judicial District, be removed to the United States District Court for the Northern District of Texas, Dallas Division, and that this Court assume full jurisdiction over this action as provided by law.

Respectfully submitted,

/s/ David H. Harper

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served on the attorneys of record in this case in accordance with the Texas Rules of Civil Procedure on the 4th day of September, 2012.

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Via CM/RRR and E-mail

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