

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

MARLON BLACKWELL
ARCHITECTS, P. A.

Plaintiff,

v.

HBG DESIGN, INC.;
SARACEN DEVELOPMENT, LLC;
and JOHN LANE BERREY in his
official capacity as Chairman of the
Quapaw Tribal Business Committee

Defendants.

Case No. 4:19-CV-925-KGB

PLAINTIFF’S RESPONSE IN OPPOSITION TO MOTIONS TO DISMISS

Plaintiff Marlon Blackwell Architects, P.A. (“MBA”) submits this Response in Opposition to the Motions to Dismiss filed by Defendants HBG Design, Inc. (“HBG”), Saracen Development, LLC (“Saracen”) and Chairman John Lane Berrey:

I. INTRODUCTION

In 2018 and early 2019, Plaintiff Marlon Blackwell Architects “performed a substantial amount of architectural design work for the Quapaw Nation’s Saracen Casino Resort project in Pine Bluff, Arkansas.” *See* Doc. 1, ¶ 1. Long after MBA began this work, Defendant HBG was eventually “brought on to assist with the project.” *Id.* The Quapaw Nation agreed to pay MBA

and HBG an architectural fee of 6% of the project's overall budget, which MBA and HBG agreed to split amongst themselves 34.42% and 65.58%, respectively. *See id.* at ¶¶ 1, 46. However, HBG subsequently misled Quapaw Nation Chairman Berrey about MBA's conduct and work on the project, causing MBA to be removed from it. *See id.* at ¶¶ 1, 65–68. HBG did this in order to pocket MBA's share of the fee split for itself, *see id.* at ¶¶ 68–69, and both HBG and the Quapaw Nation have refused to pay MBA what it is owed under their agreements with it, *see id.* at ¶ 1. Furthermore, they are continuing to use MBA's copyrighted architectural designs without MBA's authorization and without crediting MBA for its authorship of them. *Id.*

MBA filed this fifty-five page fact intensive lawsuit on December 20, 2019, against HBG, Chairman Berrey, and Saracen, which is a wholly-owned subsidiary of the Quapaw Nation's Downstream Development Authority that was created by the Quapaw Nation in order "to own, finance, manage, and operate the [Saracen] Casino." *See id.* at ¶ 4. MBA's Complaint asserts five causes of action: (1) copyright infringement against all Defendants; (2) tortious business interference against HBG; (3) breach of contract against HBG; (4) unjust enrichment against HBG and Saracen Development; and (5) a request for a permanent injunction against all Defendants. *See id.* at ¶¶ 92–115.

All three Defendants have filed separate motions to dismiss MBA's Complaint under Rule 12 of the Federal Rules of Civil Procedure. The motions filed by HBG and Saracen have a significant amount of overlap in their theories and argumentation, contending that MBA has failed to allege facts sufficient to state a claim for relief on any of its counts. The motion filed by Chairman Berrey is rather different from the other two, in that it argues that sovereign immunity bars this lawsuit against him. This Response addresses all three of those motions. Below, the

applicable legal standard will be recited. Then, this Response will simultaneously address the motions filed by HBG and Saracen. After that, it will turn to the motion filed by Chairman Berrey.

II. LEGAL STANDARD

As this Court has previously explained:

Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a “complaint must contain sufficient factual matter, accepted as true, ‘to state a claim to relief that is plausible on its face.’” *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A claim is plausible on its face “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 588 F.3d at 678 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). “When ruling on a motion to dismiss, the district court must accept the allegations contained in the complaint as true and all reasonable inferences from the complaint must be drawn in favor of the nonmoving party.” *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001) (citing *Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996)).

Martin v. Julian, 2019 WL 7018911, at *2 (E.D. Ark. Dec. 19, 2019).

III. HBG’S AND SARACEN’S MOTIONS TO DISMISS SHOULD BE DENIED.

HBG and Saracen both contend that all counts against them in MBA’s Complaint should be dismissed for failure to state a claim. In addition to their argument of factual insufficiency with respect to some of these counts, they argue that all of MBA’s state-law claims against them are preempted by federal copyright law. In this Section, MBA will address HBG’s and Saracen’s arguments on the following topics, in the following sequence: (A) MBA’s claim for copyright infringement; (B) MBA’s request for statutory damages under the Copyright Act; (C) MBA’s claim for breach of contract; (D) MBA’s claim for tortious business interference; and (E) the issue of preemption.

A. MBA's claim for copyright infringement is plausible.

HBG and Saracen both argue that MBA's claim for copyright infringement should be dismissed, on the grounds that insufficient facts have been alleged to state a plausible claim for relief. But although HBG and Saracen both pay nominal lip service to the legal standard for Rule 12(b)(6) motions to dismiss, *see* Doc. 9, § II.A; Doc. 13, p. 8, their arguments regarding MBA's claim of copyright infringement are essentially little more than an attempt at getting this Court to disregard the governing standard and to replace it with some sort of heightened pleading requirement under which MBA must allege every last relevant fact in painstaking, microscopic detail. Saracen even goes so far as to baldly assert that there is a "heightened pleading standard" for copyright infringement claims. *See* Doc. 13, p. 10. This is just flagrantly wrong, and is an invitation for this Court to commit obviously reversible error right out of the gate. The United States Supreme Court has made abundantly clear that "the *only* two types of cases with a heightened pleading requirement under the Federal Rules are claims involving fraud or mistake." *See DSMC, Inc. v. Convera Corp.*, 273 F. Supp. 2d 14, 24 (D.D.C. 2002) (emphasis in original) (citing *Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993)). Claims of copyright infringement do not fall into either of those categories. *See, e.g., Convera Corp. CoStar Realty Information, Inc. v. Field*, 612 F. Supp. 2d 660, 674 (D. Md. 2009) ("There is no heightened pleading standard for copyright infringement, and CoStar need only state that it had a valid copyright and the defendant infringed upon an original work."); *Salerno v. City Univ. of New York*, 191 F. Supp. 2d 352, 356 (S.D.N.Y. 2001) ("Initially, [the defendants] argue without benefit of authority that there is a heightened pleading requirement for violations of copyright law. However, there is no such heightened requirement for copyright claims."); *Levine v. Landy*, 860 F. Supp. 2d 184, 191 (N.D.N.Y. 2012) ("There is no heightened

pleading requirement applied to copyright infringement claims; a claim of copyright infringement need only meet the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure.” (internal citation omitted)).

Consistent with their efforts at rewriting the most basic rules of federal pleading, most of the cases that HBG and Saracen cite in support of their arguments for dismissing MBA’s claim of copyright infringement actually have nothing at all to do with how a complaint may state a plausible claim for relief. Instead, the Defendants string together a bevy of irrelevant decisions where *evidence* and ultimate issues were considered on summary judgment,¹ at trial,² or at various other types of evidentiary hearings.³ And of the cases they cite which actually do deal with pleading standards, they are remarkable for their leniency—though one might never guess that simply from reading their highly generalized characterizations and selective quotations in the Defendants’ briefs. The full context makes all the difference in the world.

For example, here is the Western District of Arkansas, *en route to denying* a motion to dismiss:

¹ *E.g.*, *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093 (7th Cir. 2017); *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849, 852 (8th Cir. 2004); *Pinkham v. Sara Lee Corp.*, 983 F.2d 824 (8th Cir. 1992); *Moore v. Columbia Pictures Indus.*, 972 F.2d 939 (8th Cir. 1992); *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 120 (8th Cir. 1987); *Savant Homes, Inc. v. Collins*, 809 F.3d 1133 (10th Cir. 2016); *Hartman v. Hallmark Cards, Inc.*, 639 F. Supp. 816 (W.D. Mo. 1986); *Wildlife Internationale, Inc. v. Clements*, 591 F. Supp. 1542 (S.D. Ohio 1984).

² *E.g.*, *Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726, 731 (8th Cir. 2006); *Nelson Design Grp., LLC v. Puckkett*, 2009 WL 2254902 (E.D. Ark. July 28, 2009).

³ *E.g.*, *Frye v. YMCA Camp Kitaki*, 617 F.3d 1005 (8th Cir. 2010); *Nucor Corp. v. Tenn. Forging Steel Serv., Inc.*, 476 F.2d 386 (8th Cir. 1973); *Animal Fair, Inc. v. AMFESCO Ind.*, 620 F. Supp. 175 (D. Minn. 1985).

Copyright infringement has two elements: ownership of a valid copyright and copying of original elements of the work. Datacom’s complaint provides factual background to establish a basis for ownership of copyrighted software, access by the Defendants, and illegal copying of the copyrighted materials. *It is unnecessary for Datacom to allege copying with great specificity; complainants need not plead copyright infringement with specificity.* The Complaint therefore states a claim on which relief may be granted.”

Datacom Sys., Inc. v. JDL Digital Sys. Inc., 2009 WL 315720, at *3 (W.D. Ark. Feb. 6, 2009)

(internal citations omitted; emphasis added).

Or here is the Eastern District of Missouri, *en route* to *denying* another motion to dismiss a claim for copyright infringement:

The Court finds that plaintiff has sufficiently stated a claim for copyright infringement against all defendants. Plaintiff is not required to allege direct evidence of copying by defendants. Instead, plaintiff need only allege that defendants had access to the copyrighted drawing and that a “substantial similarity” exists between the copyrighted drawing and the alleged infringing materials. Here, plaintiff has alleged that defendants had access to the copyrighted Bommarito Drawing. Further, plaintiff alleged that B & B Realty and Bommarite submitted a substantively identical copy of the Bommarito Drawing with their permit application, a copy of which is attached to the complaint. In addition, plaintiff has also attached a photograph of the sign installed by Piros Signs at the Bommarito Business Center. The Court finds that the drawing and photograph of the sign are similar enough to the Bommarito Drawing such that plaintiff is entitled to present evidence in support of its claim of infringement.

Warren Sign Co., Inc. v. Piros Signs, Inc., 2010 WL 3034637, at *5 (E.D. Mo. Aug. 3, 2010)

(internal citations and footnote omitted). Similarly, this Court may easily observe the substantial similarity between the image appearing in paragraph 79 of MBA’s Complaint and the designs depicted in paragraphs 28 and 29 of the same.

HBG’s first substantive argument is that the claim should be dismissed because MBA “has not attached certificates of copyright registration for the works it claims HBG has infringed,” but instead “alleges two specific copyright registration numbers (VA0002172372 and VA0002172502), and vaguely references ‘other copyrighted works connected to the Saracen

Project.” See Doc. 9, p. 4. But HBG offers no authority saying that a plaintiff must attach any registration certificates to its complaint. Nor would such a rule make any sense. The Defendants are perfectly capable of using the registration numbers that MBA has already provided to verify for themselves whether the works in question are, in fact, registered.

MBA agrees that, with certain exceptions, registration is a prerequisite to filing a lawsuit for copyright infringement. See 17 U.S.C. § 411(a). Thus MBA does not dispute that the scope of its claim here is limited to the scope of the registrations it has actually acquired. But MBA’s Complaint has simply shown these Defendants the courtesy of informing them that additional registration applications are currently pending. Once those registration numbers are received, then MBA will amend its Complaint accordingly. However, the fact that the current version of the Complaint provides the Defendants a heads-up on what is still to come does not somehow invalidate MBA’s claims on the works whose registration numbers have already been received and provided to the Defendants. To quote yet another case cited by HBG—this time the Southern District of New York, *en route to denying* a motion to dismiss:

Along with alleging that Defendant infringed ten specific works, however, the Complaint also states that “the full scope of Pearson’s infringing activities has not yet been ascertained,” and that “further investigation and discovery will yield evidence that Pearson’s [infringement] of Plaintiff’s images is not limited to the photographic works identified herein.” According to Defendant, these “excessively broad” paragraphs render the Complaint “subject to dismissal.”

Defendant is correct that Plaintiff’s allegations in paragraphs 27 and 28 are nothing more than speculation, and to the extent that Plaintiff has attempted to state a claim for copyright infringement concerning works other than the ten listed in Exhibit A of the Complaint, he has failed to do so. Nevertheless, the Court fails to see why several discrete paragraphs in a Complaint should nullify other, factually specific allegations in the Complaint; it would be unjust and inappropriate to throw out these well-pleaded allegations, merely because Plaintiff’s Complaint may also contain a bit of bathwater. Simply stated, Plaintiff has alleged that specific works to which he owned the copyright were infringed upon, and by doing so, he has adequately pleaded this element under Rule 12(b)(6).

Schneider v. Pearson Educ., Inc., 2013 WL 1386968 (S.D.N.Y. Apr. 5, 2013) (alterations in original; internal citations omitted).

Similarly, and rather bafflingly, HBG also complains that because “the titles of the registered works appear to be indecipherable computer file names” it is “virtually impossible for the parties or the Court to determine the scope of Plaintiff’s claim.” *See* Doc. 9, p. 7 n.1. The implication here seems to be that HBG wants copies of the deposit materials submitted to the Copyright Office in securing the two copyright registrations. That’s unworkable and not legally required. Large books and novels the size of *Moby Dick* do not need to be attached to a complaint when such works are at issue; likewise, MBA is only required to reference the Certificates of Registration with factual particularity, which it did.

MBA is unaware of any reason why the Defendants cannot simply submit a Copyright Office Litigation Statement Form to the United States Copyright Office’s Records Research and Certification Section in order to access and view the complete registered works at their own leisure and during discovery. But regardless, the complete registered works are discoverable and will be provided to the Defendants with MBA’s initial disclosures as required by Rule 26(a)(1).

HBG and Saracen continue in this vein by claiming that they are unable to discern from the Complaint whether, and how much of, MBA’s architectural designs satisfy the copyright requirement of originality. It’s hard to know how even to respond to this, other than to insist that the Defendants should go back and actually read the Complaint and realize the United States Copyright Office has already *received, reviewed, and approved MBA’s copyright applications and issued two Certificates of Registration*. And pursuant to 17 U.S.C § 410, the fact of registration and issuance of a certificate “shall constitute prima facie evidence of the validity of the copyright

and the facts stated in the certificate.” Further, the Complaint repeatedly and explicitly alleges that MBA was the sole architectural firm doing any design work on the project during its initial phase.

See, e.g., Doc. 1, ¶¶ 20–37. It plainly states:

MBA’s original vision for the architecture of the new casino was dramatic and constituted a substantial departure from other casinos around the country. The roof and tower had an exceptionally unique design comprising a unified material and formal logic theory and structure.

Id. at ¶ 24. Indeed, it repeatedly emphasizes that the “unified material and formal logic” of the casino’s design was “unique and never-before-seen.” *See, e.g., id.* at ¶ 21. So when the Defendants complain that they can’t tell whether MBA is saying that this feature or that feature is alleged to have been original, they’re not only missing the words that are right in front of their faces (*e.g.*, “roof,” “tower”); they’re also missing the bigger point, which is that *the entire unified design was an original work*. This, of course, is perfectly consistent with how the Copyright Act defines “architectural work”:

An “architectural work” is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes *the overall form* as well as *the arrangement and composition of spaces and elements in the design*, but does not include individual standard features.

17 U.S.C. § 101 (emphasis added).

This principle is not undermined by either of the cases cited by HBG or Saracen in which a complaint was dismissed for failure to plead originality. Rather, those cases *affirm* MBA’s point here.

For example, in *Revolution FMO, LLC v. Mitchell* the Court granted a motion to dismiss because “the *entirety* of Plaintiff’s copyrighted works are not necessarily original, and because Plaintiff fails to identify any relevant facts about even one portion of its works which were copied.” 2018 WL 2163651, at *5 (E.D. Mo. May 10, 2018) (emphasis added). But here, as discussed

above, the instant Complaint alleges that *the entire unified work was original*. (Incidentally, it shouldn't be overlooked that the *Revolution FMO* Court also granted the plaintiff leave to amend its complaint and noted that “[a]t this early stage, Plaintiff needs not allege with exacting specificity each section or part of its work that was copied, and any confusion about the works at issue can be resolved in discovery.” *See id.* at *4–*5.)

And in *Etrailer Corp. v. Automatic Equip. Mfg.*, the Court found insufficient allegations of originality where the works at issue were literally just an online retailer's images of motor vehicle accessories that were available for sale, with logos stamped over them. As the Court explained:

Nothing about the images would allow the Court to conclude that any level of creativity or originality went into the production of the photographs on the plaintiff's website.

The Court finds the plaintiff's claim to be very similar to copyright claims rejected by other courts. For example, photographs of generic Chinese food dishes used on menus were found to serve the purely utilitarian purpose of allowing customers to understand the contents of a particular dish, and therefore lacked any creative spark necessary for copyright protection. Illustrations made from photographs of transmission parts were not copyrightable because the illustrations were intended to be accurate reproductions of the photographs, and a slavish copy of a photograph is the antithesis of originality. Digital wire-frame computer models depicting an unadorned Toyota were neither creative nor original, and therefore not copyrightable.

What the plaintiff describes in its complaint as its works are merely accurate photographs of towing parts that are available for purchase through the plaintiff's website. No facts have been alleged showing any degree of creativity or originality in the photographs, and the exhibits attached to the plaintiff's complaint reflect photographic images of items for sale that are not unlike photographic images of items for sale on any of a thousand other such retail vendor websites selling a multitude of different products.

2019 WL 1596833, at *2–*3 (D. Neb. Apr. 15, 2019) (internal citations omitted). Those facts could hardly be more distinguishable from the instant ones. MBA is not alleging that Marlon

Blackwell snapped a picture on his smartphone of some building he liked from the side of a highway and then stamped his firm's logo on it.

In addition to the foregoing arguments, Saracen contends that MBA's claim for copyright infringement should be dismissed because "the Complaint fails to specify which section(s) of the Copyright Act on which the claim for copyright infringement is based." *See* Doc. 13, p. 11. But "Rule 8 does not . . . 'countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted,' *Johnson v. City of Shelby*, 574 U.S. 10, 11, 135 S. Ct. 346, 346 (2014), nor does it require the complaint to cite a specific statute." *Waterman v. NYS Office of Temp & Disability*, 2016 WL 8116151, at *2 (W.D.N.Y. Dec. 15, 2016) (internal citation omitted); *cf. Zotos v. Lindbergh Sch. Dist.*, 121 F.3d 356, 361 (8th Cir. 1997) ("Although the District's 'boilerplate language does not cite the specific statute applicable here, it nevertheless satisfies the requirement of [Rule] 8(c) that affirmative defenses be pleaded."). Indeed, the United States Supreme Court has specifically held, in the context of a civil rights action, that "no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim." *See Johnson*, 574 U.S. at 11. This Brief has already discussed *supra* that there is no heightened pleading standard for copyright claims either. As the *Johnson* Court explained, *Twombly* and *Iqbal* "concern the *factual* allegations a complaint must contain to survive a motion to dismiss." *See id.* at 12 (emphasis in original). If a plaintiff's complaint has informed the defendants "of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." *See id.*

The bottom line here is that we are in federal court, which simply requires notice pleading and plausibility—which MBA has provided in spades. The Complaint explicitly alleges that MBA

was the sole author of the initial designs of this project, and that the overall form of those designs constituted not just an original work but a “substantial departure” from the norm that was “unique and never-before-seen.” The Complaint provides multiple imaged examples of these designs so the reader may see for herself what they look like. *See, e.g.*, Doc. 1, ¶¶ 28–29. The Complaint provides an additional image of the design that Saracen and HBG are *still using*⁴ and that HBG is now touting as its own, without attribution to MBA, so that the reader may see for herself that it is substantially similar to the MBA-authored designs. *See id.* at ¶ 79. The Complaint alleges that MBA’s copyrights in these designs are registered, and it provides the registration numbers so the Defendants may not only verify the fact of registration but also obtain the complete registered works themselves if they wish to do so before they are turned over with MBA’s other initial disclosures. *See id.* at ¶¶ 92–93. If the Defendants wish to argue that originality, or registration, or substantial similarity, or any other element of copyright infringement is lacking, then they are perfectly free to put on evidence and expert testimony to that effect at summary judgment or trial. But right now we are at the pleading stage, and it simply is not rational to contend that MBA has failed even to *allege* any of these things. Again: just read the Complaint.

Federal pleading simply does not work the way HBG and Saracen wish it would. MBA would respectfully submit that its 55-page, 119-paragraph Complaint has done a far more than adequate job of stating “a claim to relief” for copyright infringement “that is plausible on its face,” *Aschroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S.

⁴ Saracen’s contention that “the allegations that refer to Saracen stop on March 26, 2019” is demonstrably false. The Complaint alleges that Saracen “own[s], finance[s], manage[s], and operate[s] the [Saracen] Casino,” *see* Doc. 1, ¶ 4, and that as recently as December 2019 Saracen was still using MBA’s designs for the casino without MBA’s permission to do so, *see id.* at ¶¶ 79, 94.

544, 570 (2007)), and of giving HBG and Saracen “notice of what the claim is and the grounds upon which it rests,” *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)) (alteration omitted). As this Court is undoubtedly aware, that is all that is required of MBA at this stage. *See id.* (“[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . .”).

B. MBA’s request for statutory damages is plausible.

HBG also requests that MBA’s “claim” for “statutory damages and/or attorney’s fees (to the extent Plaintiff is seeking attorney’s fees)” under the Copyright Act be “dismissed with prejudice.” *See* Doc. 9, p. 11. This request is premature and, as with HBG’s arguments regarding infringement, more appropriately raised at summary judgment or trial. Unsurprisingly, then, the only case HBG cites in support of this request is a ruling on summary judgment. *See William Wade Waller Co. v. Nexstar Broad., Inc.*, 2011 WL 2648584, at *2 (E.D. Ark. July 6, 2011).

Courts routinely decline to dismiss or strike prayers for attorney fees at the pleading stage on the grounds that dismissal would be premature. That is the case not only in this District, *see, e.g., Hardy v. Bartmess*, 696 F. Supp. 2d 1008, 1016 (E.D. Ark. 2010) (“The Court finds this argument [that no law provides a basis for attorney fees] premature and denies, without prejudice, Plaintiffs’ motion to summarily dismiss Bartmess’s claim for attorneys’ fees.”), but throughout this Circuit, *see, e.g., Strong v. Stryker Corp.*, 2010 WL 4967876, at *2 (D. Minn. Dec. 1, 2010) (“Similarly, the Court concludes that it is premature to determine whether Plaintiff’s request for attorneys’ fees and disgorgement, listed in his prayer for relief, should be stricken.”), and throughout the nation. Indeed, as the Northern District of New York has explained in a case cited by Saracen for another purpose:

Defendants moves [sic] to strike from Plaintiff's amended complaint the portion seeking relief for [Copyright Act] statutory damages and attorney's fees pursuant to Federal Rule of Civil Procedure 12(f). Whether or not there is merit in Defendant's motion to strike, courts in this circuit have denied a defendant's motion to strike or to dismiss claims for attorney's fees even though the likelihood that plaintiff will be able to recover attorney's fees is small, because dismissal of such claims at the pleading stage would be premature.

Elliott v. Gouverneur Tribune Press, 2013 WL 6240489, at *4 (N.D.N.Y. Dec. 3, 2013) (internal quotation marks omitted).

MBA does not dispute that 17 U.S.C. § 412(2) prohibits awards of statutory damages or attorney fees under the Copyright Act for “any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.” MBA also does not dispute that the registrations currently at issue in this case were effective more than three months after their works' first publication. But the questions of how many infringements have occurred and on what dates which parties “commenced” each such infringement are ones that cannot be definitively answered without the benefit of factual discovery.⁵ HBG's request for a ruling on the issues of statutory damages and attorney fees under the Copyright Act should be denied as premature.

C. MBA's claim for breach of contract is plausible.

HBG also contends that MBA has failed to allege facts sufficient to state a claim for breach of contract. In particular, it claims that MBA has not properly pleaded legal consideration, mutual agreement, and mutual obligation, and that MBA has not alleged how HBG breached the contract.

⁵ HBG states that “[a]ccording to the Complaint, the purported copyright infringement occurred at least as early as July 15, 2019.” *See* Doc. 9, p. 11 (citing Doc. 1, ¶ 78). To be perfectly clear, the Complaint does *not* allege that this was the date on which infringement commenced. HBG's use of the words “*at least as early as*” here is quite telling.

These arguments are wholly meritless and, as with so many of their arguments about copyright infringement *supra*, simply ignore the plain language of the Complaint itself.

The Complaint alleges that MBA and HBG “agreed” to perform architectural work on the Saracen Casino project in accordance with a “Responsibility Matrix,” which was attached to the Complaint as Exhibit A. *See* Doc. 1, ¶ 40. That 10-page document outlines the respective obligations of MBA and HBG in highly specific, comprehensive, and microscopic detail. *See id.* at Ex. A. The parties’ respective obligations were subsequently further refined in an even more finely-grained “Work Split Matrix,” which was attached to the Complaint as Exhibit G. *See id.* at ¶ 48 & Ex. G. The Complaint also alleges that in exchange for MBA’s work, HBG “agreed” to pay MBA 34.42% of all net architectural fees for the duration of the project, in accordance with a Schedule that was attached to the Complaint as Exhibit E. *See id.* at ¶ 46 & Ex. E. Furthermore, the Complaint alleges that HBG “has not paid to MBA its 34.42% share.” *Id.* at ¶ 69. At the risk of stating the obvious: the mutual obligations include those set out in the Responsibility Matrix, Work Split Matrix, and Fee Split Schedule; the legal consideration includes these mutual promises and the work actually performed by MBA, as well as “MBA’s efforts to support HBG in securing this contract,” *see id.* at ¶ 46; and HBG’s breach includes its refusal to pay the money it promised to MBA—all of which the Complaint repeatedly and explicitly alleges was “agreed” to by the parties. It is as if HBG has not even read the Complaint.

HBG also repeatedly asserts that MBA has not attached a “fully executed contract,” *see* Doc. 9, p. 12, or “fully executed agreement,” *see id.* at 16. But the reason MBA has not attached any such fully integrated document is because MBA is not alleging that any such fully integrated document exists. MBA alleges it had a contractual agreement with HBG, and it has attached a large number of documents to the Complaint memorializing the terms of that contractual

agreement. There is no requirement that a contract be reduced to a single, fully integrated and executed written instrument in order to be enforceable under Arkansas law. Contracts that do not come within the statute of frauds need not be memorialized in writing at all.⁶ And even for contracts that *do* come within the statute of frauds, a series of memoranda or notes, made in the course of the relevant transaction, may be considered together and found to constitute written evidence from which the whole contract can be discerned, so long as in their aggregate they contain all essential provisions of the contract. *See St. Louis, I.M. & S. Ry. Co. v. Beidler*, 45 Ark. 17, 28 (1885). This is true regardless of the immediate purpose for the documents' preparation, and regardless of whether some of them are unsigned. *See id.* Moreover, the writings need not have been made contemporaneously with the agreement itself in order to satisfy the SOF, so long as they show an admission by the charged party that he entered into the agreement. *See Wilson v. Spry*, 145 Ark. 21, 223 S.W. 564, 568 (1920).

HBG also argues that the terms of its agreement with MBA are too vague to be enforceable. It relies on two cases in support of this argument—both of which are easily distinguishable from the instant facts. In one of them, *City of Dardanelle v. City of Russellville*, the Arkansas Supreme

⁶ MBA's contract with HBG does not come within the statute of frauds because it was possible for the contract to be performed within one year from its making. *See* Ark. Code Ann. § 4-59-101(a)(6). Arkansas caselaw makes clear that the statute of frauds does not apply if there is *any* possibility that the performance called for under the contract *could* be completed within one year. *See Chadwell v. Pannell*, 27 Ark. App. 59, 62–63, 766 S.W.2d 38, 40 (1989). This is true even if it is probable that completion would require more than a year, *see id.*, and indeed, even if the performance actually was not completed within one year, *see Bonner v. Kimball-Lacy Lumber Co.*, 114 Ark. 42, 169 S.W. 242, 243 (1914). Put differently, the SOF only applies to agreements which are “*incapable* of performance within one year.” *See Chadwell*, 27 Ark. App. at 62–63, 766 S.W.2d at 40 (emphasis added). Here, MBA's Complaint explicitly alleges that “HBG identified for MBA and all other parties a design schedule, demonstrating that all professional architectural services rendered by either HBG or MBA was to be completed in less than twelve months,” *see* Doc. 1, at ¶ 50, and that design schedule was attached to the Complaint as Exhibit H so that the Court can see so for itself.

Court held that a particular joint resolution between two cities was too vague regarding mutual obligations to be an enforceable contract. 372 Ark. 486, 491 277 S.W.3d 562, 566 (2008). But literally the *only* mutual obligation set forth in that resolution was that the parties “have agreed with each other to cooperate in the pursuit of all avenues of funding for the proposed municipal outfall sewer line” *See id.* at 488–89, 564. In the other case, *Key v. Coryell*, the Arkansas Court of Appeals found that the following terms of an agreement were too vague to be enforceable: that an educational institution would meet a student’s “educational and special needs” and provide “a loving, supportive environment,” that it would “work with” the student’s mother “to improve matters,” and that the student’s fourth-grade teacher “could handle things.” *See* 86 Ark. App. 334, 342, 185 S.W.3d 98, 104 (2004). The vague aspirations in those two cases are comically far removed from the instant matter’s highly detailed ten-page Responsibility Matrix, Work Split Matrix, and fee split calculated down to the hundredth of a percent.

MBA has easily pleaded sufficient facts to state a claim for breach of contract. HBG’s motion to dismiss that claim should be denied.

D. MBA’s claim for tortious business interference is plausible.

HBG also asks this Court to dismiss MBA’s claim for tortious business interference. In support of that request, HBG advances two arguments. Both are meritless.

The first argument is that “[i]t is well settled that a party to a contract, and its agents acting in the scope of their authority, cannot be liable for interfering with the party’s own contract.” *See* Doc. 9, pp. 17–18 (quoting *St. Joseph’s Regional Health Center v. Munos*, 326 Ark. 605, 614, 934 S.W.2d 192, 196 (1996)). While that is a correct statement of law so far as it goes, it is also entirely beside the point. MBA is not claiming that HBG tortiously interfered with its own contract with MBA; that’s what MBA’s claim against HBG for *breach of contract* is for. Rather, MBA is

claiming that HBG tortiously interfered with MBA's contract or business expectancy "with *the Quapaw Nation and Saracen Development, LLC* regarding the Saracen Casino Resort project." See Doc. 1, ¶ 97 (emphasis added). "Tortious interference with a contractual relationship or business expectancy is intentional and improper conduct by a person that induces or otherwise causes a *third person* not to perform a contract." *Gunn v. Farmers Ins. Exchange*, 2010 Ark. 434, at *7, 372 S.W.3d 346, 352 (emphasis added). The *third persons* with respect to MBA's tortious business interference claim are the Quapaw Nation and Saracen—not HBG.

HBG is attempting to trick this Court into conflating two distinct legal and business relationships: MBA's contractual relationship with HBG, and MBA's contractual relationships or business expectancies with the Quapaw Nation and Saracen. This Court should not take the bait. The Complaint is abundantly clear that MBA's business relationship with the Quapaw Nation preceded HBG's by several years. Compare Doc. 1, ¶¶ 15–17 (describing numerous previous projects that MBA performed for the Quapaw Nation and the excellent relationship between Mr. Blackwell and Chairman Berrey "dating back to before 2016"), with *id.* at ¶¶ 38–40 (describing how HBG was introduced to the Saracen Casino project in December 2018 and January 2019). The Complaint is also abundantly clear that MBA's business relationship with the Quapaw Nation *specifically regarding the Saracen Casino project* preceded HBG's by a year and a half. See *id.* at ¶¶ 20–23 (describing how at least as early as July 2017, MBA was working on the Saracen Casino project for the Quapaw Nation and being assured by Chairman Berrey that MBA "would be the firm to do the architectural plans and design for the casino in the event the voters passed Issue 4"). MBA's business relationship with the Quapaw Nation and its business expectancy with Saracen were both separate and distinct from, and temporally prior to, MBA's contractual relationship with HBG.

Although HBG does not explicitly say so, it appears to be at least hinting or insinuating that the Quapaw Nation and Saracen cannot be considered “third parties” with respect to MBA’s claim because HBG’s contract with MBA involved the same subject matter as did MBA’s business expectancies with Saracen and the Quapaw Nation: namely, the Saracen Casino project. But the proposition that a tortious-interference defendant must be a complete stranger to the subject matter of the contract or business expectancy with which he interfered, sometimes referred to as “the stranger doctrine,” was explicitly *rejected* by the Arkansas Supreme Court in the case of *Baptist Health v. Murphy*, when it held that plaintiff physicians’ contractual or business expectancies with patients were distinct (and thus third-party) from those between the physicians and the hospitals where they treat those patients. *See* 2010 Ark. 358, at *17–*20, 373 S.W.3d 269, 283–84. The *Baptist Health* Court justified its rejection of the stranger doctrine thus:

In addition to the fact that Baptist has failed to cite any Arkansas authority in support of the stranger doctrine, we are concerned that its adoption could have far-reaching consequences regarding the viability of tortious-interference claims. Defendants in tortious-interference claims are often “interested” in the contracts in which they are alleged to have interfered. Application of the doctrine could therefore significantly extend immunity in tortious interference cases.

See id. at *19, 283 n.3. This Court is of course “bound by the highest state court’s pronouncement of state law.” *See Nanninga v. Three Rivers Elec. Co-op.*, 236 F.3d 902, 905 (8th Cir. 2000).

HBG’s second argument for dismissing MBA’s tortious-interference claim is that the Complaint “asserts no allegations as to this ‘valid contractual relationship and/or business expectancy with . . . Saracen Development, LLC.’” *See* Doc. 9, p. 18 (quoting Doc. 1, ¶ 97) (alterations in original). This argument has two fatal flaws. The first and most obvious one is that it overlooks that, per the Complaint’s explicit language (which HBG conveniently omitted),

MBA's claim is premised not only on its business expectancy with Saracen, but also on its business expectancy with the Quapaw Nation. *See* Doc. 1, ¶ 97.

The second flaw, which is closely related to the first, is that HBG ignores that these business expectancies both specifically concern the same Saracen Casino project. The point here is really quite simple, and clear from the face of the Complaint: the Saracen Casino project was initially conceived and directed by the Quapaw Nation, but responsibility for the project was eventually given to Saracen, which is a distinct legal entity from, but essentially a subsidiary of, the Quapaw Nation. *See* Doc. 1, ¶ 4. On this project MBA interacted extensively with, and reported directly to, representatives of the Quapaw Nation, including Chairman Berrey, *see id.* at ¶¶ 20, 22–23, 25–26, 29–30, 32–36, 38–39, 52–54, 56–59, 67, 72, 74, and the payment MBA received for its work was ultimately sourced from either Saracen or the agency of the Quapaw Nation that was Saracen's sole owner, *see id.* at ¶ 51.

The bottom line is this: MBA reasonably expected to continue working on the Saracen Casino project, and to be paid for its work by either the Quapaw Nation, or Saracen, or both. MBA does not need to point to any specific contract with Saracen—or, for that matter, with the Quapaw Nation—in order to have a valid business expectancy with either of those entities for purposes of its tortious interference claim against HBG. “Any prospective business relationship that would be of pecuniary value constitutes a valid business expectancy” for purposes of this tort, *including* those “not amounting to a formal contract.” *See Stewart Title Guaranty Co. v. Am. Abstract & Title Co.*, 363 Ark. 530, 543, 215 S.W.3d 596, 603 (2005) (emphasis added) (quoting Restatement (Second) of Torts, § 766B, cmt. c (1979)). HBG's arguments to the contrary are legally unfounded and unavailing. Its motion to dismiss this claim should be denied.

E. MBA's state-law claims are not preempted.

HBG's and Saracen's final argument for dismissal is that MBA's state law claims are preempted by the Copyright Act. This argument rests on fundamental mischaracterizations of what MBA's state law claims are.

The Eighth Circuit has explained that:

The Copyright Act provides the exclusive source of protection for "all legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106" of the Copyright Act. *See* 17 U.S.C. § 301(a). Concomitantly, all non-equivalent rights are not preempted. A state cause of action is preempted if: (1) the work at issue is within the subject matter of copyright as defined in §§ 102 and 103 of the Copyright Act, and (2) the state law created right is equivalent to any of the exclusive rights within the general scope of copyright as specified in § 106.

Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426, 428 (1993).

None of MBA's state-law claims against HBG and Saracen are equivalent to any of the exclusive rights within the general scope of copyright. Discussing this second element of the preemption test, the *Nat'l Car Rental Sys.* Court observed:

[C]ourts and commentators have framed this inquiry as whether the right in question is infringed by the mere act of reproduction, performance, distribution, or display. Section 301 preempts only those state law rights that may be abridged by an act which, in and of itself, would infringe one of the exclusive rights provided by federal copyright law. If an extra element is required, instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action, then the right does not lie within the general scope of copyright and there is no preemption.

Id. at 431 (internal quotation marks and citations omitted).

With respect to MBA's claim against HBG for breach of contract, HBG mischaracterizes that agreement as "boil[ing] down to" the following:

HBG allegedly did not pay Plaintiff "34.42% of all net architectural fees for the duration of the Saracen Casino Resort project, together with other potential architectural fees generated from this project" in exchange for "the implied license

to continue to develop derivative works from MBA's foundation designs and other copyrighted works." Compl. ¶¶ 102–103.

See Doc. 9, p. 23. This radically mischaracterizes the contract that is described in MBA's Complaint, myopically focusing on only one small subset of the parties' agreement to the exclusion of all other terms. In addition to the implied license to develop derivative works, the Complaint alleges that MBA's consideration for the agreement "included MBA's efforts to support HBG in securing this contract" for the Saracen Casino project, "and MBA's substantial work in reviewing HBG's work on the project." See Doc. 1, ¶ 46. In other words, HBG contracted to pay MBA not only for a license to use MBA's intellectual property, but also for MBA's *provision of services* and *referral of work* to HBG. Thus, by refusing to pay MBA the 34.42% of all net architectural fees that it promised to pay in exchange for these things, HBG has breached its contract with MBA *regardless* of whether it has also infringed MBA's copyrighted works. There is no equivalency between MBA's claim for copyright infringement and its claim for breach of contract.

HBG even more profoundly mischaracterizes MBA's claim for tortious business interference, writing that "the crux of Plaintiff's tortious business interference claim is HBG's alleged use [of] Plaintiff's works." See Doc. 9, p. 24. This is just fundamentally wrong. In fact, the "crux" of Plaintiff's tortious-interference claim is that HBG "misled and misinformed Chairman Berrey about MBA's conduct and role in the Saracen Casino Resort project," and "provided false information to Chairman Berrey to exclude MBA from continued work" on the project. See Doc. 1, ¶¶ 65–66. HBG's use of MBA's works are wholly irrelevant to this claim. Indeed, MBA's tortious-interference claim would be not a whit different if, on the day after MBA was shut out from the project, HBG completely abandoned every single design that MBA had contributed and instead developed its own entirely different designs from scratch. For that matter,

MBA's tortious-interference claim would be no different even if for some reason HBG had been kicked off the project one day after MBA was removed from it. Whether HBG used falsehoods to destroy MBA's business relationship with the Quapaw Tribe and Saracen simply has nothing to do with whether it then proceeded to add insult to injury by also infringing MBA's copyright. There is no equivalency between those two claims.

Finally, with respect to MBA's claim for unjust enrichment against HBG and Saracen, this claim is not preempted for essentially the same reasons that MBA's breach-of-contract claim is not preempted. Although HBG and Saracen both reductively mischaracterize MBA's unjust enrichment claim as being premised on copyright infringement, it is in fact simply based on those parties' refusal to pay MBA for valuable services that it performed for them—services for which they both knew that MBA expected to be paid, including its own architectural work as well as its review of HBG's architectural work. *See id.* at ¶¶ 49, 51. Eighth Circuit precedent is clear that unjust enrichment claims are not preempted by the Copyright Act when they arise out of a breach of a contractual or quasi-contractual relationship. *See Nat'l Car Rental Sys.*, 991 F.2d at 434–35. MBA's unjust enrichment claim is not about whether these parties are infringing MBA's copyrights. Rather, it is about the fact that MBA performed an enormous amount of valuable work *specifically for these Defendants* and has not been paid accordingly. The Defendants' motions to dismiss on preemption grounds should be denied.

IV. CHAIRMAN BERREY'S MOTION TO DISMISS SHOULD BE DENIED.

Chairman Berrey has also filed a motion to dismiss, arguing that he is protected from this lawsuit by sovereign immunity. The Chairman is wrong.

The United States Supreme Court has explicitly stated on multiple occasions that although sovereign immunity protects tribes from suits for damages, "tribal immunity does not bar such a

suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct.” *See Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 796 (2014) (emphasis in original) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978)). The Supreme Court’s recognition of this exception was made pursuant to the well-developed doctrine of *Ex parte Young*, 209 U.S. 123 (1908), under which “state officials may be sued in their official capacities for prospective injunctive relief when the plaintiff alleges that the officials are acting in violation of the Constitution or federal law.” *See Missouri Child Care Ass’n v. Cross*, 294 F.3d 1034, 1037 (8th Cir. 2002). The Copyright Act is, of course, federal law. And MBA’s Complaint clearly states that “Chairman Berrey is being sued only for injunctive relief in his official capacity as Chairman, and not for damages in his individual capacity.” *See* Doc. 1, ¶ 5.

So Chairman Berrey’s first argument—that “MBA can point to no waiver of immunity granted by the Nation to pursue any claims, including claims for copyright infringement, against the tribal government and its officers,” *see* Doc. 11, p. 12—is simply irrelevant. MBA does not need to point to any waiver of sovereign immunity to authorize its claim for prospective injunctive relief against Chairman Berrey, because *sovereign immunity does not protect against such claims in the first place*.

This fundamental misapprehension on the part of Chairman Berrey leads him likewise to misapprehend the legal standard for his motion, characterizing it as governed by Rule 12(b)(1), which permits motions to dismiss for lack of subject-matter jurisdiction, rather than by Rule 12(b)(6), which permits motions to dismiss for failure to state a claim. Thus, the Chairman contends that the Court “may look beyond the pleadings and may consider documentary and similar evidence concerning the challenged jurisdictional facts,” *see* Doc. 11, p. 8 (citing *Osborn v. United States*, 918 F.2d 724, 729–30 (8th Cir. 1990)), and that this Court “is not required to take

any of . . . plaintiff’s allegations as true,” *see id.* (citing *Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 914–15 (8th Cir. 2015)). But *none* of the cases on which the Chairman relies for this legal standard are suits for prospective injunctive relief under *Ex parte Young*. This is because the United States Supreme Court has plainly stated on multiple occasions that “[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a ‘straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.’” *Verizon Maryland, Inc. v. Pub. Serv. Comm’n of Maryland*, 535 U.S. 635, 645 (2002) (alteration in original) (quoting *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997)). In other words, this Court has subject matter jurisdiction over this lawsuit for the simple and obvious reason that MBA brings a claim against the Chairman under federal law, *see* 28 U.S.C. § 1331, and the only question for this Court to determine at this stage is whether the Complaint alleges sufficient facts to support that claim on its face. *Cf. Nix v. Norman*, 879 F.2d 429, 433 & n.2 (8th Cir. 1989) (permitting a claim for prospective injunctive relief against a state actor to proceed past the Rule 12 stage under *Ex parte Young*, and noting that “We do not make a final determination of whether Norman’s action constituted state policy. We merely hold that Nix has stated a claim for which relief can be granted as against Norman in his official capacity. Whether the allegations of state involvement in her termination are true remain for the district court to determine after further development of the record.”). Accordingly, this Court should disregard the self-serving Declaration that Chairman Berrey attached as an exhibit to his motion, and confine its analysis to the four corners of the

Complaint, accepting all allegations as true and making all reasonable inferences in MBA's favor, per the ordinary Rule 12(b)(6) standard as elaborated by *Twombly* and *Iqbal*.⁷

Here, Chairman Berrey offers only two arguments against permitting a claim for prospective injunctive relief to proceed against him under *Ex parte Young*. The first is that "MBA has not pleaded—and it cannot establish—that the chairman of the Nation had the authority to enact a policy or custom of the tribal government giving rise to a continuing violation of federal copyright law." *See* Doc. 11, pp. 15–16. The second is that "there are no allegations concerning any particular act performed by Berrey as Chairman of the Nation's Business Committee that would constitute an ongoing violation of federal copyright law," but that rather all alleged copyright violations are being committed solely by the Downstream Development Authority and by Saracen: "Neither Berrey nor the other members of the Nation's Business Committee were or are, in such capacities, responsible for or involved in the project." *See id.* at 17–18.

These arguments completely ignore virtually the entire scope of factual allegations in MBA's Complaint. The Complaint alleges that "John Lane Berrey is the duly elected Chairman of the Quapaw Tribal Business Committee, which is the elected legislative body of the Quapaw Nation." *See* Doc. 1, ¶ 5. It further alleges that "[i]n his official capacity, Chairman Berrey is responsible for management of tribal government and oversight of tribal business, among other things." *Id.* The Complaint also alleges that Saracen "is a wholly-owned subsidiary of the Downstream Development Authority of the Quapaw Nation," and that "[t]he Quapaw Nation"—

⁷ If the Court believes for some reason that it should depart from the well-settled precedent described above and consider extrinsic evidence on the issue of *Ex parte Young*, then MBA requests that it be given the opportunity to conduct jurisdictional discovery before the Court issues its ruling. Such discovery should include the opportunity for MBA to require Chairman Berrey to respond to interrogatories and requests for admission, to produce documents, and to have his deposition taken.

of which Chairman Berrey is the chief executive—“expressly authorized the creation of Saracen.” *See id.* at ¶ 4. The Complaint even cites to the specific Quapaw Nation Resolution which accomplished this. *See id.* The Complaint then proceeds to provide a litany of details regarding Chairman Berrey’s personal involvement in and oversight of the Saracen Casino project, stretching all the way from when he “personal contacted Mr. Blackwell requesting architectural plans and conceptual designs” in or before July 2017, *see id.* at ¶ 20, up to March 2019 when Chairman Berrey “suggested to Mr. Blackwell that ‘we should part ways on this project’” and then eventually “informed Mr. Blackwell that after ‘talking to all of the team’ he could not see MBA ‘returning in the current capacity,’” *see id.* at ¶ 67. In between those bookends, a myriad of other examples are given of Chairman Berrey’s authority over and direct involvement in the Saracen Casino project, particularly including its use of MBA’s copyrighted works, *see, e.g., id.* at ¶¶ 20, 22–23, 25–26, 29–30, 32–36, 38–39, 52–54, 56–59, 67, 72, 74, including a *photograph* of Chairman Berrey *standing next to renderings of MBA’s copyrighted designs at a press conference* where he “declared his desire” for the Saracen Casino project to “be completed in less than eleven months,” *see id.* at ¶¶ 60–61. It is simply ludicrous for the Chairman to contend that the Complaint alleges neither authority nor actual involvement on his part with respect to the ongoing infringement of MBA’s copyrighted works at the Saracen Casino project. His motion to dismiss should be denied.

V. CONCLUSION.

Ultimately, HBG, Saracen, and Chairman Berrey are all attempting in various ways to evade responsibility for their wrongful actions by flagrantly misconstruing MBA’s Complaint and by asking this Court to apply incorrect legal standards to their motions. But the simple truth of the matter is that MBA has pleaded facts far in excess of what is necessary to state plausible claims for relief and to put these Defendants on notice of what its claims are. The U.S. Copyright Office

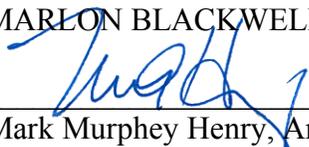
has already reviewed, approved, and issued two copyright registrations that form at least a part of the federal question basis of this lawsuit, and such registrations constitute prima facie evidence of validity and the facts stated in the Certificate.

This Court should deny all three motions to dismiss and permit this case to move forward into discovery.

Respectfully submitted,

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