

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

MARLON BLACKWELL ARCHITECTS, P.A.

PLAINTIFF

V.

NO. 4:19-CV-925-KGB

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

DEFENDANTS

BRIEF IN SUPPORT OF MOTION TO DISMISS OF HBG DESIGN, INC.

Defendant, HBG Design, Inc., (“HBG”), by and through counsel, moves the Court to dismiss the complaint of Plaintiff, Marlon Blackwell Architects, P.A., (“Plaintiff”) pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff’s Complaint fails to state a claim upon which relief can be granted and should therefore be dismissed with prejudice. In support of its Motion, HBG states as follows:

I. INTRODUCTION

This cause of action concerns the construction of a casino in Pine Bluff, Arkansas, and Plaintiff’s termination from the project by Saracen Development, LLC (“Saracen”), and Chairman John Lane Berrey (“Chairman Berrey”). Plaintiff’s termination was the result of its inability to properly control design costs on the project and otherwise follow the owner’s objectives. Plaintiff’s complaint asserts baseless allegations of copyright infringement, tortious business interference, breach of contract, and unjust enrichment against HBG. While these claims are wholly without merit, the Court need not even reach

an evaluation of the facts, as Plaintiff also fails to state claims upon which relief can be granted. Critically and as explained at length below, Plaintiff did not have a fully executed written contract with any of the defendants. In light of this, Plaintiff has undertaken a “shotgun approach” to its claims, including specifically to the claim of breach of contract asserted against HBG. Given that there was no contract between Plaintiff and any party, Plaintiff cobbles together various emails, memorandums, and spreadsheets that it then presents to the Court as “an agreement and contract.” Compl. ¶ 101. This is false. There was no contract between HBG and Plaintiff, nor was there a contract between Plaintiff and Saracen or Chairmen Berrey. The lack of any such agreement is fatal to Plaintiff’s claims, as discussed below. Accordingly and for the reasons stated herein, Plaintiff’s claims fail as a matter of law and should be dismissed with prejudice.

II. LAW & ARGUMENT

A. Legal Standard.

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court can dismiss a claim on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989). If, as a matter of law, “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,” a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one. *Id.* at 327; *see also O’Neal v. State Farm Fire & Cas. Co.*, 630 F.3d 1075, 1077 (8th Cir. 2011).

When considering a motion to dismiss under Rule 12(b)(6), the court must accept as true all of the factual allegations contained in the complaint and all reasonable inferences from the complaint must be drawn in favor of the nonmoving party. *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007); *Young v. City of*

St. Charles, Mo., 244 F.3d 623, 627 (8th Cir. 2001). In addition to the complaint, the court may consider matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint. See *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999).

To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege facts sufficient to state a claim as a matter of law and not merely legal conclusions. *Young*, 244 F.3d at 627. The factual allegations in the complaint must “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Id.* (quoting *Twombly*, 550 U.S. at 556). Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557).

B. Plaintiff Fails to State a Claim for Copyright Infringement Because It Does Not Plead Facts Showing That HBG Copied Original Elements of the Purportedly Infringed Works.

To state a claim for copyright infringement, a plaintiff must allege (1) ownership of a valid copyright and (2) that the defendant copied *original elements* of the copyrighted work. See *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849, 852 (8th Cir. 2004) (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). As the Supreme Court has explained, “[o]riginality remains the *sine qua non* of copyright; accordingly,

copyright protection may extend only to those components of a work that are original to the author.” *Feist*, 499 U.S. at 348.

As to the second element of infringement, copying may be established by direct evidence or “by showing that the defendants had access to the copyrighted materials and showing that substantial similarity of ideas and expression existed between the alleged infringing materials and the copyrighted materials.” *Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726, 731 (8th Cir. 2006). For an infringement claim to be actionable, there must be “substantial similarity” between the works at issue. *Derrick v. Columbia Pictures Indus.*, 972 F.2d 939, 941-42 (8th Cir. 1992).

Because copyright protection extends only to the original elements of a copyrighted work, the Eighth Circuit has instructed that that courts must filter out a work’s unprotected elements *before* addressing the substantial similarity of an allegedly infringing work. *See Frye v. YMCA Camp Kitaki*, 617 F.3d 1005, 1008-09 (8th Cir. 2010) (assessing substantial similarity only after “filtering out” elements not protected by copyright); *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849, 855 (8th Cir. 2004) (emphasizing that copyright only protects original elements of a work and that the factfinder must filter out and disregard non-protected elements). Afterward, a two-step analysis is performed to determine whether there is substantial similarity between the two works:

First, similarity of ideas is analyzed extrinsically, focusing on objective similarities in the details of the works. Second, if there is substantial similarity in ideas, similarity of expression is evaluated using an intrinsic test depending on the response of the ordinary, reasonable person to the forms of expression.

Hartman v. Hallmark Cards, Inc., 833 F.2d 117, 120 (8th Cir. 1987) (internal citation omitted). Succinctly stated, to establish “substantial similarity between the copyrighted material and the material that is the subject of the infringement allegations, the plaintiff must show that there is a substantial similarity of both ideas and expression.” *Nelson Design Grp., LLC v. Puckett*, No. 3:07CV00177 BSM, 2009 U.S. Dist. LEXIS 69343, at *4 (E.D. Ark. July 28, 2009) (citing *Hartman*, 833 F.2d at 120).

At the pleading stage, while a plaintiff need not plead copying with great specificity, he must still “fulfill two requirements: notice and legal sufficiency.” *DataCom Sys. v. JDL Dig. Sys.*, No. 6:08-CV-06102, 2009 U.S. Dist. LEXIS 14094, at *7 (W.D. Ark. Feb. 6, 2009). This means that the plaintiff must allege enough “factual detail for the defendant to receive fair notice of the basis for petitioner’s claims” and “a viable claim for relief that is more than merely speculative.” *Id.* at *8. For a copyright infringement claim, this translates into a minimum obligation on the plaintiff to “allege that defendants had access to the copyrighted [work] and that a ‘substantial similarity’ exists between the copyrighted [work] and the alleged infringing materials.” *Warren Sign Co. v. Piros Signs, Inc.*, No. 4:10-CV-15 (CEJ), 2010 U.S. Dist. LEXIS 77882, at *13-14 (E.D. Mo. Aug. 3, 2010).

Here, Plaintiff has not met its pleading burden for several reasons. First, it has not attached certificates of copyright registration for the works it claims HBG has infringed. Instead, it alleges two specific copyright registration numbers (VA0002172372 and VA0002172502), and vaguely references “other copyrighted works connected to the Saracen Project.” See Complaint at ¶ 92. Merely identifying the copyright registration numbers and alleging in a conclusory fashion that HBG is “infringing the exclusive rights of [Plaintiff]” is insufficient to state claim. See Complaint at ¶ 93. Instead, a properly pled

copyright infringement claim must allege “which specific original works are the subject of the copyright claim” and “by what acts during what time the defendant infringed the copyright.” *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 36 (S.D.N.Y. 1992). This is normally accomplished by identifying and describing each allegedly infringed work and delineating when, where, and how the defendants infringed that copyright. See, e.g., *Schneider v. Pearson Educ., Inc.*, 2013 U.S. Dist. LEXIS 49727, at *6 (S.D.N.Y. Apr. 5, 2013) (explaining that plaintiff adequately pleaded copyright infringement as to ten photographs by “enumerat[ing] *not only the name and registration number of each work*, but also the name of the [defendant’s] publication or publications in which each work appeared”) (emphasis added).

A close reading of the Complaint reveals that Plaintiff does not articulate facts as to how that HBG purportedly infringed any of its *registered* works. Registration, of course, is a prerequisite to any suit for infringement. See 17 U.S.C. § 411(a); *Reed Elsevier v. Muchnick*, 559 U.S. 154 (2010). To be sure, Plaintiff refers to “press images” published in *Arkansas Business* and includes a photograph of one such purported press image. See Complaint at ¶ 79. However, Plaintiff does *not* allege that this photograph is a registered work. It is also unclear if the publication of this unelaborated photography by a non-party Arkansas newspaper forms the basis of Plaintiff’s copyright claim. Plaintiff also alleges that HBG “misappropriated MBA’s original designs and architectural works” and “is now advertising its work.” Again, however, there is no allegation describing the specific works Plaintiff is referring to or whether those works are registered. This is fatal to HBG’s copyright claim. See *Asche & Spencer Music, Inc. v. Principato-Young Entm’t, Inc.*, No. 14-4275 (RHK/BRT), 2015 U.S. Dist. LEXIS 193652, at *2-3 (D. Minn. Mar. 20, 2015)

(granting defendant's motion to dismiss for plaintiff's failure to allege registration and explaining that plaintiffs must allege registration in order to state a claim for copyright infringement); *FurnitureDealer.Net, Inc. v. Amazon.com, Inc.*, No. 18-232 (JRT/HB), 2019 U.S. Dist. LEXIS 41580, at *13 (D. Minn. Mar. 14, 2019) (“the Court must determine whether [plaintiff] has alleged facts showing that it was indeed copyrighted”). In sum, because Plaintiff's copyright claim is devoid of any facts that would demonstrate the manner by which HBG has purportedly infringed the *registered* works, Plaintiff fails to state a claim for infringement.¹

A recent case out of the Eastern District of Missouri is instructive. There, the plaintiff asserted a claim for copyright infringement of some of its copyrighted business documents and forms. *See Revolution FMO, LLC v. Mitchell*, No. 4:17CV2220 HEA, 2018 U.S. Dist. LEXIS 78920, at *3-8 (E.D. Mo. May 10, 2018). As relevant here, the complaint alleged as follows:

Mitchell has infringed The Revolution's copyrights by continuing to use, publish, perform and disseminate to the public proprietary information and materials developed by and belonging to The Revolution, including, but not limited to, materials that are the subject of Copyright Registration No. Txu-1-865-939 and Copyright Registration No. Txu-1-875-708.

¹ The lack of factual enhancement combined with the failure to attach copies of the registration certificates is exacerbated by the fact that the titles of the registered works appear to be indecipherable computer file names: “MBA-E_20181130 scr scoping” and “MBA-B_20170715 scr concept”. This makes it virtually impossible for the parties or the Court to determine the scope of Plaintiff's claim. *Cf. Warren Sign Co. v. Piros Signs, Inc.*, No. 4:10-CV-15 (CEJ), 2010 U.S. Dist. LEXIS 77882, at *14 (E.D. Mo. Aug. 3, 2010) (denying motion to dismiss where the plaintiff attached copies of both its work and the allegedly infringing work so that the Court could determine, at the motion to dismiss stage, whether plaintiff alleged a plausible claim for relief); *see also Nelson v. PRN Prods., Inc.*, 873 F.2d 1141, 1143 (8th Cir. 1989) (explaining that the “District Court had before it here complete copies of both [plaintiff's] song and [defendant's] and was therefore in proper position to apply the substantial similarity test.”).

Id. at *10. The defendant moved to dismiss on the basis that the plaintiff failed to allege sufficient facts. The district court made two key rulings. First, to the extent the plaintiff was seeking to assert claims on copyrighted works not explicitly listed in the complaint, the court barred such a tactic. Instead, the court held that the copyright claim would be “limited to works that are the subject of the *enumerated registrations*, attached to the complaint as Exhibit 5.” *Id.* at *10-11 (emphasis added). Second, the court emphasized that given the plaintiff was alleging that the defendant’s book incorporated “*portions*” of the plaintiff’s literary works, it was the plaintiff’s burden to plead facts relating to the originality of any of those portions. *Id.* at *12-13 (emphasis in original). “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, the Court cannot reasonably infer that any of the copied portions pass the originality requirement.” *Id.* at *13.

So, too, here. First, Plaintiff attempts to assert a claim based on works for which it has yet to receive certificates of registration. See Complaint at ¶ 92 (“[Plaintiff] has applied for but has not yet received the Certificate of Registration for numerous other copyrighted works connected to the Saracen Project.”). A copyright claimant, however, cannot commence an infringement action until the Copyright Office actually registers the work (or denies registration). See 17 U.S.C. §411(a). Having a pending application with the Copyright Office does not satisfy this statutory requirement. See *Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019). Second, like the plaintiff in *Revolution FMO*, Plaintiff here does not allege the specific portions of its copyrighted works which were purportedly infringed or that these portions were “original” elements

within the meaning of the Copyright Act. On this point, Plaintiff simply alleges that HBG “continued forward on the project and made only insubstantial *changes* to [Plaintiff’s] designs, keeping the main features of the design” while making “some functional changes.” See Complaint at ¶¶ 80-81. In other words, Plaintiff is essentially alleging that HBG’s work “incorporates portions” of Plaintiff’s (undefined) works. *Revolution FMO*, at *12. Accordingly, Plaintiff is required to allege facts from which it can be reasonably inferred that the purportedly copied portions are original. See *id.* at *13. Plaintiff has not done so. This is particularly problematic when dealing with architectural works which, by their very nature, have more discerning requirements for originality. See *Savant Homes, Inc. v. Collins*, 809 F.3d 1133, 1139-40 (10th Cir. 2016) (explaining that standard elements of architectural works are not protected, but original selections or arrangements of such elements may be); *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1101 (7th Cir. 2017) (agreeing with the Second Circuit that a “designer’s or architect’s copyright as thin, so that only very close copying of protected elements is actionable”).

At bottom, Plaintiff’s allegations regarding the alleged conduct of HBG are insufficient to draw a reasonable inference that copyright infringement occurred. In its copyright claim (Count 1), Plaintiff’s spartan allegations are a mere threadbare recitation of the elements of a copyright claim without factual support. See Complaint at ¶ 92-96. For this reason, dismissal is appropriate. See *Etrailer Corp. v. Automatic Equip. Mfg.*, No. 8:18-CV-351, 2019 U.S. Dist. LEXIS 63873, at *4-5 (D. Neb. Apr. 15, 2019) (granting defendant’s motion to dismiss, explaining that plaintiff failed “to plead facts showing the defendant copied constituent elements of the work that are original to the plaintiff,” and

concluding that “the plaintiff’s allegations are, at best, conclusory and merely parrot the elements of the cause of action for copyright infringement.”).

C. Plaintiff’s Request for Statutory Damages Is Barred by 17 U.S.C. § 412.

Plaintiff alleges that it is “entitled to an award of damages for copyright infringement pursuant to statute, to be ascertained at trial at the election of MBA.” Compl. ¶ 118. Section 504(c) of the Copyright Act, entitled “Statutory damages,” permits a copyright owner to elect to seek statutory damages in lieu of actual damages and profits. 17 U.S.C. § 504(c)(1). The election of statutory damages is limited to “an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally.” *Id.* Although the Copyright Act does not use the word “enhanced damages,” the only provision permitting an increase in damages (*i.e.*, “enhanced damages”) on the basis of willfulness is found in section 504(c) of the Copyright Act pertaining to statutory damages. Section 504(c)(2) states in pertinent part, “In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages...” 17 U.S.C. § 504(c)(2). In addition, a copyright owner in an infringement action may recover “full costs by or against any party other than the United States or an officer thereof.” 17 U.S.C. § 505. As part of such costs, the court may award “a reasonable attorney’s fee to the prevailing party.” *Id.*

A copyright owner’s ability to recover statutory damages (including, but not limited to, enhanced damages under section 504(c)(2)) is contingent on the owner timely filing its application for registration of the work under 17 U.S.C. § 412. Section 412 bars any

award of statutory damages or attorney’s fees (including, but not limited to, discretionary costs), as provided by sections 504 and 505, for any infringement of a 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. 17 U.S.C. § 412(2); *William Wade Waller Co. v. Nexstar Broad., Inc.*, No. 4-10-CV-00764 GTE, 2011 U.S. Dist. LEXIS 72803, at *4-6 (E.D. Ark. July 6, 2011) (“It is clear that Plaintiff published the photos in question by posting them on his website on or about October 23, 2009, that the infringement occurred in November and December 2009, and that Plaintiff did not register the photographs in question until February 10, 2010, more than three months after the first publication. Plaintiff’s claim for statutory damages and attorney’s fees must be dismissed.”).

According to the records from the United States Copyright Office Public Catalog for Plaintiff’s two registrations asserted in the Complaint, Plaintiff first published the works at issue on November 30, 2018. See United States Copyright Office Public Catalog Records for U.S Reg. Nos. VA 2-172-502 and VA2-172-372 (the “Registrations”), attached as **Exhibit A**.² According to the Complaint, the purported copyright infringement occurred at least as early as July 15, 2019. Compl. ¶ 78. The Registrations have an

² “The district court may take judicial notice of public records and may thus consider them on a motion to dismiss.” *Stahl v. United States Dep’t of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003). Even though Plaintiff failed to attached the registration certificates for the asserted works, “[a] searchable database of the United States Copyright Office Public Catalog is available at www.cocatalog.loc.gov.” *Freeplay Music, LLC v. Nian Infosolutions Private Ltd.*, 2018 U.S. Dist. LEXIS 115659, at *38 n.64 (S.D.N.Y. July 10, 2018). Courts commonly take judicial notice of information of this nature. *Id.*; see also *Swanigan v. Young*, No. 15 Civ. 1272, 2016 U.S. Dist. LEXIS 165591, at *4 (N.D.N.Y. Nov. 30, 2016) (taking judicial notice of U.S. Copyright Office Public Catalog); *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, No. 16-cv-01393-JST, 2019 U.S. Dist. LEXIS 21977, at *13 (N.D. Cal. Jan. 29, 2019) (“The Court takes judicial notice of these online records because they are “generated by an official government website[,] such that [their] accuracy is not reasonably in dispute.” (internal citations omitted)).

effective date of October 20, 2019. See Ex. A. Because the alleged infringement occurred approximately seven (7) months after first publication of the work and before the effective date of the copyright registration, which was more than three months from the first publication, Plaintiff is not entitled to an award of statutory damages and/or attorney's fees (to the extent Plaintiff is seeking attorney's fees) as a matter of law, and this claim should be dismissed with prejudice.

D. Plaintiff Fails to Allege the Essential Elements for its Contract Claim.

Plaintiff's complaint fails to properly plead the essential elements of its breach of contract claim under Arkansas law, including the elements of legal consideration, mutual agreement, and mutual obligation. Under Arkansas law, "[t]he essential elements of a contract are (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligation." *City of Dardanelle v. City of Russellville*, 277 S.W.3d 562, 565-66 (2008) (internal citations omitted). "This court cannot make a contract for the parties but can only construe and enforce the contract that they have made; and if there is no meeting of the minds, there is no contract." *Id.* In construing the terms, "the terms of a contract cannot be so vague as to be unenforceable." *Id.* A contract's terms are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." *Id.*

Plaintiff's Complaint does not attach a fully executed contract or otherwise discuss the express terms of a fully executed contract. Instead, Plaintiff cobbles together various documents and emails in an attempt to form a contract between Plaintiff and HBG. These documents include:

- "a Responsibility Matrix" (Compl. ¶ 40 and Exhibit A thereto);

- “a January 15, 2019 Initial Authorization Agreement between HBG and Chairman Berrey” (Compl. ¶ 43 and Exhibit B thereto);
- “a complete ‘Cash Flow Schedule’” (Compl. ¶ 44 and Exhibit C thereto);
- an email from Chris Roper with the Downstream Development Authority wherein Mr. Roper states that “[w]e will agree to 6% fee on Cost [sic] of work” (Compl. ¶ 45 and Exhibit D thereto);
- “a Schedule” (Compl. ¶ 46 and Exhibit E thereto);
- an email from HBG principal Paul Bell wherein Mr. Bell is still inquiring about the parties’ obligations to Saracen for the project (Compl. ¶ 47 and Exhibit F thereto);
- “a Work Split Matrix” (Compl. ¶ 48 and Exhibit G thereto); and
- “a design schedule” (Compl. ¶ 49 and Exhibit H thereto).

Later in its Complaint, Plaintiff describes this collection of documents as an “express agreement with MBA,” see Compl. ¶ 69, but in fact this amalgamation of documents is far from an “express agreement.” Indeed, the only fully executed document is the January 15, 2019, Initial Authorization Agreement between HBG and Chairman Berrey (Exhibit B to the Complaint), of which Plaintiff was not a party. Ultimately the end result is that the terms of the “contract” are so vague as to be unenforceable. See *City of Dardanelle*, 277 S.W.3d at 566 (affirming dismissal of the plaintiff’s breach of contract claim where the terms of the purported contract were too vague to constitute a legally binding agreement).

This is evident from Count III of the Complaint where Plaintiff pleads its breach of contract claim, as Plaintiff fails to plead *how* HBG breached this purported agreement. Plaintiff alleges that “[t]he agreement required HBG to perform or not to perform certain acts, including payment to MBA of 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.” Compl. ¶ 103. Plaintiff goes on to allege that “MBA did what

the agreement and contract required of it” and that “HBG did not do what the agreement and contract required of it.” *Id.* ¶¶ 104-105. Plaintiff otherwise provides no detail as to what purported terms HBG breached. As such, Plaintiff’s claim fails as a matter of law.

The Arkansas Supreme Court and Arkansas Court of Appeals reached similar conclusions in two cases that are instructive here. First, in *City of Dardanelle v. City of Russellville*, the Arkansas Supreme Court affirmed the trial court’s dismissal of the plaintiff’s breach of contract claim where the terms of the purported contract were too vague to constitute a legally binding agreement. 277 S.W.3d 562, 567 (2008). The alleged agreement was a “Joint Resolution” signed by city council members for both the City of Dardanelle, Arkansas and the City of Russellville, Arkansas, and the board of directors of Russellville’s wastewater treatment facility. The “Joint Resolution” concerned locating Russellville’s proposed municipal outfall sewer line at a point downstream of the present city limits of Dardanelle on the Arkansas River.

After reviewing the language of the “Joint Resolution” at the pleading stage, the trial court found the language to be too vague to constitute a legally binding contract and the Arkansas Supreme Court affirmed. The *City of Dardanelle* court held that “the terms [of the Joint Resolution were] not certain as to the parties’ obligations.” *Id.* Stated differently, that court held that there was no mutuality of obligation, which is an essential element of a contract under Arkansas law. Mutuality of obligations means that “an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound.” *Townsend v. Standard Indus.*, 363 S.W.2d 535, 537 (Ark. 1962). The Joint Resolution stated that that the parties agreed to “cooperate in pursuit of all avenues of

funding for the proposed municipal outfall sewer line.” *City of Dardanelle*, 227 S.W.3d at 566. The court held that “cooperate” at best indicated “that the cities agreed to help each other in obtaining funding” but that the purported agreement “[d]id not provide any explanation as to when a party will be considered to have breached the agreement by not ‘cooperating’ or, in other words, by not being helpful.” *Id.* As such, the court held that “the terms of the resolution are too uncertain to establish an obligation as to either party.” *Id.*

Such a mutuality of obligation is lacking here as well. Plaintiff at no point states what the mutual obligations were. Plaintiff states that the “agreement and contract” was “memorialized and detailed through numerous communications and written schedules, itemized fee splitting agreements, and detailed allocation of collaborative work responsibilities” but stays purposefully vague as to what the mutual obligations were. See, e.g., Compl. ¶¶ 101-102. Further, Plaintiff identifies the purported consideration as “the compensation schedules” and “the implied license to continue to develop derivative works from MBA’s foundational designs and other copyrighted works.” *Id.* ¶ 102. Yet, even this is vague, as it is unclear *what* Plaintiff is referring to as the purported “compensation schedules,” much less how the purported “compensation schedule” equates to consideration for an alleged contract between Plaintiff and HBG. Regarding the implied license to continue to develop derivative works, this is the closest Plaintiff comes to pleading consideration but such terms render the claim subject to preemption as discussed below. Thus, the terms of are too uncertain to establish the mutual obligations necessary for a breach of contract claim, as the Arkansas Supreme Court also determined in *City of Dardanelle*.

The Arkansas Court of Appeals' opinion in *Key v. Coryell*, 185 S.W.3d 98 (2004) is also instructive here. In *Key*, the mother of a student formerly enrolled at parochial school brought suit in tort and for breach of contract. *Id.* The Arkansas Court of Appeals affirmed the trial court's dismissal of the Complaint "because the terms of the purported contract set forth in the complaint were so indefinite." *Id.* at 104. The court "[had] no choice but to hold that there was no contract between the parties of sufficiently definite terms by which a remedy could be fashioned in the event of a breach." *Id.* The only document at issue in the case signed by both parties was a student handbook, however, the plaintiff did not attach the student handbook to her complaint and, even then, the *Key* court held that the student handbook's "terms were so vague and general that they are not enforceable." *Id.* at 105. The present situation is analogous.

Plaintiff fails to attach or even allege a fully executed agreement between the parties. The closest Plaintiff comes to such an agreement—which is still woefully short—is an email from HBG principal Paul Bell that states *in its entirety*:

Kertis,

I sent a Deliverables Matrix in excel spreadsheet form last week. Since we have come to agreement on the percentage of fee split, can you fill out the deliverables that MBA anticipates providing? If you could just place an "x" in each cell of the MBA column and return to me, that will be helpful in our planning and schedule development. Thanks.

See Ex. F, Feb. 7, 2019 email from P. Bell. Other than discussing "the percentage of fee split," this email only amounts to a discussion of the anticipated division of work. The email does not contain all of the essential elements of an enforceable contract, including subject matter, legal consideration, mutual agreement, and mutual obligation." *City of Dardanelle*, 277 S.W.3d at 565-66. Just as with the student handbook in *Key*, the "terms

were so vague and general that they are not enforceable.” *Id.* at 105. Accordingly, Plaintiff has failed to state a breach of contract claim upon which relief should be granted, and this claim should be dismissed.

E. Plaintiff’s Claim for Tortious Business Interference Fails as a Matter of Law.

Plaintiff’s claims for tortious business interference fails as a matter of law because under Arkansas law HBG cannot tortiously interfere with a contract or business relationship that it is a party to. Plaintiff alleges in Count II that “MBA had a valid contractual relationship and/or business expectancy with the Quapaw Nation and Saracen Development, LLC regarding the Saracen Casino Resort project” and that “HBG induced or caused a disruption or termination of that contractual relationship and/or business expectancy by intentional and improper interference.” Compl. ¶¶ 97, 99. Yet, in other sections of the Complaint, Plaintiff alleges that it “reached express agreements with both HBG and other defendants to perform high quality professional architectural services and designs” (Compl. ¶ 73) and that “MBA provided services to HBG and Saracen Development, LLC who received the benefit of such services.” Compl. ¶ 108.

The elements of tortious interference under Arkansas law are: (1) the existence of a valid contractual relationship; (2) knowledge of the relationship on the part of the interfering party; (3) intentional interference inducing or causing a breach or termination of the relationship; and (4) resultant damage to the party whose relationship has been disrupted. *Brown v. Tucker*, 954 S.W.2d 262 (Ark. 1997). Additional requirements are that the conduct of the defendant must be improper, *Mason v. Wal-Mart Stores, Inc.*, 969 S.W.2d 160 (Ark. 1998), and that there must be some third party involved. See *Navorro-Monzo v. Hughes*, 763 S.W.2d 635, 636 (Ark. 1989). Yet, “[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." *St. Joseph's Regional Health Center v. Munos*, 326 Ark. 605, 934 S.W.2d 192 (1996) (agent acting within the scope of his authority on behalf of a contracting party was not a separate third party capable of tortious interference). The fully executed contract that Plaintiff has identified is the January 15, 2019, Initial Authorization Agreement between HBG and Chairman Berrey (Exhibit B to the Complaint), which, Plaintiff avers, provides that "HBG Design will coordinate with Marlon Blackwell Architects to develop the scope of services for the full services Project." See Ex. B, Jan. 15, 2019, Initial Authorization Agreement. As HBG was a party to this contract, it cannot be held liable for tortuously interfering with this contract, therefore, Plaintiff's tortious business interference claim should be dismissed.

Moreover, Plaintiff alleges that "MBA had a valid contractual relationship and/or business expectancy with the Quapaw Nation and Saracen Development, LLC regarding the Saracen Casino Resort project" but otherwise asserts no allegations as to this "valid contractual relationship and/or business expectancy with . . . Saracen Development, LLC." See Compl. ¶ 97. Plaintiff does describe what Saracen Development, LLC is in the "Parties and Jurisdiction" section of its Complaint, see Compl. ¶ 4, and does allege that "HBG only paid to MBA \$100,000 as an initial payment to mobilize on the project, which was from sums paid to HBG by Downstream Development Authority or its Arkansas limited liability company, Saracen Development, LLC." *Id.* ¶ 51. Also, Plaintiff makes very general allegations of unjust enrichment directed at Saracen Development, LLC in Count IV of the Complaint. See Compl. ¶¶ 108-111. This comprises the totality of Plaintiff's allegations against Saracen Development, LLC. As the Eighth Circuit has explained,

“legal conclusions and threadbare recitations of the elements of a cause of action supported by mere conclusory statements are not entitled to a presumption of truth when considering the sufficiency of a complaint.” *Zink v. Lombardi*, 783 F.3d 1089, 1098 (8th Cir. 2015) (internal quotations and citations omitted). Put simply, Plaintiff’s Complaint fails to “chin the bar” as to the tortious interference claim.

F. In the Alternative, Plaintiff’s Copyright Claim Preempts its State-Law Claims.

Plaintiff’s claims for breach of contract, tortious interference with a contractual relationship, and unjust enrichment are preempted by Plaintiff’s copyright infringement claim. *See Daboub v. Gibbons*, 42 F.3d 285, 290 (5th Cir. 1995) (“In effect, [Plaintiff has] attempted to avoid the Copyright Act by presenting as many state law causes of action to the court as possible. [Its] argument is like a ventriloquist’s attempt to present a copyright action in the voice of state law claims. However, if the language of the act could be so easily circumvented, the preemption provision would be useless, and the policies behind a uniform Copyright statute would be silenced.”). Section 301(a) of the Copyright Act provides:

All legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title. Therefore, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301(a). The Eighth Circuit employs a two-part test to determine whether a state-law claim is preempted by the Copyright Act. *See National Car Rental Sys., Inc., v. Computer Assocs. Int’l*, 991 F.2d 426, 428 (8th Cir. 1993). The first question is whether the work is within the subject matter of copyright as specified in §§ 102 and 103 of the

Copyright Act. *Id.* The second question is whether the rights at issue are “equivalent to any of the exclusive rights within the general scope of copyright as specified in § 106,” *id.*, which section protects the right of reproduction, preparation of derivative works, and distribution of copies to the general public. 17 U.S.C. § 106. “If a plaintiff’s state-law claim meets both of these criteria, copyright law will preempt that claim as a matter of law.” *Dryer v. NFL*, 814 F.3d 938, 942 (8th Cir. 2016). Assuming for the sake of this argument that the work or works are within the subject matter of copyright as Plaintiff alleges (see Compl. ¶ 92),³ the Court need only consider the second part of the test.

Regarding the second prong of the test, “courts and commentators have framed the inquiry as whether the right in question is ‘infringed by the mere act of reproduction, performance, distribution or display.’” *Nat’l Car Rental*, 991 F.2d at 431 (quoting 1 Nimmer on Copyright § 1.01[B], at 1-13). “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.* (internal citations and quotations omitted). Stated differently, “The second prong of the preemption test is satisfied unless there is an extra element that changes the nature of the state law action so that it is *qualitatively* different from a copyright infringement claim.” *Huckshold v. HSSL, L.L.C.*, 344 F. Supp. 2d 1203, 1206 (E.D. Mo. 2004) (internal citations and quotation marks omitted; emphasis in original). Applying this test, each of Plaintiff’s state-law claims is analyzed below.

1. The Copyright Act preempts Plaintiff’s breach of contract claim.

³ HBG does not waive its arguments set forth in Section B, *supra*, as to whether Plaintiff has properly plead a claim under the Copyright Act.

Generally, to state a claim for breach of contract under Arkansas law, “the complaint need only assert the existence of a valid and enforceable contract between the plaintiff and defendant, the obligation of defendant thereunder, a violation by the defendant, and damages resulting to plaintiff from the breach.” *Perry v. Baptist Health*, 189 S.W.3d 54 (2004). As to the valid and enforceable contract prong under Arkansas law, “[t]he essential elements of a contract are (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligation.” *City of Dardanelle v. City of Russellville*, 277 S.W.3d 562, 565-66 (2008) (internal citations omitted). As discussed above, Plaintiff fails to properly assert its breach of contract claim. See Section D, *supra*. That said, Plaintiff does allege that it provided HBG purported consideration in the form of “the implied license to continue to develop derivative works from MBA’s foundation designs and other copyrighted works” (Compl. ¶ 102), that “the agreement required HBG to perform or not to perform certain acts, including payment to MBA of 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” (Compl. ¶ 103), and that HBG did not do what the agreement and contract required of it.” Compl. ¶ 105. Based on this, the question is whether Plaintiff’s breach of contract claim against HBG for allegedly not paying 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” includes an extra element that makes this claim qualitatively different from Plaintiff’s copyright infringement action. The answer is no.

To be clear, “[b]reach of contract claims are *typically* not preempted by the Copyright Act.” *Two Palms Software, Inc. v. Worldwide Freight Mgmt. LLC*, No. 4:10-CV-1045 (CEJ), 2012 WL 2418913, *2 (E.D. Mo. June 26, 2012) (emphasis added). But this is not a bright line rule, as a breach of contract claim “may be preempted by the Copyright Act when the plaintiff merely alleges that the defendant breached the contract by infringing on the copyright.” *Two Palms Software*, 2012 WL 2418913, at *3; see also 1 Nimmer on Copyright § 1.01[B][1][a][iii], at 1-18 (2015) (“[N]otwithstanding the general rule allowing such causes of action to go forward, a breach of contract claim at times should be deemed pre-empted.”). Numerous courts have held as such after determining that the particular contract rights at issue were equivalent to those asserted under the Copyright Act.⁴ As the leading treatise on copyright law has explained, multiple courts “have followed *National Car Rental* to hold aspects of contract claims pre-empted.” 1 Nimmer on Copyright § 1.01[B][1][a][iii], at 1-22.2 (2015); see, e.g., *Health Grades*, 634 F. Supp. 2d at 1244-46; *Selby*, 96 F. Supp. 2d at 1060-62; *Am. Movie Classics*, 922 F. Supp. at 931-32.

⁴ See, e.g., *Worksteps, Inc. v. Ergo Science, Inc.*, No. A-14-CA-968-SS, 2015 WL 1807402, *16 (W.D. Tex. Apr. 20, 2015); *Alpha Media Works, Inc. v. Perception Research Servs., Inc.*, No. 09 Civ. 9563 (GBD), 2012 WL 406914, *2 (S.D.N.Y. Feb. 9, 2012); *Canal+ Image UK Ltd. v. Lutvak*, 773 F. Supp. 2d 419, 441-46 (S.D.N.Y. 2011); *ExperExchange, Inc. v. Doculex, Inc.*, No. C-08-03875 JCS, 2009 WL 3837275, *7-8, 24-26 (N.D. Cal. Nov. 16, 2009); *Health Grades, Inc. v. Robert Wood Johnson Univ. Hosp., Inc.*, 634 F. Supp. 2d 1226, 1243-47 (D. Colo. 2009); *Jacobsen v. Katzer*, 609 F. Supp. 2d 925, 933 (N.D. Cal. 2009); *Broadvision Inc. v. Gen. Elec. Co.*, No. 08 Civ. 1489 (WHP), 2008 WL 4684114, *4 (S.D.N.Y. Oct. 15, 2008); *Nichols Agency, Inc. v. Enchanted Childcare, Inc.*, 537 F. Supp. 2d 774, 783-84 (D. Md. 2008); *Nutter v. Clear Channel Communications, Inc.*, No. 5:05CV65, 2006 WL 2792903, *4-5 (N.D. W. Va. Sep. 26, 2006); *Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp.*, 351 F. Supp. 2d 436, 443-44 (M.D.N.C. 2005); *Evolution, Inc. v. Suntrust Bank*, 342 F. Supp. 2d 943, 959-60 (D. Kan. 2004); *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1056-62 (C.D. Cal. 2000); *Am. Movie Classics Co. v. Turner Entertainment Co.*, 922 F. Supp. 926, 931-32 (S.D.N.Y. 1996); *Wharton v. Columbia Pictures Indus., Inc.*, 907 F. Supp. 144, 145-46 (D. Md. 1995).

Here, the alleged breach of contract by HBG equates with Plaintiff's alleged rights under the Copyright Act. As the above-cited Complaint sections demonstrate, Plaintiff's vague allegations boil down to 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. This same right to derivative works forms the basis of Plaintiff's copyright infringement claim: "Defendants, by virtue of their continued reproduction, distribution, displaying, and performance of MBA's protected architectural and design works, including those described by the Registrations, and by their making of derivative works from the same, are infringing the exclusive rights of MBA to these architectural and design works." Compl. ¶ 93. As such, Plaintiff's complaint in actuality "merely alleges that the defendant breached the contract by infringing on the copyright," *Two Palms Software*, 2012 WL 2418913, at *3, and therefore its breach of contract claim is preempted.

2. The Copyright Act also preempts Plaintiff's tortious business interference claim.

Plaintiff alleges in Count II that "MBA had a valid contractual relationship and/or business expectancy with the Quapaw Nation and Saracen Development, LLC regarding the Saracen Casino Resort project" and that "HBG induced or caused a disruption or termination of that contractual relationship and/or business expectancy by intentional and improper interference." Compl. ¶¶ 97, 99. Though not articulated, this "disruption or termination" appears to be the allegation that "Saracen Development, LLC [has] not paid MBA the reasonable value of such services received by HBG and Saracen Development,

LLC” (Compl. ¶ 111), namely, the design fee for the works. That is to say, the crux of Plaintiff’s tortious interference claim is HBG’s alleged use Plaintiff’s works. See, e.g., Compl. ¶¶ 70, 74, 75, 82 (“Notwithstanding the express agreement with MBA, HBG continued using all plans and carried forward with the entire project without compensation to MBA;” “HBG has apparently elected to proceed forward in making derivative works from MBA’s intellectual property, in violation of copyright laws and of the parties’ express agreement to share the fees for the entire project on a 34.42% / 65.58% split;” “HBG was brought into the project to assist MBA in the implementation of MBA’s designs for this casino. HBG continued working with MBA’s designs and has made derivative works without MBA’s authorization;” “HBG has misappropriated MBA’s original designs and architectural works for its own benefit and is now advertising its work to the general public.”). As discussed above, the elements of tortious interference under Arkansas law are: (1) the existence of a valid contractual relationship; (2) knowledge of the relationship on the part of the interfering party; (3) intentional interference inducing or causing a breach or termination of the relationship; and (4) resultant damage to the party whose relationship has been disrupted. *Brown v. Tucker*, 954 S.W.2d 262 (Ark. 1997). Additional requirements are that the conduct of the defendant must be improper, *Mason v. Wal-Mart Stores, Inc.*, 969 S.W.2d 160 (Ark. 1998), and that there must be some third party involved. See *Navorro-Monzo v. Hughes*, 763 S.W.2d 635, 636 (Ark. 1989).

Critically, “[a]wareness or intent . . . are not extra elements that make a state law claim qualitatively different [from a copyright infringement claim].” *Huckshold v. HSSL, L.L.C.*, 344 F. Supp. 2d 1203, 1208 (E.D. Mo. 2004) (internal citations omitted). “Rather, these two elements limit the scope of the copyright infringement claim “but leave[] its

fundamental nature unaltered.” *Id.* (citations omitted). “Thus, that a tortious interference claim requires the plaintiff to plead the additional elements of awareness and intentional interference, which are not elements of a copyright claim, goes merely to the scope of the right; it does not establish qualitatively different conduct on the part of the infringing party, nor a fundamental nonequivalence between the state and federal rights implicated.” *Id.* (internal citations and quotations omitted). Due to Plaintiff’s vague and specious pleading, it appears Plaintiff would “need prove only an unauthorized copying” to succeed on his tortious interference claim.” *Id.* at 1209.

As the Eighth Circuit has explained, because “Plaintiff’s state-law rights [are] infringed by the mere act of reproduction, [its] state-law rights are equivalent to the exclusive rights within the general scope of copyright.” *Munro v. Lucy Activewear, Inc.*, 899 F.3d 585, 592 (8th Cir. 2018) (internal quotations and citations omitted). “As a result, [Plaintiff’s] tortious interference claim is

3. The Copyright Act preempts Plaintiff’s unjust enrichment claim.

Under Arkansas law, “an action based on unjust enrichment is maintainable where a person has received money or its equivalent under such circumstances that, in equity and good conscience, he or she ought not to retain.” *Indep. Cty. v. Pfizer, Inc.*, 534 F. Supp. 2d 882, 891 (E.D. Ark. 2008) (quoting *Merchants & Planters Bank & Trust Co. v. Massey*, 790 S.W.2d 889 (Ark. 1990)). “There must also be some operative act, intent, or situation to make the enrichment unjust and compensable.” *Indep. Cty.*, 534 F. Supp. 2d at 891 (quoting *Hatchell v. Wren*, 211 S.W.3d 516 (Ark. 2005)). “A party who is free from fault cannot have been unjustly enriched only because he chose to exercise a legal right.” *Id.*

Plaintiff's unjust enrichment claim arises out of its allegation that "MBA provided services to HBG and Saracen Development, LLC, who received the benefit of such services." Compl. ¶ 108. Plaintiff further alleges that "HBG and Saracen Development, LLC have not paid MBA the reasonable value of such services by HBG and Saracen Development, LLC." *Id.* ¶ 111. Plaintiff otherwise does not sufficiently plead what constitutes these "services" that were purportedly provided to HBG other than the provisions of Plaintiff's purported copyrighted designs. See, e.g., Compl. ¶¶ 41 ("In furtherance of this forward-looking collaboration and sharing of responsibilities, MBA provided to HBG assistants and architects its plans, drawings, sketches, schematics, footprints, renderings, and many other essential work product, including architectural computer files in .pdf format, .rvt [for Revit BIM], .ai, .psd, .ls, .eml, and substantially complete architectural schematic design plans for the Saracen Casino. Throughout this project, HBG had direct access to MBA's copyrighted architectural works and designs."); see also Compl. ¶¶ 46, 71, 72. Based on this, the central allegation is that HBG allegedly used Plaintiff's copyrighted designs and were thereby enriched as a result of the alleged wrongful exercise of Plaintiff's § 106 rights. This, in turn, renders Plaintiff's unjust enrichment claim preempted by Plaintiff's claim for copyright infringement pursuant to the Copyright Act.

Indeed, "[t]he majority of courts to consider the preemption question have determined that state unjust enrichment claims are preempted by the Copyright Act." *Issaenko v. Univ. of Minn.*, 57 F. Supp. 3d 985, 1025-27 (D. Minn. 2014) (citing *R.W. Beck, Inc. v. E3 Consulting, LLC*, 577 F.3d 1133, 1148 (10th Cir. 2009); *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004); *Murray*

Hill [*1026] *Publ'ns, Inc. v. ABC Commc'ns, Inc.*, 264 F.3d 622, 637-38 (6th Cir. 2001), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010); *Pan-Am. Prods. & Holdings, LLC v. R.T.G. Furniture Corp.*, 825 F. Supp. 2d 664, 695-96 (M.D.N.C. 2011); *Two Palms Software, Inc. v. Worldwide Freight Mgmt., LLC*, 780 F. Supp. 2d 916, 923 (E.D. Mo. 2011); *Blue Nile, Inc. v. Ice.com, Inc.*, 478 F. Supp. 2d 1240, 1251 (W.D. Wash. 2007); *Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d 756, 769 (N.D. Tex. 2006); *Ott v. Target Corp.*, 153 F. Supp. 2d 1055, 1067 (D. Minn. 2001)). Courts have repeatedly held that “where unjust enrichment claims are based upon the violation of rights protected by the Copyright Act, they ‘sound[] squarely in copyright infringement’ and are therefore preempted.” *Issaenko v. Univ. of Minn.*, 57 F. Supp. 3d 985, 1025-27 (D. Minn. 2014) (quoting *Ott*, 153 F. Supp. 2d at 1067 (finding unjust enrichment claim preempted based on the allegation that “[b]y failing to compensate Plaintiffs for the use of their dolls and designs, Defendants have been unjustly enriched at the expense of Plaintiffs” (internal quotation marks omitted))); *see also Pan-Am. Prods. & Holdings*, 825 F. Supp. 2d at 695 (finding unjust enrichment claim preempted based on allegation “that Defendants used the copyrighted designs, through advertising, distribution and sales, and were enriched thereby. . . . The gravamen of this allegation . . . is that Defendants were unjustly enriched as a result of the wrongful exercise of Pan-American’s § 106 rights.”).

The District of Minnesota analyzed this issue in a copyright infringement case where the plaintiff alleged that the defendants benefited from misappropriation of the plaintiff’s copyrighted works. *Issaenko v. Univ. of Minn.*, 57 F. Supp. 3d 985, 1025-27 (D. Minn. 2014). The *Issaenko* court held that the plaintiff’s allegations fell “within the

exclusive rights protected by the Copyright Act” and were therefore preempted even though actual enrichment is not required for copyright infringement. *Id.* at 1027; see also *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004) (“While enrichment is not required for copyright infringement, we do not believe that it goes far enough to make the unjust enrichment claim qualitatively different from a copyright infringement claim.”). HBG submits that Plaintiff’s claim is analogous to the situation in *Issaenko*.

Plaintiff will likely argue that its claim is different because it relates not to HBG’s alleged copyright infringement but to the breach of the specious “agreement and contract” between HBG and Plaintiff. This argument fails as well. As the District of Minnesota held in another case, the fact that an unjust enrichment claim is connected to an alleged breach of contract claim “does not remove the claim from the scope of the Copyright Act” when the gravamen of the claim is the HBG unjustly benefited from use of the copyrighted works. *FurnitureDealer.Net, Inc. v. Amazon.com, Inc.*, No. 18-232 (JRT/HB), 2019 U.S. Dist. LEXIS 41580, at *28 (D. Minn. Mar. 14, 2019). Therefore, Plaintiff’s unjust enrichment claim is preempted by the Copyright Act, and HBG respectfully submits that the Court should grant HBG’s Motion to Dismiss Plaintiff’s unjust enrichment claim.

III.CONCLUSION

For the reasons set forth herein, Defendant HBG Design, Inc. respectfully requests that this Court grant this Motion to Dismiss and dismiss Plaintiff’s Complaint with prejudice.

DATE: February 3, 2020

Respectfully submitted,

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* - Motion for admission *pro hac vice*
forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

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