No. 17-14110-AA

IN THE

United States Court of Appeals for the Eleventh Circuit

FASTCASE, INC.,
Plaintiff—Appellant,

v.

LAWRITER, LLC,
Defendant—Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia
(Hon. Timothy C. Batten, Sr., United States District Judge)
NO. 1:17-cv-414-TCB

BRIEF OF APPELLEE LAWRITER, LLC

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No. 17-14110-AA
Fastcase, Inc. v. Lawriter, LLC

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, Appellee Lawriter, LLC ("Appellee" or "Lawriter") certifies that, to the best of counsel's knowledge and in addition to any identified by Appellant, the following persons and entities have an interest in the outcome of this case:

Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.;

Batten, The Hon. Timothy C.;

Brazier, Esq ., Robert G.;

Fastcase, Inc.;

Georgia, Office of the Secretary of State;

Georgia, State of;

Georgia, State Bar of;

Hall, Esq., Steven G.;

Lawriter, LLC;

Rohe, Esq., Joseph W.;

Rozelsky, Esq., Kurt M.;

Smith Moore Leatherwood, LLP;

Sheth, Paresh;

Sheth, Satish;

SSN Holdings, LLC; and

Tropper, Esq., Joshua.

Pursuant to Fed. R. App. P. 26.1, Appellee states that it is wholly owned by SSN Holdings, LLC, a Nevada limited liability company, whose only members are Satish and Paresh Sheth. Appellee certifies that no publically listed or traded company or corporation holds any ownership interest in Appellee or SSN Holdings, LLC, or has any interest in the outcome of this case.

STATEMENT REGARDING ORAL ARGUMENT

This case presents important issues relating to the standard for assessing damages in determining the existence of diversity jurisdiction and issues of federal question jurisdiction for copyright claims. Appellee, Lawriter, LLC, respectfully requests oral argument, which Appellee believes would assist this Court in the determination of these issues.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court's subject matter jurisdiction, or lack thereof, is the ultimate issue on appeal in this matter. For reasons further espoused in Appellee's argument, below, the District Court lacks subject matter jurisdiction under both diversity and federal question/copyright jurisdiction, and properly dismissed Appellant's declaratory judgment action pursuant to 28 U.S.C. § 1332(a) and the authority of *Stuart Weitzman, LLC v. Microcomputer Res., Inc.*, 542 F.3d 859, 861-62 (11th Cir. 2008).

Pursuant to 28 U.S.C. § 1291, this Court maintains appellate jurisdiction over this appeal, timely filed August 16, 2017, from final judgment entered July 17, 2017.

STATEMENT OF THE CASE

(i) Course of proceedings and dispositions in the court below:

Appellant Fastcase, Inc. ("Appellant") filed this lawsuit in the United States District Court for the Northern District of Georgia, seeking a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202, as well as preliminary and permanent injunctive relief against Lawriter. (Doc. 1, p. 1). Appellant's initial action, filed February 3, 2016, was dismissed by the District Court for lack of subject matter jurisdiction. (Doc. 13, p. 4). On February 2, 2017, Appellant filed a second action

in an attempt to remedy the defects contained in the jurisdictional allegations of the first complaint. (*See* Doc. 1, generally). On April 17, 2017, Lawriter moved to dismiss the Appellant's claims on the grounds that (1) the District Court lacked both diversity and federal question/copyright jurisdiction, and (2) Appellant failed to join all required parties. (*See* Doc. 17, p. 2). The District Court entered an order on July 17, 2017, dismissing Appellant's claims for lack of subject matter jurisdiction.[1] (Doc. 13).

(ii) Statement of the facts:

Appellant and Lawriter are competitors in the market for legal research services, with each providing online access to searchable databases of public law, such as state and federal statutes, judicial decisions, and administrative rules and regulations. (Doc. 1, pp. 6-7). Lawriter is contractually engaged with the State of Georgia (the "State") to compile and publish the Georgia Administrative Rules and Regulations (the "Regulations"), electronically, on behalf of the Georgia Secretary of State (the "SOS"), who is statutorily obligated to "compile, index, and publish in print or electronically" the Regulations pursuant to the Georgia Administrative Procedures Act (the "GAPA"). (Doc. 1, p. 7; O.C.G.A. § 50-13-7(a)). The SOS has

[1] The District Court dismissed Appellants' claims for lack of subject matter jurisdiction, but did not reach Lawriter's arguments for dismissal based on failure to join a required party, the State of Georgia, under Fed. R. Civ. P. 12(b)(7) and 19. (*See* Doc. 13).

elected both to delegate this obligation and to provide this service electronically, as expressly permitted under the GAPA. (*See* Doc. 4-2, pp. 8-12). In furtherance of this statutory obligation and pursuant to § 50-13-7(e) of the Official Code of Georgia, the SOS contracted with Lawriter to "publish a compilation of the [Regulations] hosted on a World Wide Web Site" (the "Website") that must include certain content and meet certain minimum specifications. (Doc. 4-2, p. 8). Lawriter's contract with the State/SOS is expressly authorized by the GAPA, which provides that the SOS "may engage the services of a privately operated editorial and publication firm…to compile, index, and publish such rules." O.C.G.A. § 50-13-7(e). Although Lawriter makes the Regulations available to the public free of charge via the Website, the SOS and Lawriter have agreed that the Regulations are not provided free of charge to commercial resellers, like Appellant, who wishes to download the Regulations in order to sell access to Appellant's subscribers.

For the services of compiling, indexing, and electronically publishing the Regulations, Lawriter is compensated by the SOS in the form of four (4) installment payments of $5,000 per year, unless Lawriter is able to recover its costs and expenses by charging commercial users, such as Appellant, who resell access to the Regulations to their subscribers for profit. (Doc. 4-2, pp. 9-10). Under

Lawriter's agreement with the SOS, for each set of the updated Regulations sold, the SOS is relieved of the obligation of one (1) installment payment of $5,000. (Doc. 4-2, p. 10).

Appellant wishes to download or otherwise copy the Regulations through the Website and resell them commercially to Appellant's paying subscribers—including but not limited to members of the Georgia Bar—without paying the fee paid by other commercial resellers such as Westlaw or LexisNexis. Per the complaint, Appellant sought to enjoin Lawriter "from acting in such a manner as to impede" Appellant's publications and resale of the Regulations. (Doc. 1, p. 1).

(iii) Statement of the standard of scope of review:

This Court "review[s] a district court's dismissal of a complaint for lack of subject matter jurisdiction under the *de novo* standard." *Federated Mut. Ins. Co. v. McKinnon Motors, LLC*, 329 F.3d 805, 807 (11th Cir. 2003).

SUMMARY OF THE ARGUMENT

Lawriter maintains, as it did before the District Court, that the federal courts lack subject matter jurisdiction over Appellant's claims under either a theory sounding in federal question/copyright jurisdiction or diversity jurisdiction. Despite Appellant's attempts to transfer the burden of proof to Lawriter, the burden properly remains with Appellant. Where a plaintiff brings a claim for declaratory

judgment, "the party seeking to invoke federal jurisdiction bears the burden of proving by a preponderance of the evidence that the claim on which it is basing jurisdiction meets the jurisdictional minimum." *McKinnon Motors*, 329 F.3d at 807.

As to Appellant's argument regarding federal question/copyright jurisdiction, Eleventh Circuit precedent mandates that "only those copyright holders that at least apply to register their copyrights may invoke the subject matter jurisdiction of the federal courts in an infringement suit. *Stuart Weitzman*, 542 F.3d at 863. As it is undisputed that Lawriter has neither registered nor applied to register a copyright in the subject Regulations or in any materials at issue in this case, the federal courts lack subject matter jurisdiction over any speculative claim Lawriter might allegedly assert against Appellant for copyright infringement.

Additionally, although it is undisputed that the parties are diverse, Appellant can provide no more than speculation and conjecture regarding the alleged amount in controversy. Under the authority of *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1077 (11th Cir. 2000), "[w]hen a plaintiff seeks injunctive or declaratory relief…the value of the requested injunctive relief is the monetary value of the benefit that would flow to the plaintiff if the injunction were granted." Appellant's

only allegations regarding damages are hypothetical losses that Appellant *might* incur if some future event occurred. (*See* Compl. ¶¶ 5-7).

It is a fundamental rule that federal courts are prohibited from issuing advisory opinions. "Consistent with the 'cases' and 'controversies' requirement of Article III [of the U.S. Constitution], the Declaratory Judgment Act, 28 U.S.C. § 2201, specifically provides that ***a declaratory judgment may be issued only in the case of an 'actual controversy.***'" *Malowney v. Fed. Collection Deposit Gp.*, 193 F.3d 1342, 1347 (11th Cir. 1999); *see also Dow Jones & Co., Inc. v. Ablaise, Ltd.*, 606 F.3d 1338, 1345 (Fed. Cir. 2010)(*quoting MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007)("Subject matter jurisdiction in a declaratory judgment suit depends upon the existence of 'a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment,' and the plaintiff bears the burden of proving the existence of such a controversy through the litigation."). Lawriter maintains that this matter presents no actual case or controversy, and thus the District Court lacks the jurisdiction to issue an advisory opinion that would become applicable in the event Appellant's speculative, conjectural and hypothetical "injuries" materialize at some future date.

ARGUMENT AND CITATIONS OF AUTHORITY

Appellant filed this lawsuit pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. (Compl. ¶ 1). "[I]t is well established that the Declaratory Judgment Act does not, of itself, confer jurisdiction upon federal courts." *Stuart Weitzman*, 542 F.3d at 861-62. Rather, "a suit brought under the Act must state some independent source of jurisdiction, such as the existence of diversity or the presentation of a federal question." *Borden v. Katzman*, 881 F.2d 1035, 1037 (11th Cir. 1989). Herein, Plaintiff alleges that jurisdiction lies under the Court's federal question and federal copyright jurisdiction, and/or diversity jurisdiction; however and for the reasons set forth hereinbelow, subject matter jurisdiction is lacking and the District Court was correct to dismiss Appellant's claims.

I. APPELLANT'S CLAIMS WERE PROPERLY DISMISSED BECAUSE THE DISTRICT COURT LACKS FEDERAL QUESTION AND FEDERAL COPYRIGHT JURISDICTION.

Under 28 U.S.C. § 1331, federal district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Similarly, 28 U.S.C. § 1338 grants federal district courts "original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks." Because the only

possible federal question suggested arises under the Copyright Act, the court need not distinguish these two separate sources of jurisdiction. *See Stuart Weitzman*, 542 F.3d at 862 n.1.

Ordinarily, a case can be said to "arise under" federal law "only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Dunlap v. G&L Holding Gp., Inc.*, 381 F.3d 1285, 1290 (11th Cir. 2004). However, "***in the context of a declaratory judgment action…[the courts] do not look to the face of the declaratory judgment complaint in order to determine the presence of a federal question…[but rather] must determine whether or not the cause of action anticipated by the declaratory judgment plaintiff arises under federal law***." *Stuart Weitzman*, 542 F.3d at 862 (internal citations omitted) [emphasis added]. The "inquiry is thus whether, absent the availability of declaratory relief, the instant case could nonetheless have been brought in federal court. To do this, [the court] must analyze the assumed coercive action by the declaratory judgment defendant." *Id.* (internal citations omitted).

Here, as was the case in the prior lawsuit filed by Appellant, the only federal claims potentially implicated by Lawriter's alleged threat of litigation against Appellant are federal copyright claims. Under established Eleventh Circuit precedent, "only those copyright holders that at least apply to register their

copyrights may invoke the subject matter jurisdiction of the federal courts in an infringement suit." *Stuart Weitzman*, 542 F.3d at 863. However, it is undisputed among the parties that Lawriter has neither registered nor applied to register a copyright in the materials at issue. Moreover, Lawriter has provided Appellant a Covenant Not To Sue for any copyright infringement concerning the Regulations. (*See* Doc. 20-1, pp. 15-16). Thus, Lawriter cannot sustain a viable federal claim against Appellant under the Copyright Act pursuant to established Eleventh Circuit precedent. Notwithstanding, Appellant argues the present matter is distinguished from application of the holding in *Stuart Weitzman* on the basis of "Lawriter's explicit threat to sue for copyright infringement…and for state-law claims that should be pre-empted by copyright." (Doc. 1, p. 3). This threat, Appellant argues, "necessarily implies at least an attempt to obtain copyright registration." (Doc. 1, p. 3). Such an implication, however, is not supported by the facts alleged in the Complaint and is, in any event, entirely hypothetical and speculative.

Pursuant to the express language of 28 U.S.C. § 2201, a declaratory judgment may only be issued in cases of "actual controversy," meaning there must be a substantial continuing controversy between two adverse parties. *See Emory v. Peeler*, 756 F.2d 1455, 1551-52 (11th Cir. 1985). "***[T]he continuing controversy may not be conjectural, hypothetical, or contingent; it must be real and***

immediate, and create a definite, rather than speculative threat of future injury." *Id.* [emphasis added]. "***The remote possibility that a future injury may happen is not sufficient*** to satisfy the 'actual controversy' requirement for declaratory judgments." *Id.* at 1552 [emphasis added].

Despite Appellant's claims to the contrary, the facts of this case are in all pertinent parts identical to those presented in *Stuart Weitzman*. In that case, the plaintiff brought a declaratory judgment action seeking a declaration that it could use, maintain and modify certain computer software without infringing upon the defendant's alleged copyrights, which the parties acknowledged the defendant never registered. *See Stuart Weitzman*, 542 F.3d at 861. This Court held that "because the Declaratory Judgment Act cannot, of itself, confer jurisdiction upon the federal courts, and because [the defendant] could not sustain an infringement action [based upon unregistered copyrights] in federal court,…such a hypothetical coercive action cannot provide the district court with subject matter jurisdiction over [the plaintiff's] declaratory suit." *Id.* at 863. The alleged continued threat of legal action against Plaintiff under the copyright laws does not alter the effect of this Court's decision in *Stuart Weitzman*.

Appellant additionally argues that *Stuart Weitzman* has been impliedly overruled by the United States Supreme Court's decision in *Reed Elsevier, Inc. v.*

Muchnick, 559 U.S. 154 (2010). However, *Muchnick* did not address dismissal of claims involving unregistered copyrights. Moreover, other courts—including this Court—have dismissed copyright infringement claims involving unregistered works post-*Muchnick*. *See Dowbenko v. Google, Inc.*, 582 F.Appx. 801, 805 (11th Cir. 2014)(holding that plaintiff's copyright infringement claim must be dismissed for failure to register); *Fund for Lost Boys & Girls of Sudan, Inc. v. Alcon Entm't, LLC*, 2016 WL 4394486, *7 (N.D.Ga. Mar. 22, 2016)(holding that plaintiff's declaratory judgment claim must be dismissed as it sought to enforce copyrights where no copyright had been registered.).

Because there is no allegation that Lawriter has registered, or even applied to register, a copyright in the materials at issue (and Lawriter has not done so), the District Court correctly ruled that it lacks federal question jurisdiction in this declaratory action.

II. APPELLANT'S CLAIMS WERE PROPERLY DISMISSED BECAUSE THE TRIAL COURT LACKS DIVERSITY JURISDICTION.

Federal district courts are also vested with original jurisdiction over any civil action between citizens of different states "where the matter in controversy exceeds the sum or value of $75,000, exclusive of interests and costs." 28 U.S.C. § 1332(a).

There is no dispute that the parties are completely diverse, and the jurisdictional inquiry thus focuses only on whether the amount in controversy is satisfied.

"When a plaintiff seeks injunctive or declaratory relief, the amount in controversy is the monetary value of the object of the litigation from the plaintiff's perspective." *Office Depot*, 204 F.3d at 1077. "In other words, ***the value of the requested injunctive relief is the monetary value of the benefit that would flow to the plaintiff if the injunction were granted***." *Id.* [emphasis added]. Where a plaintiff brings a claim for declaratory judgment, "the party seeking to invoke federal jurisdiction bears the burden of proving by a preponderance of the evidence that the claim on which it is basing jurisdiction meets the jurisdictional minimum." *McKinnon Motors*, 329 F.3d at 807. Only benefits that are "sufficiently measurable and certain" may be considered; the court may not rely on speculation or conjecture to conclude that it has jurisdiction. *See Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1268-69 (11th Cir. 2000) (internal citations omitted).

Appellant seeks to satisfy its burden by claiming its contract with the State Bar of Georgia (the "Georgia Bar"), which Appellant alleges is valued at "substantially more than $75,000 per year," "would be subject to termination" if Appellant were unable to offer the Regulations to members of the Georgia Bar. (Doc. 1, p. 3). In addition, Appellant alleges that the liquidated damage amount set

forth in Lawriter's online "Terms of Use" satisfies the amount in controversy requirement. (Doc. 1, pp. 3-4). Specifically, Appellant alleges that it could violate Lawriter's online "Terms of Use" by accessing data "possibly thousands of times every day," thereby subjecting it to liquidated damages of $20,000 per violation.[2] (Doc. 1, p. 4). However, neither the hypothetical damages that would be allegedly suffered by Appellant upon loss of its contract with the Georgia Bar nor liquidated damages for violation of Lawriter's "Terms of Use" speak to "the monetary value of the object of the litigation that would flow to Appellant if the injunction were granted." *See Office Depot*, 204 F.3d at 1077; *see also Ala. Power Co. v. Calhoun Power Co.*, 2012 WL 6755061 at *3 (N.D.Ala. Dec. 28, 2012)("the Eleventh Circuit has held that ***the value of a declaratory action is judged by the value a plaintiff will receive if an injunction is granted, not if it is denied***." [emphasis added]). Appellant's allegations regarding amount in controversy all concern the alleged monetary loss that Appellant would suffer in the event the injunction is denied, rather than the value Appellant would receive if the relief sought were

[2] Appellant alleges it would be subject to liquidated damages of $20,000 "each and every time" it accesses or offers access to the Regulations; however, the plain language of the "Terms of Use" as cited in the Complaint do not support Appellant's "per occurrence" exposure. The provision merely provides that "[i]f you violate [the Terms of Use], or if you access or use this website in violation of [the Terms of Use], you agree that Lawriter will suffer damages of at least $20,000." (Doc. 8-3).

granted. Accordingly, these allegations cannot suffice to carry Appellant's burden of establishing the requisite amount in controversy to support diversity jurisdiction.

"[F]ederal courts are obligated to strictly construe the statutory grant of diversity jurisdiction." *Morrison*, 28 F.3d at 1268. In this case, Appellant has failed to present facts that would allow the Court to do anything more than speculate about the monetary value of the object of this litigation from the Appellant's perspective. Accordingly, diversity jurisdiction is lacking.

III. APPELLANT'S CLAIMS ARE SUBJECT TO DISMISSAL FOR FAILURE TO JOIN A REQUIRED PARTY.

Because the State cannot be joined in this action, the Appellant's claims are subject to dismissal for failure to join a required party. Courts addressing a motion to dismiss under Rule 12(b)(7) and Rule 19 undergo a two-step inquiry. "First, the court must ascertain under the standards of Rule 19(a) whether the person in question is one who should be joined if feasible. If the person should be joined but cannot be…then the court must inquire whether, applying the factors enumerated in Rule 19(b), the litigation may continue." *Challenge Homes, Inc. v. Greater Naples Care Cntr., Inc.*, 669 F.2d 667, 669 (11th Cir. 1982). However, "[i]f the party is indispensable, the case *must* be dismissed." *Collegiate Licensing Co. v. Am. Cas. Co. of Reading, Pa.*, 842 F.Supp.2d 1360, 1364 (N.D.Ga. 2012) (internal citations omitted).

"The party making the 12(b)(7) motion bears the initial burden of showing that the person who was not joined is necessary for a just adjudication." *Weeks v. Housing Auth. of City of Opp, Ala.*, 292 F.R.D. 689, 692 (M.D.Ala. 2013)(*citing Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005)). That said, "[w]here an initial appraisal of the facts reveals the possibility that an unjoined party is arguably indispensable, the burden devolves upon the party whose interests are adverse to the unjoined party to negate the unjoined party's indispensability to the satisfaction of the court." *Ranger Ins. Co. v. United Housing of N.M., Inc.*, 488 F.2d 682, 683 (5th Cir. 1974). "The proponent of a 12(b)(7) motion can satisfy its burden 'by providing affidavits of persons having knowledge of these interests as well as other relevant extra-pleading evidence." *Weeks*, 292 F.R.D. at 692 (*citing Citizen Bank Potawatomi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994)).

For the reasons set forth below, the State by and through the SOS is a required party that cannot be joined—that is, it is an indispensable party independently necessitating dismissal of Appellant's declaratory judgment claims.

A. The State of Georgia is a required party under Rule 19(a).

A person is required and "must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that

person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1). "Whether a particular nonparty is necessary to an action is heavily influenced by the facts and circumstances of each case." *Collegiate Licensing*, 842 F.Supp.2d at 1364 (*citing Pinckney v. SLM Financial Corp.*, 236 F.R.D. 587, 589 (N.D.Ga. 2005)). "However, when making its determination, the Court must consider whether complete relief can be granted with the present parties, and **whether the absent party has an interest in the disposition**." *Id.* at 1365 [emphasis added]. "[P]ragmatic concerns, especially the effect on the parties and the litigation, control." *Challenge Homes*, 669 F.2d at 669 (internal citations omitted).

The State has a strong interest in this matter, in which Appellant asks the District Court to declare unenforceable the State's chosen contractual mechanism for publishing the Regulations and paying the costs of publication. Under the GAPA, the SOS is statutorily obligated to "compile, index, and publish in print or electronically" the Georgia Regulations. *See* O.C.G.A. § 50-13-7(a). The SOS has elected both to delegate this obligation and to provide this service electronically, as

expressly permitted under the GAPA. In furtherance of this statutory obligation and pursuant to O.C.G.A. § 50-13-7(e), the SOS contracted with Lawriter to "publish a compilation of the Georgia Administrative Rules and Regulation[s] hosted on a World Wide Web Site" that must include certain content and meet minimum specifications. (Doc. 4-2, p.8.) Lawriter is compensated by the SOS for providing this service in the form of four (4) installments of $5,000 per year, unless Lawriter is able to recover its costs and expenses by charging commercial users, such as Plaintiff, who resell access to the Georgia Regulations to their subscribers for profit. (Doc. 4-2, pp. 9-10.) Under Lawriter's agreement with the SOS, for each set of the updated rules and regulations sold, the SOS is relieved of the obligation of one (1) installment payment of $5,000. (Doc 4-2, p. 10.)

Per the Complaint, Appellant sought to enjoin Lawriter "from acting in such a manner as to impede" Appellant's publication of the Georgia Regulations. (Doc. 1, p.1.) Stated another way, Appellant sought to enjoin Lawriter and the SOS from impeding Appellant's ability to resell and profit from publication of the Regulations. Though Appellant's claims are directed at Lawriter, Appellant's declaratory action and request for injunctive relief indirectly challenge the State's authority and exercise of its statutory rights and obligations under the GAPA.

Thus, the State has an interest in the subject of this action as Appellant has challenged the State's decision to delegate its statutory obligation and contractually engage Lawriter to "compile, index, and publish in print or electronically" the Regulations. Therefore, the State's absence from this action risks impairing the State's ability to protect its authority and exercise of its discretionary statutory powers. Moreover, Appellant has challenged the details of the contractual arrangement by which the SOS seeks to defray the costs of compiling, indexing, and publishing the Regulations, including Lawriter's ability to charge commercial users for access to the Regulations, thereby offsetting the amount of compensation paid to Lawriter by the SOS. Appellant's challenge seeks to enjoin enforcement of the State's chosen contractual mechanism for publishing the Regulations and paying the costs of publication—including the Terms of Use, the State's chosen method of requiring those who commercially resell the Regulations to pay for copying them. By challenging the Terms of Use, Appellant seeks to directly impact both the State's right to determine its actions as a sovereign and the State's financial interests. Accordingly and for these reasons, the State is a necessary and required party as defined by Rule 19(a).

B. The State of Georgia, a sovereign, cannot be joined in this action.

"If a court determines that an absent person satisfies the Rule 19(a) criteria, he must be joined if his joinder is feasible. *Only* if joinder is not possible—i.e., the court lacks personal jurisdiction over him or joining him would destroy the court's subject matter jurisdiction—does rule 19(b) come into play." *Collegiate Licensing*, 842 F.Supp.2d at 1365-66 (*citing Burger King Corp. v. Am. Nat'l Bank & Trust Co.*, 119 F.R.D. 672, 674 (N.D.Ill. 1988)). In the present action, the State cannot be joined because the federal courts lack jurisdiction over the State according to the doctrine of sovereign immunity.

In 1784, Georgia adopted the common law doctrine of sovereign immunity, which protected governments at all levels from unconsented-to legal actions. *See Ga. Dep't of Natural Res. v. Cntr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 597, 755 S.E.2d 184, 188 (2014) (internal citations omitted). This common law doctrine was initially afforded constitutional status under the Georgia Constitution in 1974. *See id.* Today, the constitutional provisions governing sovereign immunity and waiver thereof are found in GA CONST Art. 1, § 2, ¶ IX, which provides in pertinent part:

> Except as provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The

> sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

GA CONST Art. 1, § 2, ¶ IX(e). Accordingly, the State is immune from suit except as specifically waived in the Constitution or by an act of the General Assembly.

Appellant's claim in the present action sounds under the federal declaratory judgment statute, which, of course, cannot operate to waive the State's sovereign immunity; however, the declaratory judgment provisions of the GAPA provide guidance. As noted above, Lawriter's contract with the State/SOS is expressly authorized by the GAPA, specifically O.C.G.A. § 50-13-7(e), which provides that the SOS "may engage the services of a privately operated editorial and publication firm…to compile, index, and publish such rules."

Although an express waiver of sovereign immunity is contained in the GAPA, such waiver is limited to declaratory judgment actions addressing "[t]he validity of any rule, waiver, or variance…" *See* O.C.G.A. § 50-13-10(a); *see also Burton v. Composite State Bd. of Medical Examiners*, 245 Ga.App. 587, 589, 538 S.E.2d 501, 503 (2000)("§ 15-13-10…permits the state to be sued in an otherwise proper declaratory judgment action involving the *validity* of an agency rule."

[emphasis added]). Herein, Appellant's argument challenges the State's exercise of its discretionary powers and engagement of Lawriter to perform a statutory obligation of the State. This is significantly distinguishable from a challenge to the validity of a rule, waiver or variance. Because any waiver of sovereign immunity must be strictly construed, the GAPA's waiver cannot be enlarged to envelop Appellant's claims. *See Sawnee Elec. Membership Corp. v. Ga. Dep't of Revenue*, 279 Ga. 22, 23, 608 S.E.2d 611, 612 (2005)("the State's consent to be sued must be strictly construed."); *Bd. of Com'rs of Putnam Cnty. v. Barefoot*, 313 Ga.App. 406, 409, 712 S.E.2d 612, 615 (2011)("statutes that provide for a waiver of sovereign immunity…are in derogation of the common law and thus are to be strictly construed *against* a finding of waiver.").

Appellant additionally sought "preliminary and permanent injunctive relief." (Pl.'s Compl. ¶ 1.) However, "sovereign immunity is a bar to injunctive relief at common law." *Cntr. for a Sustainable Coast*, 294 Ga. at 596, 755 S.E.2d at 188.

As the State is a necessary party to this action that cannot be joined herein due to the doctrine of sovereign immunity, Appellant's claims are subject to and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(7) and 19.

CONCLUSION

The District Court correctly dismissed Appellant's claims for want of subject matter jurisdiction. It is undisputed that Lawriter has neither registered nor applied to register a copyright concerning the materials at issue in this matter. As such, Lawriter cannot sustain a viable federal claim against Appellant under the copyright laws pursuant to the Eleventh Circuit's holding in *Stuart Weitzman*. Thus, Appellant's allegations of federal question or copyright jurisdiction under either 28 U.S.C. §§ 1331 or 1338 in this declaratory judgment action must necessarily fail.

Likewise, Appellant's allegations of diversity jurisdiction under 28 U.S.C. § 1332 must fail because Appellant cannot satisfy the burden of demonstrating the requisite amount in controversy. Not only are Appellant's allegations of amount in controversy speculative and conjectural, but they concern only hypothetical losses to Appellant and not the "monetary value…that would flow to the plaintiff if the injunction were granted" as mandated by the Court's decision in *Office Depot*.

Finally, Appellant's claims are subject to dismissal and must be dismissed because the State of Georgia is a necessary and required party under Fed. R. Civ. P. 19(a) and cannot be joined in this action due to application of the doctrine of sovereign immunity.

Accordingly and based upon the foregoing, Appellant's claims were properly dismissed for lack of subject matter jurisdiction and Lawriter respectfully submits that this honorable Court should affirm the District Court's dismissal of Appellant's claims.

Respectfully submitted this fourth day of December, 2017,

By: s/ Joseph W. Rohe
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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and (6), and was prepared with a proportionally spaced 14-point Times New Roman font. This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7) and, excluding those portions exempted under Fed. R. App. P. 32(f), contains twenty-three (23) pages.

s/ Joseph W. Rohe
Joseph W. Rohe

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this fourth day of December, 2017, I caused the *Brief of Appellee Lawriter, LLC* to be filed electronically with the Clerk of Court using the CM/ECF System, which automatically sends notice of such filing to the following registered CM/ECF users:

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