IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-3097

GREGORY S. MARKANTONE, DPM, PC.,
AND GREGORY S. MARKANTONE,

Appellants,

v.

PODIATRIC BILLING SPECIALISTS, LLC,

Appellee.

On Appeal from United States District Court for the
Western District of Pennsylvania
Hon. Lisa P. Lenihan
No. 2:14-cv-215

APPELLEE'S BRIEF

Oral Argument Is Requested

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STATEMENT OF RELATED CASES AND PROCEEDINGS

In accordance with Third Circuit L.A.R. 28.1(a)(2), this case has not been before this Court previously and there are no related cases before this Court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in dismissing Appellants' count for copyright infringement where the Appellants did not allege registration of the alleged copyright, no exception under 17 U.S.C. § 411 applies, and Appellants failed to allege infringement of any of the "exclusive rights" under 17 U.S.C. § 106?

2. Whether the District Court erred in declining to exercise jurisdiction over the pendent state law claims?

3. Whether the District Court erred in dismissing Appellants' count for declaratory judgment?

STATEMENT OF THE CASE

This is not a case of first impression. As recently as 2011, the Third Circuit Court of Appeals affirmed that a plaintiff must register its copyright pursuant to 17 U.S.C. § 411(a) with the United States Copyright Office prior to bringing a claim in Federal Court. Appellants did not do so. Likewise, pursuant to 17 U.S.C. § 106, a plaintiff must allege facts sufficient to demonstrate a plausible claim that one of the "exclusive rights" granted a copyright owner has been infringed. Appellants did not do that either. Accordingly, upon a properly filed Rule 12(b)(6) Motion to Dismiss, the District Court for the Western District of Pennsylvania appropriately dismissed Appellants' count for copyright infringement and declaratory judgment. Devoid of a federal question, the District Court properly declined jurisdiction over the pendent state law claims, rendering Appellants' self-styled and improper filings, "Notice of Demand for Data Backup" and "Motion to Compel Impoundment of Subject Matter," moot. The District Court did not err and the dismissal should be affirmed.

The Appellants' argument for reversal lacks merit. The Appellants argue that in reviewing a complaint for copyright infringement, the Court's proverbial head should be in "The Cloud" rather than grounded in the

requirements of the United States Copyright Act and corresponding case law.

I. ALLEGATIONS OF THE COMPLAINT

Appellant Gregory S. Markantone, DPM, PC., is a podiatry medical practice located in Latrobe, Pennsylvania. (A19 (Complt. ¶ 6)). Appellant Gregory S. Markantone (collectively referred to herein with Gregory S. Markantone, DPM, PC. as "Appellants") is an individual who practices at the same location. (A18 (Complt. ¶ 1)). Appellee The Podiatric Billing Specialist, LLC ("Podiatric Billing")[1] developed a system, which includes many carefully arranged and selected templates, to facilitate the collection and entry of patient data for doctors of podiatric medicine. (A18-A19 (Complt. ¶¶ 2, 9); A38 (Memorandum in Support of Defendant Podiatric Billing Specialists, LLC's Motion to Dismiss ("Memorandum in Support"), p. 1)). All parties share citizenship in Pennsylvania, and therefore, there is no basis for diversity jurisdiction. (A18 (Complt. ¶¶ 1-2)).

On February 22, 2012, Appellant Corporation and Podiatric Billing entered into a "Content License Agreement" (the "Agreement"). (A19 (Complt. ¶ 9); A26-A29 (Complt. Ex. 1, Content License Agreement)). Pursuant to the Agreement, Appellant Corporation purchased a license to

[1] The Podiatric Billing Specialists, LLC was incorrectly identified in the Complaint as Podiatric Billing Specialists, LLC.

use the Allscripts My Way software, which includes podiatric templates. (A19 (Complt. ¶ 9); A26-29 (Complt. Ex. 1, Content License Agreement)). The paragraph of the Agreement that grants the license states, "You do not have the right to use the Content in connection with any software other than Allscripts My Way . . . . You may not copy the Content or accompanying material (if any) to sell, give or distribute to others." (A26 (Complt. Ex. 1, Content License Agreement, ¶ 1)).

The Agreement's termination provision states:

> Upon the termination of this License for any reason, [Appellants] must cease use of the Content, delete the Content from all computers on which the Content was loaded and destroy all accompanying written materials provided by Licensor and all copies thereof (if any) (except that you will continue to have the right to use content that has been incorporated into patient care and billing records prior to the date of termination of this License so long as such use otherwise complies with the terms of this License).

(A27 (Complt. Ex. 1, Content License Agreement, ¶ 3)). The crux of this dispute is a question of contractual interpretation as to the form and manner of each party's rights after contract termination. (See A12 (Memorandum Opinion on Motion of Defendant to Dismiss Under Fed. R. Civ. P. 12(b)(6) ("Memorandum Opinion"), p. 9)).

II. PROCEDURAL HISTORY

Appellants filed suit against Podiatric Billing on February 13, 2014. (A18-A35 (Complt.)). The Complaint attempted to set forth the following six (6) causes of action: (1) Declaratory Relief; (2) Permanent and Temporary Specific Performance/Injunction; (3) Breach of Contract; (4) Tortious Interference with Contractual Relations; (5) Tortious Interference with Prospective Business Advantage; and (6) Copyright Infringement. (See A21-A25 (Complt. ¶¶ 17-34)). Appellants' sole factual averment to support their purported copyright infringement claim was that Podiatric Billing is "using [Appellants'] Medical Data in a manner against the directive of [Appellants] . . . in violation of 17 USC [*sic*]." (A24 (Complt. ¶ 33)).

The Complaint did not allege that Appellants registered their purported work with the United States Copyright Office. (See A18-A35 (Complt.)).

On April 14, 2014, Podiatric Billing filed a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss the Complaint in its entirety. (A76-A78[2] (Defendant Podiatric Billing Specialists, LLC's Motion to Dismiss ("Motion to Dismiss"), p. 1); A38-A46 (Memorandum in Support)). The Motion to Dismiss was

[2] The Motion to Dismiss was omitted from the Appendix unilaterally filed by the Appellants, thus Podiatric Billing has concurrently filed Appendix Volume III containing a copy of the Motion to Dismiss.

based on Appellants' failure to state a cognizable claim for copyright infringement because of their failure to allege registration of their work and infringement of an exclusive right. (A41-A43 (Memorandum in Support, pp. 4-6)). Further, Podiatric Billing argued that Appellants' "office procedures, patient information, operational rules, and related data" (the "Medical Data") was not copyrightable, because it consists of facts related to patients' reports of their medical conditions. (A19 (Complt. ¶ 6); A44-A45 (Memorandum in Support, pp. 7-8)). Podiatric Billing concluded by arguing that because the copyright infringement claim should be dismissed, the District Court lacked jurisdiction over the remaining state law claims, thus, the Complaint should be dismissed in its entirety. (A45-A46 (Memorandum in Support, pp. 8-9)). On May 5, 2014, Appellants filed their Brief in Opposition to Defendant's Motion to Dismiss. (A50-A57 (Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss ("Brief in Opposition"))).

On June 9, 2014, the District Court entered a Memorandum Opinion and an Order granting Podiatric Billing's Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), because Appellants failed to allege registration of their work, no exception under 17 U.S.C. § 411 applied, and Appellants failed to allege infringement of one or more "exclusive rights" under 17 U.S.C. § 106. (A4-A13 (Memorandum Opinion)). Further, the District Court declined

to exercise jurisdiction over the remaining state law claims and held that Appellants' "Notice of Demand for Data Backup" and "Motion to Compel Impoundment of Subject-Matter" were moot. (A13 (Memorandum Opinion, p. 10)). This appeal followed.

SUMMARY OF THE ARGUMENT

The District Court did not err in holding that Appellants failed to state a cognizable claim for copyright infringement. The trial Court appropriately determined that a contractual dispute between non-diverse parties does not belong in federal court.

Appellants acknowledge that they have not registered a copyright. Thus, they are unable to plead a plausible copyright infringement claim. Further, Appellants did not allege any facts to suggest that Podiatric Billing violated any of Appellants' "exclusive rights" under the Copyright Act and admit in the Brief of Appellants that they have no reasonable belief to make such allegations. Appellants also improperly relied on their allegations that Podiatric Billing has a registered copyright as the basis for federal jurisdiction for their declaratory relief claim.

Upon the dismissal of the federal question presented by the copyright claim and absent extraordinary circumstances, the District Court lacks subject matter jurisdiction over all pendent state law claims. The District Court properly dismissed the Complaint in its entirety.

ARGUMENT

I. STANDARD OF REVIEW

Appellants challenge an Order issued by the District Court granting Podiatric Billing's Fed. R. Civ. P. 12(b)(6) Motion to Dismiss and holding that Appellants' "Notice of Demand for Data Backup" and "Motion to Compel Impoundment of Subject-Matter" were moot. This Court's standard of review of such an order is well-established.

The Third Circuit's "standard of review of the district court's dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure is plenary." Evancho v. Fisher, 423 F.3d 347, 350 (3d Cir. 2005). "When considering a Rule 12(b)(6) motion, [this Court] is required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the plaintiff." Id. However, "[t]o withstand a Rule 12(b)(6) motion to dismiss, 'a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face."'" Tormasi v. Hayman, 443 Fed. Appx. 742, 744 (3d Cir. 2011) (citing Ashcroft v. Iqbal, 556 U.S. 662 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Accordingly, "[a] court must engage in a two-step analysis to ensure compliance with the Iqbal pleading standard: (1) a court must ignore legal

conclusions and (2) consider only those allegations entitled to a presumption of truth to determine whether 'they plausibly give rise to an entitlement to relief.'" Golod v. Bank of Am. Corp., 403 Fed. Appx. 699, 702 (3d Cir. 2005) (quoting Iqbal, 556 U.S. at 679-80).

Applying these standards, the judgment entered in favor of Podiatric Billing should be affirmed.

II. THE DISTRICT COURT DID NOT ERR IN GRANTING PODIATRIC BILLING'S 12(B)(6) MOTION BECAUSE APPELLANTS' FAILED TO ALLEGE A VALID COPYRIGHT INFRINGEMENT ACTION

The District Court relied on binding Third Circuit case law in ruling that because Appellants have not registered the alleged copyrighted work with the United States Copyright Office and did not allege any facts that suggest Podiatric Billing infringed any of Appellants' exclusive rights under the Copyright Act, the claim for copyright infringement should be dismissed. To establish a copyright infringement claim, the Appellants must prove "(1) ownership of a valid copyright; and (2) copying of constituent elements of the work that are original." Impact Applications, Inc. v. CNS Vital Signs, 2013 U.S. Dist. LEXIS 158261, *11 (W.D. Pa. 2013) (citing Jackson v. Booker, 465 Fed. Appx. 163, 165 (3d Cir. 2012) (quoting Feist Publications, Inc. v. Rural Telephone Serv., Co., 499 U.S. 340, 361 (1991)). "An action for infringement of a copyright may not be brought until the copyright is

registered." Dawes-Lloyd v. Publish America, LLLP, 441 Fed. Appx. 956, 957 (3d Cir. 2011) (citing 17 U.S.C. § 411(a)). Appellants' claim for copyright infringement was appropriately dismissed, because Appellants did not allege registration or any copying or other act of Podiatric Billing that would constitute the infringement of an exclusive right of a copyright owner. Thus, Appellants' Complaint fails to allege a claim for copyright infringement that is "plausible on its face." Tormasi, 443 Fed. Appx. at 744 (citations omitted). Simply put, the Appellants have attempted to stretch a state law breach of contract claim regarding the parties' responsibilities at contract termination into a federal question.

A. Appellants concede that they have not registered a copyright.

A claim for copyright infringement requires that the Complaint set forth "'which specific original work is subject of the copyright claim, that plaintiff owns the copyright, **that the work in question has been registered in compliance with the statute** and **by what acts and during what time defendant infringed upon the copyright**.'" Teri Woods Publ., L.L.C. v. Williams, 2013 U.S. Dist. LEXIS 52745, *8 (E.D. Pa. 2013) (citing Flynn v. Health Advocate, Inc., 2004 U.S. Dist. LEXIS 293 (E.D. Pa. 2004) (quoting Gee v. CBS, Inc., 471 F. Supp. 600, 643 (E.D. Pa. 1979), *aff'd*, 612 F.2d 572 (3d Cir. 1979))) (emphasis added). Thus, the District Court

held, "without evidence of registration of a copyright . . . a copyright claim does not exist."[3] (A9 (Memorandum Opinion, p. 6)). See Dawes-Lloyd, 441 Fed. Appx. at 957 ("An action for infringement of a copyright may not be brought until the copyright is registered.").

Appellants did not allege that the Medical Data is registered in accordance with 17 U.S.C. § 411(a). (See A18-A35 (Complt.)). Rather, the Appellants only alleged that they "claim a copyright ownership interest in the Medical Data." (A19 (Complt. ¶ 8)). The District Court correctly held that Appellants' arguments attempting to circumvent the registration requirement lacked merit. Despite Podiatric Billing never asserting a jurisdictional argument relating to the lack of registration of Appellants' work, Appellants argue that the District Court has subject-matter jurisdiction

[3] The District Court held that the narrow exceptions to the registration requirement do not apply to this case, citing Reed Elsevier Inc. v. Muchnick, 559 U.S. 154, 165 (2010) (Section 411(a) of the Copyright Act "expressly allows courts to adjudicate infringement claims involving unregistered works in three circumstances: where the work is not a U.S. work, where the infringement claim concerns rights of attribution and integrity under § 106A, or where the holder attempted to register the work and registration was refused [by the United States Copyright Office]. Separately, § 411(c) permits courts to adjudicate infringement actions over certain kinds of unregistered works [consisting of sounds, images, or both] where the author "declare[s] an intention to secure copyright in the work" and "makes registration for the work, if required by subsection (a), within three months after [the work's] first transmission. 17 U.S.C. §§ 411(c)(1)-(2)"). The District Court was correct in holding that none of these exceptions apply.

regardless of whether Appellants' work was registered with the United State Copyright Office. (A53 (Brief in Opposition, p. 4)). While the District Court acknowledged that Appellants were correct that failure to register or attempt to register a copyright pursuant to 17 U.S.C. § 411(a) is a "*non-jurisdictional* question," it held that "it is a *substantive* question for consideration on challenge, and one which [Appellants'] clearly fail to meet[,]" as there is no allegation of registration. (A10 (Memorandum Opinion, p. 7)) See Reed Elsevier, Inc., 559 U.S. at 166 ("Section 411(a) [of the Copyright Act] imposes a precondition to filing a claim that is not clearly labeled jurisdictional, is not located in a jurisdiction-granting provision, and admits congressionally authorized exceptions. . . . Section 411(a) thus imposes a type of precondition to suit that supports nonjurisdictional treatment under our precedents.").

Despite its nonjurisdictional treatment, registration is still a substantive prerequisite to assert a plausible claim for copyright infringement. After the United States Supreme Court's holding in Reed Elsevier, Inc., the Third Circuit affirmed that "[a]n action for infringement of a copyright may not be brought until the copyright is registered." Dawes-Lloyd, 441 Fed. Appx. at 957. The Third Circuit in Dawes-Lloyd held that because plaintiff did not hold a registered copyright, she could not state a

prima facie case of copyright infringement, and the appropriate remedy for failure to register was to grant the defendant's motion for summary judgment. Id. Thus, Appellants' failure to register prevents them from setting forth a plausible claim for copyright infringement.

Appellants also alleged in the District Court that "substantial justice requires that [the] Plaintiff[s] be afforded the opportunity to register the [Medical Data]." (A53 (Brief in Opposition, p. 4)). The Appellants reiterate that argument on appeal and concede that they have not registered the alleged work. Appellants argue that "[Podiatric Billing] has refused to provide [Appellants] their medical data, so [Appellants] do not have the subject-matter they created, and they cannot register the copyright." (Brief of Appellants, p. 6). The Appellants' arguments fail, because as the District Court stated, "[Appellants] fail[ed] to provide any authority that interprets 17 U.S.C. § 411(a)'s registration requirement as an elective element. It is not." (A10 (Memorandum Opinion, p. 7)). Rather, it is "a mandatory precondition that a copyright must be registered with the Copyright Office before a copyright infringement claim is filed." Sims v. Viacom, Inc., 2012 U.S. Dist. LEXIS 11485, *11 (W.D. Pa. 2012) (granting 12(b)(6) Motion to Dismiss); See also Dawes-Lloyd, 441 Fed. Appx. at 957 ("An action for infringement of a copyright may not be brought until the copyright is registered."). In

Dawes-Lloyd, the Third Circuit Court of Appeals held that because the plaintiff "did not hold a registered copyright, she could not state a prima facie case of copyright infringement, and that the District Court therefore properly granted [a]ppellee's motion for summary judgment." Dawes-Lloyd, 441 Fed. Appx. at 957. Lastly, to the extent the Appellants are requesting the return of the original work, that issue was addressed in the Reply Brief in Support of Defendant Podiatric Billing Specialists, LLC's Motion to Dismiss at p. 2 (A59). As explained in Peirson v. Clemens, Inc., 2005 U.S. Dist. LEXIS 4587, *7-*8 (D. Del. 2005), alleged conversion of the embodiment of a copyright work is not preempted by the Copyright Act. Thus, Appellants' claim for return of the data may be subject to a conversion or contract claim, but not a copyright claim.

B. Appellants concede that they cannot allege facts to suggest that Podiatric Billing violated any "exclusive rights" of the Appellants.

The District Court correctly held that Appellants "fail to allege an infringement of any of the 'exclusive rights' of a copyright owner pursuant to 17 U.S.C. § 106 (2012)." (A10 (Memorandum Opinion, p. 7)). The Copyright Act provides that "[t]he legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner

of it." 17 U.S.C. § 501. Pursuant to Section 106, the copyright owner has the exclusive right to: (1) reproduce the copyrighted work in copies; (2) prepare derivative works; (3) distribute copies or phonorecords of the copyrighted work; (4) to perform the copyrighted work publicly; (5) to display certain types of copyrighted works publicly; and (6) for sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission. 17 U.S.C. § 106; See also Tegg Corp. v. Beckstrom Elec. Co., 650 F. Supp.2d 413, 421 n. 6 (W.D. Pa. 2008).

Appellants did not allege that Podiatric Billing infringed upon any of the exclusive rights of a copyright owner under 17 U.S.C. § 106. There is no allegation of copying or distribution of the Medical Data in the Complaint. (A18-A35 (Complt.)). Instead, the Appellants simply allege that their copyright infringement claim is premised on Podiatric Billing "using Plaintiffs [*sic*] Medical Data in a manner against the directive of Plaintiffs . . . in violation of 17 USC [*sic*]." (A24 (Complt. ¶ 33)). The Copyright Act does not grant an exclusive right to a copyright owner that creates an infringement based upon failure to follow "the directive" of the copyright owner. The District Court held that "[Appellants] have provided neither a statute nor meaningful precedent that leads the Court to interpret a failure to follow 'the directive' of a copyright owner as an infringement of the

copyright owner's 'exclusive rights' pursuant to 17 U.S.C. § 106." (A11 (Memorandum Opinion, p. 8)). Aside from Appellants' allegation that Podiatric Billing used their work in a manner against their directive, Appellants fail to allege any copying, distribution, or any other violation of their exclusive rights with respect to their work. (See A18-A35 (Complt.)).

Moreover, Appellants concede, even now, that they do not know if Podiatric Billing has violated any exclusive rights of the Appellants. "[Appellants] do not yet know if [Podiatric Billing] is copying the medical data, distributing it, performing it, displaying it, etc." (Brief of Appellants, p. 17).[4]

Appellants argue that an effect of the District Court's ruling "is to create a pleading standard that requires special formalities in the nature of 'magic words' . . . ." (Brief of Appellants, p. 18). To the contrary, the District Court required no "magic words" but rather required the Appellants to plead a plausible copyright infringement claim, which would include allegations of facts that the alleged infringer violated one or more "exclusive rights" under 17 U.S.C. § 106. (See A11 (Memorandum Opinion, p. 8)). See also Teri Woods Publ., L.L.C., 2013 U.S. Dist. LEXIS at *8 (A claim for

[4] Given the Appellants' admission that they have no basis to believe "Podiatric Billing is copying the medical data, distributing it, performing it, displaying it, etc.," it is questionable whether the count for copyright infringement met even the Fed. R. Civ. P. 11 threshold.

copyright infringement requires the Complaint set forth "by what acts and during what time defendant infringed upon the copyright.") (citations omitted). The District Court held that Appellants did not satisfy the requirements for a copyright infringement claim. The District Court's analysis was correct, and should not be disturbed on appeal.

III. THE DISTRICT COURT DID NOT ERR IN DISMISSING THE REMAINING SUBSTANTIVE STATE LAW CLAIMS FOR LACK OF SUBJECT MATTER JURISDICTION

Upon dismissal of the copyright infringement action, the District Court held that it lacked subject matter jurisdiction over the remaining state law claims and dismissed the Complaint in its entirety. The Appellants did not contest this result in opposition to Podiatric Billing's Motion to Dismiss. Rather, they conceded that if the copyright claim was dismissed, the other claims would be as well: "**Pendant** [*sic*] **Claims.** These claims are argued on the basis of an improper request for a dismissal of the copyright claim, and the propriety of pendant [*sic*] jurisdiction will be determined by incidental ruling on jurisdiction." (A55 (Brief in Opposition, p. 6)). The District Court held that "if it appears that all federal claims are subject to dismissal, the court should not exercise jurisdiction over remaining claims unless 'extraordinary circumstances' exist." City of Pittsburgh Comm'n on Human Rels. v. Key Bank USA, 163 Fed. Appx. 163, 166 (3d Cir. 2006)

(citing Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 195 (3d Cir. 1976)). The District Court further analyzed diversity jurisdiction, recognizing that the "United States Constitution grants federal courts jurisdiction over suits arising between citizens of different states, see U.S. Const. art. III § 2, cl. 1, which Congress codified in 28 U.S.C. § 1332(a)(1) (2012)." (A12 (Memorandum Opinion, p. 9)). Because all the parties are citizens of Pennsylvania, federal jurisdiction does not exist pursuant to 28 U.S.C. § 1332(a)(1). (A18 (Complt. ¶¶ 1-2)). The District Court held that "[a] contractual dispute between non-diverse parties is misplaced in this Court." (A12 (Memorandum Opinion, p. 9)).

The District Court dismissed the pendent state law claims consistent with the Third Circuit's ruling in Cindrich v. Fisher, 341 Fed. Appx. 780, 789 (3d Cir. 2009). "A district court may decline to exercise supplemental jurisdiction if the court has dismissed all claims over which it has original jurisdiction." Cindrich, 341 Fed. Appx. at 789 (citing 28 U.S.C.S. § 1367). The Third Circuit "observed that, in most cases, pendent state law claims should be dismissed without prejudice 'where the claim over which the district court has original jurisdiction is dismissed before trial.'" Id. (citing Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995)). Accordingly, the District Court acted appropriately in dismissing the

pendent claims, and Appellants offered no analysis, case law, or statute opposing such dismissal to the District Court.

IV. THE DISTRICT COURT PROPERLY DISMISSED THE DECLARATORY JUDGMENT COUNT

Appellants argue that they have "a proper, and long-established, basis for declaratory relief for the [declaratory relief] claim regarding exclusive federal right." (Brief of Appellants, p. 22). They rely on their allegations that Podiatric Billing has a registered copyright as the basis for federal jurisdiction for the declaratory relief claim. This is improper for two reasons.

First, Appellants' claims are belied by the Exhibits attached to the Complaint. The Complaint states, "Defendant claims a copyright over certain content, and had expressly placed Plaintiffs into the threat of claim and harm for copyright violation if Plaintiffs forces [*sic*] extraction of through [*sic*] any mechanism by obtaining a backup or otherwise. See, Exhibits 2-5." (A21 (Complt., ¶ 15)). Exhibits 2 – 5 of the Complaint, however, contain no threat of any sort by Podiatric Billing, much less a justiciable copyright claim.[5] Exhibit 2, a letter from Attorney Cravitz to Attorney

[5] "[I]n resolving a 12(b)(6) motion to dismiss, a court may look beyond the complaint to documents referenced in the complaint or which are essential to a plaintiff's claim and are attached to . . . the complaint[.]" Pittsburgh League of Young Voters Educ. Fund v. Port Authority of Allegheny County,

Zegarelli dated December 4, 2013, states "[t]ransfer of the Podiatry Templates with the database would be in violation of the **parties' Agreement** and would be a possible threat to my client's proprietary rights to those Templates." (A30 (Complt. Ex. 2, December 4, 2013 Letter) (emphasis added)). The correspondence specifically referenced "Section 1 of the parties' Content Licensing Agreement" to state that the agreement restricts the right to use content in connection with other software. (A30 (Complt. Ex. 2, December 4, 2013 Letter)). Exhibits 3 and 5 to the Complaint are letters from Appellants' counsel and, of course, contain no "threat" from Podiatric Billing. (A32 (Complt. Ex. 3, December 12, 2013 Letter); A35 (Complt. Ex. 5, December 17, 2013 Letter)). Exhibit 4 to the Complaint is correspondence from Attorney Cravitz to Attorney Zegarelli that once again explicitly references the Agreement between the parties. (A34 (Complt. Ex. 4, December 16, 2013 Letter)) ("My client does not agree with the representations made in your letter concerning its alleged performance breaches . . . . According to the parties' Content License Agreement . . . Section II. Termination of the same Agreement states[.]"). The word "copyright" does not appear in any of the correspondence

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2007 U.S. Dist. LEXIS 23626, *9 (W.D. Pa. 2007) (citing Pension Benefit Guar. Corp. v. White Consol. Industries, Inc., 998 F.2d 1192, 1196 (3d Cir. 1993)).

attached as Exhibits 2 – 5 of the Complaint. More notably, all of the respective positions, rights, and arguments are provided in the context and interpretation of the parties' Agreement. Any analysis will require interpretation of the Agreement between the parties, a point the District Court noted that Appellants conceded, "[t]he Court agrees with Plaintiffs that a 'crux of the dispute' is the parties' diverging views of a contract." (A12 (Memorandum Opinion, p. 9 (citing Brief in Opposition, ¶ 17))). Thus, Appellants' claims are a "contractual dispute between non-diverse parties [and are] misplaced in this Court." (A12 (Memorandum Opinion, p. 9)).

Second, as the District Court noted, "[n]or can a Plaintiff fabricate a federal copyright action by purporting to bring a claim based on Defendant's copyright." (A11 (Memorandum Opinion, p. 8)). Accordingly, the District Court ruled that "any question of the costs or procedures associated with the Agreement's termination provision is one of contract." (A12 (Memorandum Opinion, p. 9)).

It is well established that a "federal question must appear on the face of a well-pleaded complaint" for federal jurisdiction to exist. Trent Realty Assocs. v. First Federal Savings & Loan Ass'n of Phila., 657 F.2d 29, 33 (3d Cir. 1981). Further, "[f]ederal jurisdiction cannot be created by anticipating that a defense based on federal law will be filed to a claim

based on state law." Id. (citing Louisville & Nashville Railroad v. Mottley, 211 U.S. 149 (1908)). Thus, Appellants cannot resurrect jurisdiction based upon their allegations that Podiatric Billing has a registered copyright. Appellants' claims do not belong in federal court, and the District Court's dismissal of the Complaint in its entirety should be affirmed.

V. APPELLANTS' LACK OF CITED AUTHORITY CONSTITUTES A WAIVER OF ARGUMENTS.

Appellants waive several of their arguments by failing to cite any authority to support those arguments. "Federal Rule of Appellate Procedure 28(a)(9) requires that an appellant's brief must contain argument, and that argument in turn must contain 'appellant's contentions and the reasons for them, with *citations to the authorities* and parts of the record on which the appellant relies." Collins v. Boyd, 541 Fed. Appx. 197, 203 (3d Cir. 2013). This Court held "in Kost v. Kozakiewicz, 1 F.3d 176, 182 (3d Cir. 1993), that 'if an appellant fails to comply with these requirements on a particular issue, the appellant normally has abandoned and waived that issue on appeal and it need not be addressed by the court of appeals.'" Id.

Appellants have failed to comply with Rule 28(a)(9) throughout their Brief. For example, the arguments with the following headings do not contain any citations to authorities: (1) "A Contract Case," pp. 19 – 20; (2) "Registration Required without Equitable Exception," pp. 20 – 21; and (3)

"The Court Erred by Summarily Refusing to Provide Plaintiffs with a Full and Fair Right to be Heard on Their Request to Obtain the Subject-Matter and/or Special Scheduling Order, and Notice of Request for Data Backup, Rendering the Requests Moot by its Dismissal of the Case," pp. 23 – 24.[6] These arguments are therefore waived. The Appellants have not complied with Fed. R. Civ. P. 28(a)(9) and their arguments listed above need not be considered by this Court.

[6] To the extent the Appellants have not waived the mootness argument, the District Court did not err in determining the Appellants' requests were moot. "The doctrine of mootness is rooted in Article III of the Constitution, which limits federal courts to the adjudication of 'cases' or 'controversies.'" Williams v. Secretary of Pa. Dept. of Corrections, 447 Fed. Appx. 399, *5 (3d Cir. 2011) (citing Am. Bird Conservancy v. Kempthorne, 559 F.3d 184, 188 (3d Cir. 2009)). "'If one or more of the issues involved in an action become moot . . . the adjudication of the moot issue or issues should be refused.'" Williams, 447 Fed. Appx. at *5 (quoting N.J. Tpk. Auth.v. Jersey Cent. Power & Light, 772 F.2d 25, 30 (3d Cir. 1985)). The central question in determining mootness is "whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief." Williams, 447 Fed. Appx. at *5 (quoting Jersey Cent. Power & Light Co. v. New Jersey, 772 F.2d 35, 39 (3d Cir. 1985)). Upon the District Court's finding that the Appellants did not state a plausible claim for copyright infringement and dismissal of the pendent state law claims, there was no "case" or "controversy" remaining for which Appellants could seek meaningful relief via its Notice of Demand for Data Backup or Motion to Compel Impoundment of Subject-Matter. The District Court correctly held that such requests for relief were mooted. Further, there is simply no rule of civil procedure or local rule that permits such filings.

A. Appellants' claims related to "The Cloud" were not raised below and lack merit.

Appellants somewhat rely on the argument that they never had possession of their Medical Data because of "The Cloud." (Brief of Appellants, pp. 4-5). This is the first time that Appellants attempt to rely on an argument relating to "The Cloud." In fact, "The Cloud" was never even referenced at the District Court level. (A18-A35 (Complt.); A50-A57 (Brief in Opposition)). "It is well established that 'absent exceptional circumstances, issues not raised before the district court are waived on appeal.'" Peoples v. Discover Financial Services, Inc., 387 Fed. Appx. 179, 184 (3d Cir. 2010) (citing Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc., 482 F.3d 247, 253 (3d Cir. 2007)). There are no exceptional circumstances in this case. Thus, this argument should not be considered by this Court.

Further, Appellants' argument regarding "The Cloud"[7] does not create an issue of first impression. The Third Circuit in Dawes-Lloyd decided a work must be registered before a lawsuit commences. See Dawes-Lloyd, 441 Fed. Appx. at 957 ("An action for infringement of a copyright may not be brought until the copyright is registered."). The sum of Appellants'

[7] "This case is believed to be a case of first impression under the Copyright Act in any jurisdiction[.]" (Brief of Appellants, p. 2).

argument is that Podiatric Billing has possession of the purported original work[8] and Appellants want it back. (Brief of Appellants, p. 10). Whether the Appellants are entitled to it is a question of contractual interpretation. (See A12 (Memorandum Opinion, p. 9)). A breach of contract claim relating to the Medical Data is the proper method to resolve such a dispute. Whether Appellants' work is stored in a locked drawer or "The Cloud" does not change this analysis.

CONCLUSION

For the reasons set forth above, Appellee The Podiatric Billing Specialists, LLC respectfully requests that this Court affirm the June 9, 2013 Order granting Appellee The Podiatric Billing Specialists, LLC's 12(b)(6) Motion to Dismiss in the United States District Court for the Western District of Pennsylvania.

[8] There is a substantial question as to whether the Appellants' work meets the originality requirement for copyright protection at all, and whether the Appellants are even the authors of the alleged work, because the alleged work is a collection of "office procedures, patient information, operational rules, and related data." (See A10 (Discussion in Memorandum Opinion, p. 7, n. 8)).

Respectfully submitted,

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Dated: November 13, 2014

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellee's Brief complies with the following requirements of the Federal Rules of Appellate Procedure and Rules of this Court:

1. Appellee's Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,235 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. Appellee's Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in font size 14, Arial.

3. The electronic version of this brief is identical to the paper copies.

4. A virus check was performed on the electronic file and no virus was detected. I rely on the virus detection program Microsoft Security Essentials in making this representation.

5. The attorneys whose names appear on this brief are members of the bar of this Court.

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I hereby certify that a true and correct copy of the foregoing ***Appellee's Brief*** was served on counsel of record via electronic filing and United States first class mail this 13th day of November 2014, as follows:

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