

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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WHITE HOUSE/BLACK MARKET, INC. and CHICO'S,	:	
FAS, INC.,	:	
	:	
Plaintiffs,	:	
	:	
- against -	:	10 Civ. 5266 (PGG)
	:	
CACHE, INC., RABIA FARHANG and CHRISTINE	:	
BOARD,	:	
	:	
Defendants.	:	
	:	
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**CACHE, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS'
ORDER TO SHOW CAUSE TO REMAND TO STATE COURT**

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PRELIMINARY STATEMENT

The fashion industry, by its very nature, follows trends. It is no coincidence that in the 1970s bell-bottom jeans and floral decals were the rage, that the 1980s saw the disastrous domination of the shoulder pad, the leg warmer, the “Flashdance” off the shoulder top, and that the early 1990s catered to the plaid button-down shirts and loose fitting jeans and cords made popular by the Seattle grunge music scene. Nor, for that matter, is it any secret that the past season’s infatuation with deep blue drew inspiration from couture designers’ runway shows and the movie *Avatar*.

By the time these trends flow downstream from popular culture or Italian fashion houses to retail chains, the styles and concepts associated with them are widespread, and certainly not the stuff of “trade secret.” Perhaps the notion of fashion trend is explained best by Meryl Streep in her portrayal of icy Miranda Priestly in *The Devil Wears Prada*, a character based upon Anna Wintour, editor in chief of *Vogue*, after an intern giggles at two seemingly identical green belts:

Okay. I see. You think this has nothing to do with you. You go to your closet and you select... I don't know... that lumpy blue sweater, for instance because you're trying to tell the world that you take yourself too seriously to care about what you put on your back. But what you don't know is that that sweater is not just blue, it's

not turquoise. It's not lapis. It's actually cerulean. And you're also blithely unaware of the fact that in 2002, Oscar de la Renta did a collection of cerulean gowns. And then I think it was Yves Saint Laurent... wasn't it who showed cerulean military jackets? I think we need a jacket here. And then cerulean quickly showed up in the collections of eight different designers. And then it, uh, filtered down through the department stores and then trickled on down into some tragic Casual Corner where you, no doubt, fished it out of some clearance bin. However, that blue represents millions of dollars and countless jobs and it's sort of comical how you think that you've made a choice that exempts you from the fashion industry when, in fact, you're wearing the sweater that was selected for you by the people in this room from a pile of stuff.

There is no serious debate that fashion trends, whether or not they are called "concepts" by Plaintiffs, cannot be trade secrets by their very public nature. As set forth in Section I(D), this is true *even before clothing designs reach the market*. Inspiration is free, and it is well-settled in this district that trade secrets are not ephemeral, but must be continuously used in one's business.

This is not to say, however, that creators of original fabric designs, patterns, and prints, who take these fashion trends and translate them into original, creative expressions as Plaintiffs claim to have done here, have no recourse against one who accesses those designs and creates something substantially similar. Such protection comes from the ability to receive protection pursuant to the United States Copyright Act, and is reflected in the countless copyright infringement actions alleging infringement of original fabric prints, patterns, and designs, filed primarily in this district and in the Central District of California.

Yet Plaintiffs seemingly did not bother to register any copyrights, and instead attempt to clothe their claims in such a way as to overcome this prerequisite. Plaintiffs take two innocuous events: (1) the use by a competitor of fashion trends seen everywhere; and (2) the common movement of those in the fashion industry from one shop to another, and attempt to create legal rights where none exist absent a valid copyright registration. Indeed, when Cache saw through Plaintiffs' ploy and removed this action from New York State Court to the Southern District of New York, the very first thing Plaintiffs did was attempt to reconstruct their complaint, chopping

their causes of action against Cache nearly in half and removing the claims obviously preempted by the Copyright Act. The allegations, however, remained the same, as did the relief demanded by Plaintiffs – allegations and relief that make out a claim for copyright infringement, and copyright infringement alone.

This lawsuit, the remedies it demands, the sweeping preliminary injunction sought by Plaintiffs, and the irreparable harm Plaintiffs claim they will suffer, are not about marketing plans, or ship and release dates, or manufacturing and delivery costs, or supplier names, or the other various categories Plaintiffs allege comprise its “confidential competitive information.” This lawsuit, in Plaintiffs’ own words in both complaints and to Justice Kapnick, is about “design prints”; “watercolor style pink floral prints”; “black and white floral prints”; “black, white, and pink floral prints”; “black and white animal (zebra and leopard) prints”; and “prints depicting bright pink watercolor floral patterns juxtaposed with black and white animal prints.”

This case must not be remanded, as to do so would allow states to freely expand the perimeters of copyright protection to their own liking, on the theory that preemption would be no bar to state protection of materials not meeting federal statutory standards. Plaintiffs’ misappropriation of trade secret claim as it relates to their clothing is nothing more than an artfully plead copyright infringement claim. While Plaintiffs use the guise of trade secret to save their clothing-related claims from both preemption and dismissal, because the subject matter of Plaintiffs’ claims cannot be a trade secret as a matter of law, no additional element exists in their trade secret allegation that would make it any different than a copyright infringement claim.

As set forth herein, Plaintiffs’ motion to remand should be denied because (1) the Copyright Act, whose preemption is broader than the Act itself, covers the design-related subject matter plead by Plaintiffs (the very subject matter that forms the crux of Plaintiffs’ allegations

and demands for relief); (2) Plaintiffs' allegations as to the "misappropriated" clothing designs are nothing more than those of copyright infringement; and (3) because clothing designs cannot be a trade secret as a matter of law, Plaintiffs claim is not qualitatively different than one for copyright infringement.

PROCEDURAL BACKGROUND

I. THE COMPLAINT FILED IN STATE COURT

On June 30, 2010, Plaintiffs filed a Complaint ("Compl.") along with an Order to Show Cause, Temporary Restraining Order, Expedited Discovery and a Preliminary Injunction in the Supreme Court of the State of New York, New York County. The Complaint alleges that Defendants copied certain designs of the Plaintiffs, stating that "seasonal lines . . . directly mirror those of WH|BM" and that certain of Cache's designs for garments "are identical or virtually identical to products designed by WH|BM." (Compl. ¶ 78.) Plaintiffs also allege that Cache used "brazen efforts to duplicate products" of WH|BM. (Compl. ¶ 86.) The Complaint details multiple product designs and fabric patterns and prints that Plaintiffs allege to be "identical or nearly identical to those that WH|BM designed" (Compl. ¶ 87.) Accordingly, the Complaint seeks relief in the form of injunctions and destruction of any goods that Plaintiffs allege are copies of their designs. (Compl. pp. 37-38.) These allegations are unequivocally those for copyright infringement, and examples of such allegations include:

- "As detailed below, Cache has, in fact, put the designs, styles and 'looks' created by WH|BM to its own use *by creating clothing for its Spring and Summer 2010 seasonal lines that is identical, or virtually identical, to WH|BM designs and line concepts. . . .* Cache reported that it . . . saw an increase in sales . . . when *the fashion designs stolen from WH|BM* hit Cache's stores for Spring 2010." (Compl. ¶ 8.) (emphasis added);

- “[U]nless Defendants are immediately enjoined from using the *misappropriated designs and styles*, Plaintiffs will continue to suffer irreparable harm. . . .” (Compl. ¶ 9) (emphasis added);
- “The design concepts, themes and selections that arise from the WH|BM’s overall design and merchandising process . . . constitute strategic, confidential, proprietary and competitively valuable information. In other words, these concepts, and *their implementation through specifically designed garments and a comprehensive seasonal line*, constitute trade secrets for a private label fashion retailer like WH|BM.” (Compl. ¶ 32) (emphasis added);
- “Cache engaged with Farhang and Board in a conspiracy and scheme to misappropriate the trade secrets, proprietary designs and confidential information of WH|BM, with one settled purpose – to ‘fast track’ its way out of repeated seasons of declining sales and unprofitability by *copying WH|BM’s product lines*, and by *accessing* and using WH|BM’s confidential design, merchandising and retail strategies.” (Compl. ¶ 67) (emphasis added);
- “*Similarities between WH|BM’s products and Cache’s products* began appearing in March 2010 for the Spring 2010 season. . . . The color palate for these lines . . . was bright pink, black, white, and soft stone. It also included watercolor style pink floral prints, black and white floral prints, and black and white animal (zebra and leopard) prints. *A unique feature of these lines was prints that depicted bright pink watercolor floral patterns juxtaposed with black and white animal print designs.*” (Compl. ¶¶ 80, 82) (emphasis added); and
- “Cache’s theft included brazen efforts to *duplicate products* that WH|BM was preparing to introduce into its own stores. . . . Indeed, *a number of Cache’s Summer line garments are identical or nearly identical to those that WH|BM designed for this line . . .*” (Compl. ¶¶ 86, 87) (emphasis added).

Notwithstanding these allegations of copying and the form of requested relief, which fits squarely into a claim of copyright infringement, Plaintiffs couched their causes of action in terms of, *inter alia*, trade secret misappropriation, unfair competition, unjust enrichment, civil conspiracy, and theft/conversion. (Compl. pp. 29-37.)

II. THE MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs appeared in Court *ex parte* on June 30, 2010 for a temporary restraining order hearing before Justice Kapnick (having served Cache with its papers late that afternoon). Plaintiffs' motion papers in support of their request for a temporary restraining order, expedited discovery and preliminary injunction assert that Plaintiffs would suffer irreparable harm absent an injunction because the "similarities" between Cache's and Plaintiff's clothing are "**striking**." (Pl. Prelim. Inj. Br. at 11) (emphasis in original). Plaintiffs' detailed assertions in its preliminary injunction brief state that:

Cache broadly misappropriated the color palette, **design prints** and themes of WH|BM's 2010 Spring lines . . . [The lines] included watercolor style pink floral **prints**; black and white floral **prints**; black, white, and pink floral **prints**; and black and white animal (zebra and leopard) **prints**. A signature feature of these designs were **prints** depicting bright pink watercolor floral **patterns** juxtaposed with black and white animal **prints**."

(Pl. Prelim. Inj. Br. at 16.) (emphasis added.) Plaintiffs continue that a "comparison of the WH|BM and Cache Spring 2010 catalogs . . . demonstrates the striking similarities . . ." (*Id.*) Plaintiffs' allegations are mimicked with regard to Cache's "Summer Breeze" line, which "emphasized abstract sea animal **prints** in cobalt blue, black and white; and 'Greek key' decorative border **prints**. . . . another focus of WH|BM's designers for the summer 2010 lines were garments depicting a black and white 'chain' **print**. Cache, too, released a host of garments prominently featuring 'chain' **prints** in May 2010." (*Id.* at 17.) (emphasis added.)

III. THE STATE COURT TRO HEARING BEFORE JUSTICE KAPNICK

Justice Kapnick instructed Plaintiffs to return the following morning; by that point, Cache was at least served and was able to send counsel to the hearing. On July 1, 2010, Justice Kapnick heard oral argument on Plaintiffs' application. During the hearing, counsel for Plaintiffs argued that its motion for a TRO be granted by emphasizing the similarities between

the patterns on WH|BM's clothing on the one hand, and Cache's clothing on the other:

Mr. Levine: And here, your honor, it's visible, the comparisons are very strong. On ours you have the flowers and that color, you have the *prints*, the animal *prints*, and you have the exact same ones here, the animal *print*, you have the pink color with the *floral design*.

You see them here, three tee shirts in the middle, you see them here in the Cache, in the shirt worn by the model there as well. They are very, very *strikingly similar*.

.....
Again animal *prints*, some paisley *prints* in this blue and black and white. We had a *Greek key design*, another fashion term that I have recently learned, and a *chain print*.

.....
Again, the *patterns are very strikingly similar, animal prints, with the stripes, colors, with the black and white*.

.....
Here you have this animal type *print*. You see that here on the image all the way on the right. The similarity, the color, it is all very, very similar.

(July 1, 2010 Hearing Tr. at 8-9; 10; 12.) (emphasis added.)

After oral argument, Justice Kapnick denied Plaintiffs all other material requests for relief, but ordered that the parties engage in expedited discovery in preparation for a preliminary injunction hearing on July 30, 2010. In so doing, Justice Kapnick based her decision to order expedited discovery on the similarity of some of the prints shown to the court. (July 1, 2010 Hearing Tr. at 31) ("I do think that some of the things you have shown me are a little bit more similar than some of the things you are showing me.")

IV. REMOVAL TO THIS COURT

On July 9, 2010, seeing clearly through Plaintiffs' artful pleading of its state law claims to avoid complete preemption pursuant to the United States Copyright Act, 17 U.S.C. § 101 *et seq.*, defendants removed the action to this Court pursuant to 28 U.S.C. § 1441. As set forth in Cache's Notice of Removal, Plaintiffs' claims relating to their clothing designs, patterns and prints and any alleged copying of the same by defendants are preempted by the United States

Copyright Act, 17 U.S.C. § 301(a). On July 12, 2010, Cache requested by letter that this Court allow it to move to vacate the State Court expedited discovery order and to move to dismiss Plaintiffs' claims relating to its clothing designs pursuant to Fed. R. Civ. P. 12(b)(6).

V. THE FIRST AMENDED COMPLAINT

On July 14, 2010, Plaintiffs wrote a letter to this Court requesting permission to file by order to show cause a motion to remand the action to state court, and delivered to the Court and parties a proposed First Amended Complaint. (“Am. Compl.”) Tellingly, the Amended Complaint removed causes of action for unfair competition, unjust enrichment and conversion (i.e., the obviously preempted claims), but maintained a cause of action for trade secret misappropriation based in part (1) on the exact same allegations as in the original Complaint that the prints and designs on the parties' clothing are “strikingly similar”; and (2) the same underlying facts of the causes of action Plaintiffs' voluntarily removed. (Am. Compl. ¶¶ 89, 93 (“It also included watercolor style pink floral prints, black and white floral prints, black, white and pink floral prints, and black and white animal (zebra and leopard) prints. A unique feature of these lines was prints that depicted bring pick watercolor floral patterns juxtaposed with black and white animal print designs.”), 94 (“Cache's products highlighted black and white animal prints with pink floral prints.”), 98 (“[A] number of Cache's Summer line garments are identical or nearly identical to those that WH|BM designed for this line. . . .”), 99 (“Cache's introduction of garments in its Summer 2010 seasonal line that were based on concepts and designs initially considered by WH|BM's design team”), 100 (Cache “misappropriated the color palette and design themes . . . by adopting the identical color palette and design themes”), 101 (“This line highlights abstract sea animal prints in cobalt blue, black and white; black and white horizontal stripes; abstract paisley prints in cobalt blue, black and white; and ‘Greek key’

decorative border prints.”), 102 (“[F]eatures black and white horizontal stripes; and prints in cobalt blue, black and white.”), 106 (“Another focus of WH|BM’s designers for the 2010 Summer lines were garments depicting a black and white ‘chain’ print.”). Importantly, the Amended Complaint *seeks the exact same remedies as the Complaint*. (Am. Compl. pp. 41-42.)

ARGUMENT

VI. THIS ACTION WAS PROPERLY REMOVED.

Except in those instances where Congress has expressly forbidden removal, Section 1441 permits defendants to remove any claim that could be brought in federal court as well as any claim that is joined with a claim premised on federal law. *California Public Emp. Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 105-6 (2d Cir. 2004). The right to remove a case to federal court is statutory, jurisdictional, and absolute, regardless of motivation, when it is found to exist. *White v. Wellington*, 627 F.2d 582, 586 (2d Cir. 1980). Such is the case here.

A. The Artful Pleading Rule Mandates Preemption Over Plaintiffs’ Claims Relating to the Alleged Copying by Cache of its Clothing Patterns and Prints.

“Generally, removal is proper if an action originally filed in state court could have been filed in federal court. Absent diversity of citizenship, this occurs when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.” *Fenn v. Verizon Comm’ns, Inc.*, No. 08 Civ. 2348, 2010 WL 908918, at *4 (S.D.N.Y. Mar. 15, 2010) (Gardephe, J.).

Although the general rule is that removal is not permitted simply because a defendant intends to defend the case on the basis of federal preemption, there is an exception for state law claims that are completely preempted by federal law, meaning that any claim based on preempted state law is considered a federal claim arising under federal law. Thus, even though the parties agree that plaintiff’s well-pleaded complaint alleges on its face only state claims, and no one argues that diversity of citizenship exists between the parties, if plaintiff’s state ‘claims are preempted by [federal statute], federal jurisdiction exists and the removal of his case was proper.

See id. (internal citations and quotation marks omitted) (finding removal proper where certain

causes of action were preempted by Section 301 of the Labor Management Relations Act despite the fact that plaintiff failed to plead that federal claim).

Whether federal courts have federal question jurisdiction over an action is typically governed by the “well-pleaded complaint” rule, pursuant to which federal question jurisdiction exists only if “plaintiff’s statement of his own cause of action shows that it is based” on federal law. *Vaden v. Discover Bank*, 129 S.Ct. 1262, 1275 (U.S. 2009). However, there exists a corollary to the well-pleaded complaint rule - the “artful pleading” rule - pursuant to which plaintiff cannot avoid removal by declining to plead “necessary federal questions.” *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998); see, e.g., *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 758 (2d Cir. 1986), cert. denied, 479 U.S. 885 (1986) (A plaintiff “may not defeat removal by clothing a federal claim in state garb, or, as it is said, by use of ‘artful pleading.’”); *In re the Reserve Fund Sec. and Derivative Litigation*, 09 Civ. 782, 2009 WL 3634085, at *2 (S.D.N.Y. Nov. 3, 2009) (Gardephe, J.) (Plaintiffs are limited “by the artful pleading doctrine – ‘an independent corollary’ of the well-pleaded complaint rule – which prevents a plaintiff from defeating federal jurisdiction by ‘omitting to plead necessary federal questions in a complaint.’”) If such is the case, the reviewing court will “uphold removal even though no federal question appears on the face of the complaint.” *Rivet*, 522 U.S. at 475.

The artful pleading rule applies when Congress has either (1) so completely preempted, or entirely substituted, a federal law cause of action for a state one that plaintiff cannot avoid removal by declining to plead “necessary federal questions,” *id.*, or (2) expressly provided for the removal of particular actions asserting state law claims in state court. See *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 6 (2003).

B. The Copyright Act Has Complete Preemptive Force.

Section 301(a) of the United States Copyright Act has complete preemptive force over all state causes of action deriving from any “works of authorship that are fixed in a tangible medium of expression.” 17 U.S.C. § 301(a). Such works “are governed exclusively by this title. . . . [N]o 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). It is vitally important that this rule is followed to maintain the integrity of the Copyright Act, “precisely because if the law was otherwise, ‘states would be free to expand the perimeters of copyright protection to their own liking, on the theory that preemption would be no bar to state protection of materials not meeting federal statutory standards.’” *Stewart v. World Wrestling Fedn. Entm’t, Inc.*, 03 Civ. 2468, 2005 WL 66890, at *3 (S.D.N.Y. Jan. 11, 2005) (citation omitted).

The complete preemptive force of Section 301(a) is well recognized by courts in this and other federal jurisdictions. *See, e.g., Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004); *see also Ritchie v. Williams*, 395 F.3d 283, 285-87 (6th Cir. 2005); *Rosciszewski v. Arete Assocs., Inc.*, 1 F.3d 225, 232-33 (4th Cir. 1993); *Integrative Nutrition, Inc. v. Academy of Healing Nutrition*, 476 F. Supp. 2d 291, 293 (S.D.N.Y. 2007); *Literary Properties, Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co., Kg.*, 448 F. Supp. 2d 244, 257 (D. Mass. 2006); *Stanford v. Caesar’s Entm’t, Inc.*, 430 F. Supp. 2d 749, 753-754 (W.D. Tenn. 2006); *Panizza v. Mattel, Inc.*, 02 Civ. 7722, 2003 WL 22251317, at *3-*4 (S.D.N.Y. Sept. 30, 2003); *DeCarlo v. Archie Comic Publ’ns, Inc.*, 127 F. Supp. 2d 497, 502 (S.D.N.Y. 2001), *aff’d*, 11 Fed. App’x 26 (2d Cir. 2001); *Metrano v. Fox Broad. Co., Inc.*, 00 Civ. 2279, 2000 WL 979664, at *3 (C.D. Cal. 2000); *Info. Handling Servs., Inc. v. LRP Publications, Inc.*, 00 Civ. 1859, 2000 WL 4333998 14531, at *4 (E.D. Pa. 2000); *Worth v. Universal Pictures, Inc.*, 5 F. Supp. 2d 816, 821 (C.D. Cal. 1997); *Dielsi v. Falk*, 916 F. Supp. 985, 993 (C.D. Cal. 1996);

Patrick v. Francis, 887 F. Supp. 481, 484-85 (W.D.N.Y. 1995).

C. Contrary to Plaintiffs' Assertions, The Reach Of Copyright Preemption Is Broader Than The Statute Itself and Governs Plaintiffs' Clothing Design Claims, Which Fall Squarely Under the Copyright Act.

Plaintiffs assert that defendants “cannot satisfy the first condition of preemption, *i.e.*, they cannot demonstrate that the subject matter of Plaintiffs’ state law claims falls within the subject matter of copyright law.” (Pl. Br. at 14.) As a threshold matter, Cache is *not* asserting that Plaintiffs’ purported “categories of confidential and trade secret information” other than those relating to clothing designs that they bootstrap onto their pleadings (such as “sales forecasts; operational calendars; financial information”) are necessarily preempted by the Copyright Act. This Court need not view Plaintiffs’ cause of action for trade secret misappropriation as one cohesive claim, but can bifurcate the claim into pieces relating to the various underlying facts. *See, e.g., Millenium Expressions, Inc. v. Chauss Marketing, Ltd.*, 02 Civ. 7545, 2007 WL 950070, at *3 (S.D.N.Y. Mar. 30, 2007) (“With respect to the claims for misappropriation of trade secrets and proprietary information, Judge Berman granted summary judgment insofar as the plaintiff’s allegations were based on its product designs but denied it to the extent that Millenium asserted that Prime Source had misappropriated marketing information.”). Indeed, due to their close relation to their preempted claims, “particularly with respect to the scope of damages”, this Court should exercise supplemental jurisdiction on whatever remaining state law claims exist. *Integrative Nutrition, Inc.*, 476 F. Supp. 2d at 299.

Regarding Plaintiffs’ argument that their trade secret misappropriation claims as they relate to clothing designs are not preempted by the Copyright Act, Plaintiffs are incorrect, as: (1) copyright preemption is broader than the Copyright Act itself, and (2) Plaintiffs’ allegations are unequivocally those of copyright infringement of fabric patterns, prints and designs.

**1. The Reach Of Copyright Preemption Is Broader Than The Statute Itself
And Includes Claims Relating to Clothing Designs.**

The preemptive force of Section 301(a) is vast. “The fact that the state-created right is either broader or narrower than its federal counterpart will not save it from preemption.” 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[B][1] (2010). Plaintiffs conveniently ignore this well-settled law that the garments allegedly designed by Plaintiffs and claimed to be derived from Plaintiffs’ non-existent “trade secrets” and/or proprietary and confidential information fall within the scope of copyrightable subject matter pursuant to 17 U.S.C. § 102(a) specifically for preemption purposes. “[P]reemption under § 301 [the Copyright Act] is not the same as the scope of copyright protection and that the former is in fact broader than the latter.” *Stewart*, 2005 WL 66890, at *3 (emphasis added).

Plaintiffs attempt to argue in their brief that *Stewart* does not apply to this action because they “have alleged high-level concepts and themes, such as the juxtaposition of certain colors against certain prints, or certain combinations of color, that were discussed among our designers and considered part of our trade secrets. Such concepts and themes are too abstract to be preempted by the subject matter of copyright.” (Pl. Br. at 17.) Yet this is precisely what the plaintiff in *Stewart* unsuccessfully argued.¹

¹ Plaintiffs attempt to downplay the effect of *Stewart* on their claims because Judge Carter found that *Stewart*’s misappropriation of an idea claim was not preempted. (Pl. Br. at 17.) Plaintiffs are correct – Judge Carter found that the first prong for preemption (subject matter) was met for *Stewart*’s misappropriation claim, but that the second prong (equivalency) failed. *Stewart*, 2005 WL 66890, at *5. *Misappropriation of an idea*, however, is *not* remotely the same claim Plaintiffs make for *trade secret misappropriation*, and this point therefore gets them nowhere, especially in light of the other claims Justice Carter *did* find preempted, including unjust enrichment and conversion – causes of action Plaintiffs’ unilaterally stripped from their complaint in an attempt to avoid preemption. *Stewart*, 2005 WL 66890, at *5. Plaintiffs did not plead idea misappropriation here because they knew they could not meet the elements – no ideas they claim as trade secrets are remotely novel. Of course, the remainder of their trade secret claims not at issue here for preemption purposes (calendars, catalog delivery dates) ultimately suffer from the same ailment.

Plaintiff in *Stewart* argued, similar to Plaintiffs here, that “the misappropriation of an idea, as distinguished from its tangible expression, does not constitute subject matter covered by federal copyright law. Plaintiff maintains that it was his ideas and concepts which were stolen and thus that his claims are exempt from preemption.” *Stewart*, 2005 WL 66890 at *3. The Court stated that “although plaintiff is correct in asserting that ideas are generally not given copyright protection, it is well established that the scope of preemption under § 301 is not the same as the scope of copyright protection and that the former is in fact broader than the latter.” *Id.* (citing *Katz Dochermann & Epstein, Inc. v. Home Box Office*, 97 Civ. 7763, 1999 WL 179603, at *2 (S.D.N.Y. 1999) (“[T]he scope of preemption under § 301 is not the same as the scope of copyright protection, and the former is in fact broader than the latter.”)).

A review of Plaintiffs’ claims in both the Complaint and the First Amended Complaint, as well as Plaintiffs’ preliminary injunction brief and comments to the Justice Kapnick during oral argument, make abundantly clear that the majority of Plaintiffs’ claims do not arise solely from the ideas and concepts pertaining to WH|BM’s seasonal lines, but also depend substantially upon the “misappropriation” of the designs and prints on the clothing produced by WH|BM- the tangible expression of Plaintiffs’ alleged ideas and concepts. (See Am. Compl. ¶¶ 89, 93-94, 98-102, 106; July 1, 2010 Hearing Tr. at 8-9; 10; 12; 14.) Likewise in *Stewart*, the Court held:

On the facts alleged in the present case, the ideas at issue cannot be meaningfully separated from their tangible expression for preemption purposes. Plaintiff’s complaint makes clear that the majority of his claims do not arise solely from the ideas and concepts orally conveyed to the WWE, but also depend substantially upon the misappropriation of the video and clothing samples-the tangible expression of those ideas-submitted to defendant. *Indeed, Stewart relies heavily on the alleged similarities between his video and lingerie samples and defendant’s televised program and its WWE-marketed lingerie items.* Given both the broader scope of § 301 and the fact that the video and lingerie samples fall within the subject matter of the Copyright Act for preemption purposes, we hold that, with the exception of plaintiff’s breach of implied contract claim for the reasons recited below, the subject matter of the work in which the state law claims are asserted

fall within the subject matter of copyright law.

Stewart, 2005 WL 66890, at *3 (internal citations omitted) (emphasis added). Indeed, *Stewart* explicitly states that “clothing designs, though generally not copyrightable, nevertheless do fall within the subject matter of copyright for preemption purposes.” *Stewart*, 2005 WL 66890, at *3 (citing *Morris v. Buffalo Chips Bootery, Inc.*, 160 F. Supp. 2d 718, 721 (S.D.N.Y. 2001) (“[A]lthough the Complaint also alleges claims of unjust enrichment, misappropriation, and unfair competition under New York law, such claims are here preempted by federal copyright law, since they are grounded solely in the alleged copying of ‘[plaintiff fashion designer]’s protected expression.”)). For this reason alone, Plaintiffs’ preemption assertions are incorrect, and Plaintiffs’ claims relating to the misappropriation of their clothing designs, patterns, prints, and even concepts, are preempted by the Copyright Act.

2. Plaintiffs’ Allegations As To The Misappropriated Clothing Designs Are Those Of Copyright Infringement.

Even if the scope of copyright preemption were not broad enough to cover state law claims relating to alleged concepts and actual similarities between clothing designs, which it is as per Argument Section I(C)(1), Plaintiffs’ argument when viewed with their pleadings that “apparel, including dress designs, is excluded from the subject matter of copyright protection” is simply wrong. (Pl. Br. at 14.) Plaintiffs’ error is due in part to their misunderstanding and misuse of the term “dress design”:

In discussing the extent of copyright protection available for dresses and other items of clothing, a distinction must be made between two different concepts that, unfortunately for the purposes of analysis, are often referred to by the same names. There is first the design imprinted on the fabric, such as a rose petal, which in a completed dress may appear repeatedly throughout the dress fabric, or may appear but once in a given dress. This is known both as a ‘design’ and as a ‘pattern,’ but for our purposes will be referred to as a fabric design. Then there is a design that graphically sets forth the shape, style, cut, and dimensions for converting fabric into a finished dress or clothing garment. This, too, is known as

both ‘design’ and as a ‘pattern,’ but for our purposes will be referred to as a dress design.

4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[H][1] (2010).

Nimmer continues that “it is now clear that [fabric designs] are copyrightable” and even leaves open the possibility that dress designs can be as well. *See id*; *see also, Galiano v. Harrah’s Operating Co.*, 416 F.3d 411, 419 n.17 (5th Cir. 2005) (“[Nimmer] does not conclude clothing designs do not qualify for copyright protection per se, but it rather concludes that clothing designs rarely pass the ‘separability’ test. This is an important distinction in light of existing case law, which can sometimes appear to implement a categorical approach.”). A review of Plaintiffs’ allegations reveal that the crux of their “trade secret” clothing claims do not relate to the silhouette or the cut and dimensions of a dress or a pant, but rather to the prints and patterns contained on the apparel. (*See, e.g.*, Compl. ¶¶ 8-9, 32, 67, 80, 82, 86-87; Am. Compl. ¶¶ 89, 93-94, 98-102, 106; July 1, 2010 Hearing Tr. at 8-9; 10; 12; 14; Pl. Prelim. Inj. Br. at 16-17.)

Plaintiffs provide a string cite of cases that they believe support the proposition that garment designs are not copyrightable. (Pl. Br. at 14-15.) Plaintiffs grossly mischaracterize the holdings of each of these cases, which clearly show that fabric designs, prints, and patterns, just like the ones complained about by Plaintiffs, received full copyright protection. A review of the cases Plaintiffs present to the Court both in their July 14, 2010 letter and in their brief reveal that they were all, in fact, copyright cases:

- In *Langman Fabrics v. Graff Californiawear, Inc.*, 160 F.3d 106 (2d Cir. 1998), the fabric design was copyrighted and fully protected. *Id.* at 108. It was not necessary, however, for the copyright holder to print the year of the copyright on the fabric because fabric is a “useful article,” from which 17 U.S.C. § 401(b)(2) provides an exemption from printing the copyright date. *Id.* at 114. Plaintiffs’ claim that the fabric in *Langman* was “therefore excluded from copyright protection” is false.
- In *Knitwaves, Inc. v. Lolly togs Ltd.*, 71 F.3d 996 (2d Cir. 1995), the court held, immediately after the portion cited by plaintiffs, “fabric designs, such as the artwork

on Knitwaves' sweaters, are considered 'writings' for purposes of copyright law and are accordingly protectable." *Id.* at 1002.

- In *Chosun Int'l, Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324 (2d Cir. 2005), the court held, immediately after the portion cited by plaintiffs, "[b]ut we also have held separable elements in clothing, to the extent that they exist, may be eligible for copyright protection." *Id.* at 328-29.
- *Chosun* cites *Fashion Originators Guild v. FTC*, 114 F.2d 80 (2d Cir. 1940), which held that "[t]he author of a design for a dress should be deemed to be on the same footing as the author of a drawing or a picture." *Id.* at 83. Plaintiffs grossly mischaracterize the case, which does not apply the Copyright Act but instead applies common-law copyright, which was preempted by Section 301(a). *Id.* at 83
- In *Folio Impressions, Inc. v. Eyer California*, 937 F.2d 759 (2d Cir. 1991), the court held in the sentence immediately preceding that mentioned by plaintiffs, "[a]mong those forms of 'writings' now recognized as entitled to copyright protection are fabric designs, which are the subject matter of this appeal." *Id.* at 763.
- *Whimsicality, Inc. v. Rubie's Costume Co.*, 891 F.2d 452, 455 (2d Cir. 1989), addressed costumes, not clothing, and holding that the plaintiff's costumes were not copyrightable because of misrepresentations made to the Copyright Office.

(*See* Pl. Br. at 14-15.) (Plaintiffs also cite to *Galiano*, which, as set forth above, is also contrary to their position.) Indeed, these cases are subsumed within a long line of cases in this Circuit holding that designs, patterns and prints on clothing fit squarely within the Copyright Act, that such copyright registrations are valid, and that copyright infringement actions based upon these registrations are litigated regularly. *See, e.g., Cameron Indus. v. Mother's Work, Inc.*, 338 Fed. App'x 69, 70 (2d Cir. 2009) ("The only issue on appeal is whether the defendant's fabric design is substantially similar to the plaintiff's copyrighted fabric design [for a fabric pattern used on a dress]."); *L.A. Printex Indus. v. At Last Sportswear, Inc.*, 08 Civ. 8981, 2009 WL 1285923, at *1 (S.D.N.Y. May 4, 2009) ("Plaintiff . . . brings this action for copyright infringement against defendant At Last Sportswear, Inc., alleging that At Last manufactured garments printed with a pattern that infringes a design in which L.A. Printex holds the copyright."); *Queenie, Ltd. v. Sears, Roebuck & Co.*, 124 F. Supp. 2d 178, 179 (S.D.N.Y. 2000) ("This is one of a number of

actions for copyright infringement of a certain fabric design [for a blouse], all of which are before me. . . Queenie . . . registered a design designated as ‘TF 7459 (Box Design)’ with the Copyright Office on August 10, 1995.”); *Queenie, Ltd. v. Notations*, 98 Civ. 2922, 1999 WL 1044368, at *1 (S.D.N.Y. Nov. 18, 1999) (“This is an action for copyright infringement of a fabric design. Plaintiff Queenie, Ltd. alleges that the defendant Notations, Inc. copied its tile print design ‘TF 7459’ for which the Register of Copyrights issued Copyright No. VA 718-788, and then sold garments bearing the infringing design to defendants Kohl’s Department Stores, Inc. and Mercantile Stores Co., Inc.”); *Design v. Lynch Knitting Mills*, 689 F. Supp. 176, 180 (S.D.N.Y. 1988), *aff’d*, 863 F.2d 45 (2d Cir. 1988) (Plaintiff holder of valid copyright registrations in two “sweater designs” brought action for copyright infringement for a design of a sweater, wherein Judge Cederbaum held that “although the similarity of the basic design elements of the two sweaters would not be apparent to the ordinary observer, the ‘total effect . . . is quite distinct,’ and I therefore hold that Lynch and Wal-Mart are not liable for infringement.”).

Not one of these cases finds that a copyright registration is invalid based upon any principle that clothing is not amenable to copyright protection. Accordingly, designs, prints, and patterns on garments, which unequivocally comprise the heart of Plaintiffs’ claims – as well as their arguments to the State Court in support of injunctive relief against Cache – clearly fall within the preemptive ambit of Section 301(a).

3. Plaintiffs’ Sought Remedies Are Those Of Copyright Infringement.

It is not subject to debate that when a complaint alleges a claim *or* seeks a remedy provided by the Copyright Act, federal jurisdiction is properly invoked. *DeCarlo*, 11 Fed. App’x at 505, *cert. denied*, 534 U.S. 1056 (2001) (Second Circuit held that the district court properly “refused to remand” state law claim seeking those remedies “traditionally available under the Act

in cases of copyright infringement. 17 U.S.C. §§ 501-504.”) (citing *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 355 (2d Cir. 2000)) (“When a complaint alleges a claim or seeks a remedy provided by the Copyright Act, federal jurisdiction is properly invoked.”); *see also Barnhart v. Federated Dept. Stores, Inc.*, 04 Civ. 3668, 2005 WL 549712, at *3 (S.D.N.Y. March 8, 2005) (“A claim arises under the Copyright Act if the complaint either (1) seeks a remedy expressly granted by the Act or (2) asserts a claim requiring construction of the Act. Whether the claim is brought in federal district court originally or by removal from a state court, the court must apply this test to determine whether it has jurisdiction to hear the claim under 28 U.S.C. § 1338(a).”) (internal citations omitted).

Here, Plaintiffs in their First Amended Complaint include as remedies against Cache that it be enjoined from the sale of apparel and recall of its existing apparel containing prints, patterns and designs alleged by Plaintiffs to be “strikingly similar” and “identical” to Plaintiffs’ clothing, as well as actual and compensatory damages, and even attorneys fees and costs. (Am. Compl. pp. 41-42; *see also* July 1, 2010 Hearing Tr. at 8-9; 10; 12.) These remedies are those traditionally accorded by copyright law. *DeCarlo*, 11 Fed. App’x at 505; *see also* 17 U.S.C. §§ 501-505. For this third reason, Plaintiffs’ claims are subject to copyright preemption.

D. Plaintiffs’ Claim Of Trade Secret Misappropriation Cannot Contain The Required Additional Element To Avoid Preemption And Is Thus Not Qualitatively Different Than A Copyright Infringement Claim.

Plaintiffs next argue that complete equivalency does not exist between the “rights asserted under Plaintiffs’ state law claims, and the rights protected by the Copyright Act” because their trade secret misappropriation claim contains the “requisite additional element” that defendants misappropriated their trade secrets in breach of a confidential relationship or as a result of discovery by improper means. (Pl. Br. at 19.) Plaintiffs assert that this additional

element exists because “[u]nlike a copyright claim, Plaintiff must show each defendant misappropriated the trade secret [a] on breach of an agreement, a confidential relationship or a duty, or [b] as a result of discovery by improper means.” (*Id.*) This is precisely where this Court should be wary of Plaintiffs’ artful pleading, as Plaintiffs’ claims for misappropriation of trade secrets to the extent they relate to clothing designs fail as a matter of law, and are simply claims of copyright infringement. This is because (a) as a matter of law, clothing designs, whether or not they have yet entered the public realm, are not protectable trade secrets, and as a result (b) Plaintiffs’ claim of “misappropriation” by former employees is no more than facts that would be essential in proving copyright infringement by “access” to the works at issue.

1. Plaintiffs’ Purported “Trade Secrets” Claim As It Relates To Clothing Designs Fails As A Matter Of Law.

Plaintiffs rely solely on *Cole v. Manhattan Modes Co.*, 159 N.Y.S.2d 709, 713 (NY Sup. 1956), a 1956 State Court case, to prove that their claims pertaining to clothing designs maintain a cause of action for trade secret misappropriation. (Pl. Br. at 6-7.) Nowhere in *Cole* does the court state that Cole’s dress designs are “trade secrets.” *See generally id.* This is not surprising, as such a holding would fly in the face of recent Southern District of New York precedent that squarely conflicts with – and supersedes – any such interpretation of *Cole*, namely, *Detsis v. Victoria’s Secret Stores, Inc.*, 03 Civ. 5358, 2006 WL 2819586, at *5 (S.D.N.Y. Sep. 29, 2006). Plaintiffs attempt to downplay the importance of *Detsis* by dropping a footnote stating that the case stands for the proposition that “once a product is placed into the public realm, it generally loses trade secret protection.” (Pl. Br. at 7, n.3.) Plaintiffs are completely, utterly, wrong.

Detsis concerned a *confidential* submission to Victoria’s Secret pursuant to a confidentiality agreement “of illustrations, photographs and texts presenting her idea of the ‘Neck-Less,’” a necklace fastened to and hung across the straps of a bra that “was part of her

broader concept of using jewelry accessories to personalize intimate apparel.” *Id.* at *4-*5.

With respect to plaintiff’s claims for trade secret misappropriation, Judge Daniels held that:

Plaintiff’s trade secret misappropriation claims fail as a matter of law because the ideas that defendant allegedly misappropriated do not constitute trade secrets under either Ohio law, which governs the Agreement, or the common law in New York. Neither state extends trade secret protection to product designs that lose their secrecy when the finished products reach the market. . . . The design concepts that Detsis contends were misappropriated by Victoria’s Secret are readily apparent from the finished product, that once marketed, become visible for all competitors to copy. Therefore, the designs cannot be protected by trade secret law.

See id. at *16-*17 (emphasis added). Like Plaintiffs claim here, the plaintiff’s product designs in *Detsis* that were alleged to be “trade secrets” *never reached the market*, yet, in line with other like cases, Judge Daniels still held those items to not have trade secret protection. *See id;* *see also Hudson Hotels Corp. v. Choice Hotels Int’l*, 995 F.2d 1173, 1175 (2d Cir. 1993) (finding a hotel room design concept was not a trade secret because it would be publicly disclosed once the hotel was built, and, as such, “a non-novel idea, which is not used secretly and continuously in commerce, is not a trade secret.”), *abrogated on other grounds by Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368 (2d Cir. 2000); *Millenium Expressions, Inc.*, 2007 WL 950070, at *3 (“With respect to the claims for misappropriation of trade secrets and proprietary information, Judge Berman granted summary judgment insofar as the plaintiff’s allegations were based on its product designs”); *Linkco, Inc. v. Fujitsu Ltd.*, 230 F. Supp. 2d 492, 498 (S.D.N.Y. 2002) (“[C]ourts have held that there can be no trade secret protection, as a matter of law, if the secrecy is necessarily lost when the design or product is placed on the market.”).

Plaintiffs’ assertions that their clothing designs and concepts can be the fodder of trade secret demonstrates their misunderstanding of what a “trade secret” actually is – a process or device for *continuous use* in the operation of the business, not one, like Plaintiffs assert, that can exist ephemerally until a product reaches the marketplace. *See, e.g., Medtech Products Inc. v.*

Ranir, LLC, 596 F. Supp. 2d 778, 787 (S.D.N.Y. 2008) (“A trade secret, however, ‘is not simply information as to single or ephemeral events in the conduct of the business; rather, it is a process or device for continuous use in the operation of the business.’”) (quoting *Sit-Up Ltd. v. IAC/InterActiveCorp.*, 05 Civ. 9292, 2008 WL 463884, at *8 (S.D.N.Y. Feb. 20, 2008)); *Bear, Stearns Funding, Inc. v. Interface Group-Nevada, Inc.*, 361 F. Supp. 2d 283, 305 (S.D.N.Y. 2005) (“Importantly, a trade secret is not simply information as to single or ephemeral events in the conduct of the business; rather, it is a process or device for continuous use in the operation of the business.”) (internal quotation marks omitted); *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 315 (S.D.N.Y. 1999) (same); *Minnesota Min. & Mfg. Co. v. Technical Tape Corp.*, 192 N.Y.S.2d 102, 112-113 (N.Y. Sup. Ct. 1959) (“A trade secret is a process or device for continuous use in the operation of the business.”). Clearly, product designs – even at the conceptual level – are ephemeral by their nature, and thus cannot comprise a trade secret.

2. Because Clothing Designs Cannot Be Trade Secrets, Plaintiffs’ Claims That Former Employees Took And Shared Plaintiffs’ Clothing Designs With Cache Simply Amounts to An Attempt To Prove Access.

“It is well-settled copyright law that in order to establish copyright infringement, ‘a plaintiff must show that: (1) the defendant actually copied the plaintiff’s work; and (2) the copying is illegal because a ‘substantial similarity’ exists between the defendant’s work and the protectible elements of the plaintiff’s work.’” *Mowry v. Viacom*, 03 Civ. 3090, 2005 WL 1793773, at *1 (S.D.N.Y. July 29, 2005) (quoting *Street Wise Maps, Inc. v. Vandam, Inc.*, 159 F.3d 739, 747 (2d Cir. 1998)). Actual copying may be established by direct or indirect evidence, and indirect evidence “may include proof of ‘access to the copy-righted work, similarities that are probative of copying between the works, and expert testimony.’” *Id.* (quoting *Boisson v. Banian, Ltd.*, 273 F.3d 262, 267-68 (2d Cir.2001)). Indeed, “[c]opying is

often proven through circumstantial evidence consisting of (1) access by the defendant to the plaintiff's work, and (2) probative similarity between the two works." *Id.* (internal quotation marks omitted); *see also, e.g., Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir. 1992) ("It is now an axiom of copyright law that actionable copying can be inferred from the defendant's access to the copyrighted work and substantial similarity between the copyrighted work and the alleged infringement."); *Silberstein v. Fox Entm't Group, Inc.*, 02 Civ. 1131, 2004 WL 1620895, at *5 (S.D.N.Y. Jul. 19, 2004); *Cox v. Abrams*, 93 Civ. 6899, 1997 WL 251532, at *3 (S.D.N.Y. May 14, 1997); *see also* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.02[B] ("[I]n order to demonstrate defendant's copying as a factual matter, plaintiff must prove the twin ingredients of probative similarity plus access.").

Here, because clothing designs are not trade secrets, and therefore cannot be "misappropriated", Plaintiffs' allegations of misappropriation of trade secret merely amount to access by former employees (Christine Board and Rabia Farhang) of the patterns, prints, and designs they allege comprise their clothing lines. (*See, e.g., Am. Compl.* ¶¶ 8-12, 18, 40, 44-47, 79-81; July 1 Tr. at 7, 9, 18.)

Plaintiffs here are far from the first litigants to attempt to prove copying by circumstantial evidence of access by former employees. *See, e.g., SGC Communication Resources, LLC v. The Seminar Center, Inc.*, 98 Civ. 2724, 2001 WL 274053, at *5 (S.D.N.Y. Mar. 20, 2001) (Plaintiff provided "circumstantial proof," of copying "based on defendants' access to plaintiff's catalog" by arguing that "prior to the publication of their first catalog, defendants hired several former employees of plaintiff-one was general manager of plaintiff's New York branch and another was its senior program director-who were familiar with the text and layout of plaintiff's catalog."); *Innovative Networks, Inc., v. Satellite Airlines Ticketing Centers, Inc.*, 871 F. Supp. 709, 721

(S.D.N.Y. 1995) (“Plaintiff alleges that the Satellite Defendants had access to the INI Workstation Designs by virtue of the fact that Barton took copies of these Designs when he departed from INI in 1991.”); *see also, e.g., Key Consolidated v. Troost*, 432 F. Supp. 2d 484 (M.D. Pa. 2006) (complaint supported claim for copyright infringement, where company’s former employee and his new business had access to company’s text, and that former employee and his business used, copied, and distributed that text without company’s permission).

Plaintiffs *must* not be allowed to claim that access by former employees to items that cannot be the subject of trade secrets somehow creates a claim qualitatively different than one of copyright infringement: the consequences of such a ruling would be that “states would be free to expand the perimeters of copyright protection to their own liking, on the theory that preemption would be no bar to state protection of materials not meeting federal statutory standards.”

Stewart, 2005 WL 66890, at *3. To allow Plaintiffs to concoct such a claim would literally ignore the artful pleading rule and give state courts the ability to expand the boundaries of copyright protection beyond that set forth in the Copyright Act and developed by federal courts.

Accordingly, because product designs that eventually reach the market cannot be the subject of a trade secret that is “misappropriated” – even if they were arguably unknown to the public at some point – because they are not continuous, but rather ephemeral and are allegedly unknown only until the product reaches the market, Plaintiffs’ cause of action for trade secret misappropriation as it applies to defendants having access to their clothing designs, colors, prints and patterns are merely claims for copyright infringement garbed in state law claims. Hence, as a matter of law, there is no way that an extra element necessary to defeat preemption can exist with regard to Plaintiffs’ claims of trade secret misappropriation as they apply to clothing designs. In sum, the entirety of Plaintiffs’ clothing-related claims amount to copyright

infringement claims without the prerequisite of copyright registrations.

E. Plaintiffs' Claims, As Plead, Subsumes Third Parties' Intellectual Property Rights.

As a final matter, but a very important one, Plaintiffs' trade secret claims at issue must not be viewed as anything more than claims of copyright infringement, because to find to the contrary would literally give Plaintiffs superior rights to those merchants, vendors, and fabric mills that actually hold the copyrights of the various patterns and prints alleged by Plaintiffs to comprise their intellectual property. In the fashion industry, retail outfits like WH|BM or Cache often purchase copyrighted prints or fully produced garments from fabric mills, art studios, or other vendors like Lanificio Egidio Ferla SpA, L.A. Printex, Miroglio, Global Wise, Cyrus, Circle line, Jack Jones, and KeelerGordon, among others. Indeed, when a consumer notices seemingly similar fabric patterns on clothing in different retail clothing stores, it is sometimes due to the fact that, in following the seasonal trend, a vendor sold the entity a non-exclusive license to use the print. If Plaintiffs' claims are taken seriously, it would translate into the ability of retailers to integrate the copyrighted print licensed from an outside vendor into a piece of clothing, and assert that the print is encompassed in their trade secret which no one else could be permitted to use – even the copyright holder. Indeed, many of the patterns alleged by Plaintiffs to be “strikingly similar” to those of WH|BM were in fact purchased from vendors. Plaintiffs must not be allowed to assert rights to copyrighted patterns that they do not even own.

CONCLUSION

For the reasons set forth above, Cache, Inc. respectfully requests that Plaintiffs' Order to Show Cause to Remand be denied.

Dated: July 20, 2010

By: **DLA PIPER LLP (US)**

/s/ Frank W. Ryan

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