

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:10-CV-25-FL

SAS INSTITUTE INC.,)
)
 Plaintiff,)
)
 v.)
)
 WORLD PROGRAMMING LIMITED,)
)
 Defendant.)

ORDER

This matter comes before the court upon defendant's motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6) (DE # 71). Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b), United States Magistrate Judge James E. Gates entered memorandum and recommendation ("M&R") wherein he recommends that the court deny defendant's motion to dismiss. No objections to the M&R have been filed, and the time within which to make any objection has expired. This matter is ripe for ruling. For the reasons that follow, the court adopts the recommendation of the magistrate judge and DENIES defendant's motion to dismiss. Also before the court is plaintiff's motion to proceed with discovery (DE # 93). Defendant has timely filed a response (DE # 95) in opposition, to which plaintiff has replied (DE # 97). It appears, however, that discovery matters at issue now may be moot. The court seeks clarification from the parties in this regard.

BACKGROUND

Plaintiff filed this action on January 19, 2010, asserting claims for copyright infringement (Counts One and Two); breach of contract, or in the alternative, tortious interference with contract (Counts Three and Three A); tortious interference with economic advantage (Count Four), and; unfair and deceptive trade practices and unfair competition under the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. §§ 75-1.1 *et seq.* (“UDTPA”) (Count Five). The court granted defendant’s motion to dismiss on grounds of forums non conveniens, from which plaintiff appealed. In opinion filed February 16, 2012, the United States Court of Appeal for the Fourth Circuit reversed this court’s judgment, and remanded the case for further proceedings in plaintiff’s chosen forum. Thereafter, the court’s mandate issued.

On March 23, 2012, defendant filed the instant motion to dismiss seeking to dismiss all counts for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). Upon referral, the magistrate judge conducted hearing on the motion on June 7, 2012. On June 8, 2012, the magistrate judge entered an amended case management order, directing discovery to begin immediately after decision on the motion to dismiss, should the case remain. Plaintiff filed a motion to proceed with discovery on September 18, 2012, however, while decision on the underlying motion remained pending. On October 18, 2012, M&R was entered.

COURT’S DISCUSSION

The district court reviews *de novo* those portions of a magistrate judge’s M&R to which specific objections are filed. 28 U.S.C. § 636(b). The court does not perform a *de novo* review where a party makes only “general and conclusory objections that do not direct the court to a specific error in the magistrate’s proposed findings and recommendations.” Orpiano v. Johnson, 687

F.2d 44, 47 (4th Cir. 1982). Absent a specific and timely filed objection, the court reviews only for “clear error,” and need not give any explanation for adopting the M&R. Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005); Camby v. Davis, 718 F.2d 198, 200 (4th Cir.1983). Upon careful review of the record, “the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(c).

For the reasons given in the M&R, the court denies defendant’s motion to dismiss. The court finds no clear error in the magistrate judge’s thoughtful, thorough determination that plaintiff has adequately and plausibly pleaded all of the necessary elements for all of its claims. Furthermore, the court agrees with the magistrate judge’s finding that plaintiff’s UDTPA claim is not preempted by the copyright laws, and adopts his recommendation that this count not be dismissed in accordance with the analysis in the M&R.

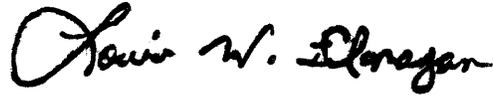
As the court’s resolution of defendant’s motion to dismiss also appears, pursuant to the amended case management order (DE # 89), to resolve plaintiff’s motion to proceed with discovery, the court directs plaintiff to inform the court within fourteen (14) days of entry of this order whether any issues raised in its discovery motion remain pending. If no such notification is received in this time, the court will assume discovery now is proceeding and the clerk shall terminate the motion.

CONCLUSION

Upon considered review of the M&R to which no objections have been made, the court **ADOPTS** the findings and recommendations of the magistrate judge in full, and **DENIES** the defendant’s motion to dismiss (DE # 71). The court also **DIRECTS** plaintiff to inform the court within fourteen (14) days of entry of this order whether any issues raised in its discovery motion remain pending (DE # 93). If plaintiff does not so notify the court in such time, the clerk is

DIRECTED to terminate plaintiff's motion.

SO ORDERED, this the 19th day of November, 2012.

A handwritten signature in black ink, reading "Louise W. Flanagan". The signature is written in a cursive style with a large initial "L".

LOUISE W. FLANAGAN
United States District Judge