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6                   IN THE UNITED STATES DISTRICT COURT  
7                   FOR THE DISTRICT OF ARIZONA

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9       Stremor Corp.,

10                   Plaintiff,

11       v.

12       Brandon Wirtz; Blackwater Ops,

13                   Defendant.

No. CV-14-01230-PHX-NVW

**ORDER**

14               Before the Court is Defendants' Motion to Add as Counterdefendants William  
15       Irvine, Stephen Melzer, and Mark Allen (Doc. 64).

16       **I.     BACKGROUND**

17               Plaintiff Stremor Corp. is an Arizona corporation that develops and sells software  
18       programs that are distributed, licensed, and used via the Internet. It claims ownership of  
19       a natural language processing ("NLP") technology and a separate program named  
20       "Stremor-Cache," which is used to enhance the performance of Stremor's NLP  
21       technology through caching.

22               Defendant Brandon Wirtz is the sole proprietor of Blackwater Ops. Wirtz has  
23       applied for U.S. copyright registration for certain software products. Blackwater Ops  
24       holds the right to license Wirtz's products. From approximately February 2012 to May  
25       2014, Wirtz was employed by Stremor as its Chief Technology Officer.

26               When Wirtz joined Stremor, he brought with him software technology and  
27       allowed Stremor to use certain aspects of the technology to improve the performance of  
28       certain aspects of Stremor's NLP technology. Stremor claims that it assessed Wirtz's

1 software technology and then developed Stremor-Cache “starting from scratch.” Stremor  
2 alleges that Stremor-Cache is completely new source code and “Stremor’s NLP  
3 technology is an original work resulting from independent design and creative and  
4 inventive efforts of Stremor’s employees.” Stremor further alleges that the codes of  
5 Wirtz’s technology and Stremor-Cache are distinctly different, and Stremor does not  
6 infringe, induce infringement, or contribute to any valid and enforceable copyrights held  
7 by Defendants. Stremor alleges that Wirtz has made false claims of copyright  
8 infringement to potential clients and companies with which Stremor has existing or  
9 potential relationships.

10 Wirtz seeks leave to add as counterdefendants William Irvine, Stephen Melzer,  
11 and Mark Allin, officers and board members of Stremor. Wirtz alleges that the proposed  
12 counterdefendants were involved in or otherwise approved actions against Wirtz,  
13 including fraud, wrongful termination, unfair competition/trade secret misappropriation,  
14 direct and indirect copyright infringement, and negligent representation. The proposed  
15 counterdefendants were previously named as defendants in state court litigation by Wirtz,  
16 which apparently Wirtz dismissed after Stremor initiated this federal court action on June  
17 4, 2014. On June 9, 2014, Wirtz filed an answer with a counterclaim for copyright  
18 infringement and injunctive relief. On June 11, 2014, Stremor filed its first amended  
19 complaint, adding Blackwater as a defendant. Stremor’s initial complaint and the first  
20 amended complaint both alleged two counts: (1) Declaratory Judgment of Non-  
21 Infringement of Copyright and (2) Temporary Restraining Order and Preliminary  
22 Injunction. On June 12, 2014, a preliminary injunction hearing was held during which  
23 the parties reached an agreement that was stated on the record and filed on June 13, 2014.

24 On July 25, 2014, Stremor filed its Second Amended Verified Complaint for  
25 Declaratory Judgment (Doc. 48), which alleges three counts: (1) “Declaratory Judgment  
26 of Non-Infringement of Copyright”; (2) “Breach of Contract—Section 5 of At-Will  
27 Employment, Non-Disclosure, and Non-Competition Agreement”; and (3) “Preliminary  
28 Injunction and Permanent Injunction.” It alleges original jurisdiction relating to

1 copyrights under 28 U.S.C. §§ 1331 and 1338(a). It does not allege supplemental  
2 jurisdiction under 28 U.S.C. § 1367.

3 On August 29, 2014, Wirtz and Blackwater filed answers to the Second Amended  
4 Complaint for Declaratory Judgment and counterclaims. On September 8, 2014, the  
5 answers and counterclaims were stricken for failure to obtain leave of Court to add  
6 counterdefendants. On September 19, 2014, Wirtz and Blackwater filed the instant  
7 motion to do so and lodged their proposed answers and counterclaims. The proposed  
8 pleadings include two federal copyright infringement claims and fourteen additional  
9 claims, which appear to be based on state law and employment-related agreements  
10 between Wirtz and Stremor.<sup>1</sup> On October 13, 2014, Stremor responded to Defendants'  
11 motion to add counterdefendants. On October 23, 2014, Defendants filed a reply in  
12 support of their motion.

## 13 **II. ANALYSIS**

14 Stremor opposes Stremor's motion to add counterdefendants for several reasons,  
15 including that the Court lacks supplemental jurisdiction over Defendants' state law  
16 claims. It also contends that, even if the Court has supplemental jurisdiction, it should  
17 decline to exercise it because Wirtz's state law counterclaims will predominate over the  
18 narrow issues raised in Stremor's copyright infringement action.

19 "[I]n any civil action of which the district courts have original jurisdiction, the  
20 district courts shall have supplemental jurisdiction over all other claims that are so related  
21 to claims in the action within such original jurisdiction that they form part of the same  
22 case or controversy under Article III of the United States Constitution." 28 U.S.C.  
23 § 1367(a). "A state law claim is part of the same case or controversy when it shares a

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25 <sup>1</sup> Proposed Counterclaim III is titled "Misappropriation of Trade Secrets Under  
26 Federal and Arizona Law, A.R.S. § 401" and refers to "unfair trade practices in violation  
27 of the Arizona Uniform Trade Secrets Act and Federal law" without identifying the  
28 "Federal law" involved. Other proposed counterclaims include fraud, negligent  
misrepresentation, breach of contract, etc.

1 ‘common nucleus of operative fact’ with the federal claims and the state and federal  
2 claims would normally be tried together.” *Bahrapour v. Lampert*, 356 F.3d 969, 978  
3 (9th Cir. 2004).

4 Stremor describes its Second Amended Complaint as “a fairly straightforward and  
5 narrow claim” requiring “a fairly narrow and technical scope of litigation arising from a  
6 fairly narrow sets [*sic*] of facts and conduct.” It states: “All of Wirtz’s [state law] claims  
7 arise from his pre-termination employment status, while, to the contrary, Stremor’s  
8 claims arise from a narrow analysis of software packages, which ultimately may turn on a  
9 question of law as to whether infringement exists.” (Doc. 69 at 5.) Stremor’s assertion  
10 that the numerous facts regarding Wirtz’s employment are irrelevant to the copyright  
11 infringement question is corroborated by Wirtz’s motion to strike specific paragraphs of  
12 the first amended complaint. (Doc. 39.) Wirtz contended then, before Stremor added a  
13 breach of contract claim, that “the substance of the claim brought by Plaintiff involves  
14 the question as to whether Plaintiff’s technology utilizes Defendant’s intellectual property  
15 and whether any such use is valid.” Wirtz objected to Stremor including factual  
16 allegations about the parties’ employment relationship that were “distracting and  
17 ultimately irrelevant to the claims.” The Court agrees with both parties and finds  
18 Stremor’s federal copyright infringement claim and its state law breach of contract claim  
19 do not share a “common nucleus of operative fact” and thus are not so related that they  
20 form part of the same case or controversy necessary for supplemental jurisdiction.  
21 Likewise, Defendants’ proposed state law counterclaims are not so related that they form  
22 part of the same case or controversy as Stremor’s and their federal copyright  
23 infringement claims.

24 Even if the Court had supplemental jurisdiction over Stremor’s state law claim, it  
25 would decline to exercise jurisdiction. “The district courts may decline to exercise  
26 supplemental jurisdiction over a claim under [28 U.S.C. § 1367(a)] if . . . the claim  
27 substantially predominates over the claim or claims over which the district court has  
28 original jurisdiction.” 28 U.S.C. § 1367(c)(2). “In exercising its discretion to decline

1 supplemental jurisdiction, a district court must undertake a case-specific analysis to  
2 determine whether declining supplemental jurisdiction comports with the underlying  
3 objective of most sensibly accommodating the values of economy, convenience, fairness  
4 and comity.” *Bahrampour*, 356 F.3d at 978 (internal quotation marks and citations  
5 omitted). Although Stremor describes its Second Amended Complaint as “a fairly  
6 straightforward and narrow claim,” more than 30 of its 96 paragraphs allege facts related  
7 to Wirtz’s employment and unrelated to the “narrow analysis of software packages”  
8 required to determine copyright infringement. Trying the parties’ employment and  
9 contractual disputes will be fact intensive, involving who said what to whom and with  
10 what economic consequences in a complicated market. Trying the federal copyright  
11 infringement claims likely will involve expert analysis of program code with limited fact  
12 witness testimony, thus requiring minimal fact discovery and no analysis of “personal  
13 animus.” Trying these claims together would not accommodate the values of economy  
14 and convenience.

15 Similarly, Defendants’ proposed counterclaims include fourteen state law claims  
16 that are not part of the same case or controversy, but even if they were, the Court would  
17 decline to exercise supplemental jurisdiction because they would substantially  
18 predominate over the federal claims. Moreover, based on Defendants’ proposed  
19 pleading, it appears unlikely that Defendants will allege that the proposed individual  
20 counterdefendants, Irvine, Melzer, and Allin, have individual liability for Stremor’s  
21 copyright infringement actions.

22 In summary, the Court has original jurisdiction over Count One of the Second  
23 Amended Verified Complaint for Declaratory Judgment (Doc. 48). This narrow claim is  
24 limited to whether Stremor has infringed Wirtz’s<sup>2</sup> purported federal copyrights in specific  
25 software technology and does not include alleged violations of “any other federal or state,

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27 <sup>2</sup> None of the pleadings have yet alleged facts showing that Blackwater Ops is a  
28 proper party for either side’s copyright infringement claims.

1 statute, or common laws” despite a passing reference to such. Count Two of the Second  
2 Amended Verified Complaint for Declaratory Judgment claims breach of an employment  
3 contract, a state law claim over which the Court does not have supplemental jurisdiction  
4 and would decline to exercise supplemental jurisdiction for the reasons stated herein.  
5 Count Three of the Second Amended Verified Complaint for Declaratory Judgment seeks  
6 injunctive relief against Wirtz for conduct inconsistent with the declaratory judgment  
7 sought in Count One. Until Stremor obtains a declaratory judgment of non-infringement,  
8 it is premature for Stremor to seek injunctive relief to prevent actions that Wirtz may or  
9 may not be entitled to take. Therefore, the Second Amended Verified Complaint for  
10 Declaratory Judgment (Doc. 48) will be dismissed with leave to file a further amended  
11 complaint alleging only its narrow claim for declaratory judgment regarding copyright  
12 infringement.

13 If Plaintiff files a further amended complaint, Defendants may file a responsive  
14 pleading that conforms to the Court’s findings in this Order. That is, the Court does not  
15 have supplemental jurisdiction over state law claims regarding Wirtz’s employment  
16 relationship with Stremor. Further, Defendants may not add counterdefendants to this  
17 litigation without seeking leave of the Court and alleging a factual basis for each  
18 proposed counterdefendant’s liability under each of Defendants’ federal copyright  
19 infringement claims.

20 These findings have rendered moot many of the parties’ arguments, *e.g.*, whether  
21 under these circumstances Defendants are entitled to add counterdefendants without leave  
22 of court, whether joinder of the proposed counterdefendants is required, whether the  
23 proposed counterclaims are futile, etc.

24 IT IS THEREFORE ORDERED that in this narrow copyright infringement action  
25 the Court does not have supplemental jurisdiction over state law claims related to  
26 Plaintiff Stremor Corp.’s employment of or relationship with Defendant Brandon Wirtz.

27 IT IS FURTHER ORDERED that the Second Amended Verified Complaint for  
28 Declaratory Judgment (Doc. 48) is dismissed with leave to file **by December 19, 2014**, a

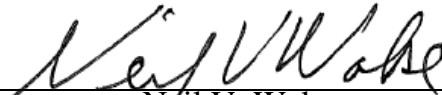
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further amended complaint alleging only a claim for declaratory judgment of non-infringement of copyright and only facts directly relevant to the claim.

IT IS FURTHER ORDERED that if Plaintiff files a further amended complaint by December 19, 2014, Defendants may file a responsive pleading by **January 9, 2015**.

IT IS FURTHER ORDERED that Defendants' Motion to Add as Counterdefendants William Irvine, Stephen Melzer, and Mark Allen (Doc. 64) is denied as moot.

Dated this 4<sup>th</sup> day of December, 2014.

  
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Neil V. Wake  
United States District Judge