UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ONE LAPTOP PER CHILD ASSOCIATION, INC. Plaintiff, v. LAGOS ANALYSIS CORPORATION, Defendant.	)	Civil Action No. 08-10405-GAO

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF ONE LAPTOP PER CHILD ASSOCIATION, INC.'S MOTION TO REMAND

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Plaintiff One Laptop Per Child Association, Inc. respectfully submits this memorandum of law in support of its motion to remand pursuant to 28 U.S.C. § 1447(c) on the ground that this Court lacks subject matter jurisdiction. This action, which properly belongs in state court, seeks a declaratory judgment on state law questions regarding purportedly confidential, proprietary or "trade secret" information. As the complaint alleges only state law claims, this Court lacks subject matter jurisdiction and should remand this action to the Middlesex Superior Court and award OLPC its attorneys' fees and costs.

I. Background

This is an action for a declaratory judgment pursuant to Massachusetts General Laws Chapter 231A concerning the parties' respective rights regarding purportedly confidential, proprietary or "trade secret" information of Defendant Lagos Analysis Corporation. (Complaint ("Compl."), ¶ 1). Plaintiff is One Laptop Per Child Association, Inc. ("OLPC"), a nonprofit corporation that provides educational resources to children in the developing world through its XO laptop. (Compl. at ¶ 6). Among the features of the XO laptop is a multilingual keyboard. (*Id*.). Defendant Lagos Analysis Corporation ("LANCOR") is a professional consulting, research and development based service firm. (Compl. at ¶ 8). One of LANCOR's products is the Konyin Multilingual Keyboard, a functional object that permits typing in multiple languages on a single keyboard layout. (*Id*.).

This action arises out of OLPC's development of its XO laptop. In developing the laptop's multilingual keyboard, OLPC consulted a variety of publicly available sources, including LANCOR's Konyin Multilingual Keyboard. (Compl. at ¶ 15). While developing the XO laptop, OLPC purchased a Konyin Multilingual Keyboard, which came with software that OLPC never used. (Compl. at ¶ 16). LANCOR claims that when OLPC purchased the

keyboard, it entered into an end user license agreement ("the Agreement"), which it subsequently breached through the development of the XO laptop. (Compl. at ¶ 14). In August 2007, LANCOR accused OLPC of infringing its intellectual property rights in the Konyin Multilingual Keyboard and violating the Agreement. (Compl. at ¶¶ 9, 11). LANCOR subsequently filed suit against OLPC in Nigeria alleging design patent infringement. (Compl. at ¶ 12).

After the Nigerian patent suit was filed, an American attorney representing LANCOR wrote OLPC, again alleging that OLPC violated the Agreement and infringed LANCOR's intellectual property rights.[1] (Compl. at ¶ 13). Central to LANCOR's accusations is the Agreement, which LANCOR claims OLPC breached through the development of software supporting the XO laptop's multilingual keyboard. (Compl. at ¶ 14). However, OLPC never entered into the Agreement and, therefore, could not and did not breach it. (Compl. at ¶ 16). LANCOR requested OLPC pay $6,000,000 to settle the claims and threatened to take all necessary legal action to enforce its rights. (Compl. at ¶ 13).

On February 12, 2008, OLPC brought this action in Massachusetts state court requesting a declaratory judgment that OLPC has not misappropriated any trade secrets or proprietary or confidential information belonging to LANCOR. On March 12, 2008, LANCOR filed a notice of removal, erroneously claiming that this Court has original jurisdiction over OLPC's claim pursuant to 28 U.S.C. § 1331. (Notice of Removal ("Notice"), ¶ 7).

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[1] Specifically, LANCOR alleged that OLPC (i) breached the end user license agreement by decompiling content of the installation CD included with LANCOR's keyboards to gain access to the structure of the engineering anchoring the keyboard layout and driver; (ii) modified LANCOR's products to incorporate multilingual keyboard layouts with direct access typing of combining diacritic marks; (iii) disassembled software from the installation CD to gain access to the modalities of the keyboard layout technique; (iv) converted LANCOR's software from Windows to Linux; (v) improperly discovered the algorithm of the keyboard driver and keyboard layout; (vi) reverse engineered the source code or algorithm of the keyboard drivers; (vii) created derivative work from the keyboards' driver and layout technique; and (viii) made LANCOR's keyboard layout potentially available to millions of individuals over the internet. (Compl. at ¶ 14).

II. Argument

A. Remand is appropriate where the removing party cannot satisfy its burden of demonstrating the existence of federal jurisdiction.

This Court should remand this action to the Middlesex Superior Court because LANCOR's removal of this case was improper, as there is no basis for federal subject matter jurisdiction. *See* 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."). It is well settled that "the removing party bears the burden of establishing subject matter jurisdiction." *Commonwealth of Massachusetts v. Fremont Inv. & Loan*, No. 07-11965-GAO, 2007 WL 4571162, at *2 (D. Mass. 2007); *see also BIW Deceived v. Local S6*, 132 F.3d 824, 831 (1st Cir. 1997). The removal statute should be strictly construed and doubts about the propriety of removal should be resolved against the removal of an action. *See Danca v. Private Health Care Sys.*, 185 F.3d 1, 4 (1st Cir. 1999); *Rosselló-González v. CalderónSerra*, 398 F.3d 1, 11 (1st Cir. 2004); *see also Fremont*, 2007 WL 4571162, at *2.

LANCOR has failed to satisfy its burden of showing that this case arises under federal law and remand is therefore required.[2] Under the "well-pleaded complaint rule," federal removal jurisdiction "is normally ascertained from the face of the state court complaint that triggered the removal." *Danca*, 185 F.3d at 4; *Am. Policyholders Ins. Co. v. Nyacol Prods., Inc.*, 989 F.2d 1256, 1262 (1st Cir. 1993). "To establish removal jurisdiction based on a federal question under 28 U.S.C. § 1441(a), federal subject matter jurisdiction must be established within the four corners of the *plaintiff's* complaint." *In re Whatley*, 396 F. Supp. 2d 50, 54 (D. Mass. 2005)

[2] LANCOR does not and cannot assert that removal is proper on the basis of diversity jurisdiction since it is a Massachusetts resident. *See* 28 U.S.C. § 1441(b).

(emphasis in original). Defenses and counterclaims cannot create federal jurisdiction. *Id*. (quoting *Ballard's Serv. Ctr., Inc. v. Transue*, 865 F.2d 447, 499 (1st Cir. 1989)); *Fremont*, 2007 WL 4571162, at *2.

If plaintiff's well-pleaded complaint alleges only state law claims, federal subject matter jurisdiction can only exist under two narrow exceptions. *See Alshrafi v. Am. Airlines, Inc.*, 321 F. Supp. 2d 150, 155 (D. Mass. 2004); *Fremont*, 2007 WL 4571162, at *2. A claim pled under state law will "arise under" federal law only if: (1) its resolution "necessarily requires resolution of a substantial federal question" or (2) "federal law completely preempts a plaintiff's state law claim.'" *Alshrafi*, 321 F. Supp. 2d at 155 (internal quotations omitted).

LANCOR's Notice of Removal asserts two bases for federal question jurisdiction, both of which fail. First, it claims that its end user license agreement "is subject to U.S. federal law" pursuant to the Agreement's choice-of-law provision. (Notice at ¶ 5). Second, it asserts that "[t]he disputed issues in the complaint … also refer to matters governed by federal copyright laws." (Id.). Despite LANCOR's attempts to create federal subject matter jurisdiction, the claims alleged in OLPC's state court complaint do not provide a sufficient basis for this Court to exercise subject matter jurisdiction. Accordingly, this action should be remanded to Middlesex Superior Court.

B. OLPC's complaint does not assert federal claims, nor does it require resolution of a substantial federal question.

LANCOR's assertion that OLPC's declaratory judgment claim is "based upon a claim or right 'arising under the Constitution, laws, or treaties of the United States'" is unsupported by the allegations in OLPC's complaint. (Notice at ¶ 7). LANCOR points to the Agreement and the fact that the complaint purportedly raises "matters governed by federal copyright laws" as the basis for federal jurisdiction. (Notice at ¶ 5). This argument fails, however, because OLPC's

complaint does not assert claims based on the Agreement, nor does it assert copyright claims. Furthermore, resolution of the state law claim in OLPC's complaint does not require resolution of a substantial federal question. Accordingly, there is no federal question jurisdiction.

The mere fact that OLPC's complaint alleges facts that may tangentially relate to federal law is insufficient to create federal jurisdiction. Rather, for removal based on federal question jurisdiction to be proper, any federal claim in OLPC's complaint must be a "necessary or essential element" of OLPC's cause of action. *Fremont*, 2007 WL 4571162, at *3; *see also Gully v. First Nat'l Bank*, 299 U.S. 109, 112-13 (1936) (federal question must be "an element, and an essential one, of the plaintiff's cause of action" and there must be "[a] genuine and present controversy, not merely a possible or conjectural one…"); *see also Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 813-14 (recognizing "the long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction") (discussing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1 (1983)). OLPC's complaint does not assert a claim arising under federal law; thus, to establish federal jurisdiction, LANCOR must show that a well-pleaded claim sounding in state law "necessarily requires resolution of a substantial question of federal law." *Almond v. Capital Props., Inc.*, 212 F.3d 20, 23 (1st Cir. 2000) (internal quotations omitted). This is often referred to as "federal ingredient" jurisdiction. *Metheny v. Becker*, 352 F.3d 458, 460-61 (1st Cir. 2003).

LANCOR's Notice of Removal asserts that, because "Plaintiff alleges that it did not violate Defendant's End User License Agreement," which LANCOR claims is governed by federal law, this Court has jurisdiction pursuant to 28 U.S.C. § 1331. However, OLPC's complaint does not raise any contract claims arising out of the Agreement, nor is the Agreement

a component of OLPC's request for a declaratory judgment under Massachusetts law.[3] Rather, OLPC's complaint alleges that it "never agreed to the end user license agreement and could not have breached and did not breach the agreement through its development of the XO laptop's multilingual keyboard." (Compl. at ¶ 16). The Agreement is tangential to OLPC's claims and any federal issues it raises, to the extent the Agreement even raises federal issues, are far from substantial.

Furthermore, OLPC's complaint does not contain any claims of copyright infringement or other violations of the federal copyright laws, nor does LANCOR even attempt to argue that the complaint contains such claims. Rather, LANCOR argues that the complaint refers to "matters governed by the federal copyright laws" and, therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1331. (Notice at ¶ 5). Specifically, LANCOR points to paragraphs 18, 19, and 22 of OLPC's complaint, none of which provide a basis for this Court to exercise jurisdiction. Paragraphs 18 and 19 allege that "[a]ll information for generating the X Windows System driver for the multilingual keyboard is publicly available"; that the Konyin Multilingual Keyboard's layout is publicly available to anyone who inspects the keyboard; and that the keyboard layout "was publicly available on the internet" at an address believed to be affiliated with LANCOR when OLPC designed the keyboard for its XO laptop. (Compl. at ¶¶ 18, 19). Paragraph 22 alleges that "[a]n actual controversy exists as to whether, as claimed by LANCOR, OLPC has misappropriated any trade secrets or proprietary or confidential information of LANCOR or, as OLPC asserts, its development, use and sale of the multilingual keyboard

[3] The Notice of Removal claims that jurisdiction exists based on the Agreement because "[i]n its complaint, Plaintiff alleges that it did not violate Defendant's End User License Agreement." (Notice at ¶ 5). In fact, the complaint asserts that OLPC never entered into the Agreement and, therefore, could not have breached it. (Compl. at ¶ 16). However, it is not necessary for this Court to resolve this issue, as the Agreement cannot create federal jurisdiction regardless of whether OLPC entered into it.

provided with the XO laptop is lawful and proper." (Compl. at ¶ 22).

These allegations do not explicitly raise a federal copyright claim, nor do they attempt to disguise a copyright claim as a state claim. LANCOR fails to explain what the alleged copyright issues are, or how OLPC's complaint implicates such issues. The mere fact that OLPC's state law claims may have a federal component is insufficient to create federal jurisdiction as a matter of law. *See Venegas-Hernández v. Asociación De Compositores Editores De Música Latinoamericana*, 424 F.3d 50, 58 (1st Cir. 2005) ("The Copyright Act does not draw into federal court all matters that pertain to copyright ..."); *see also Merrell Dow*, 478 U.S. at 813-14 (mere presence of federal issue does not automatically confer jurisdiction). LANCOR has not shown, as it must, that OLPC's claims "'really and substantially involv[e] a dispute or controversy respecting the validity, construction or effect of [federal] law.'" *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313 (2005) (internal citations omitted). Furthermore, LANCOR has failed to even attempt to explain how the presence of "matters governed by the federal copyright laws" requires resolution of a substantial federal question. Without more, LANCOR's bald assertion that the complaint involves "matters governed by federal copyright laws" clearly fails to satisfy its burden of demonstrating the existence of federal jurisdiction.

C. The end user license agreement's choice-of-law provision does not create federal subject matter jurisdiction.

Even if OLPC's complaint raised claims based on the Agreement, LANCOR has not met its burden of showing that the Agreement creates federal subject matter jurisdiction. LANCOR's claim that the Agreement's terms create federal jurisdiction because of its provision that "the laws of the United States" govern the Agreement is not a sufficient basis for this Court to exercise jurisdiction. Indeed, it is contrary to Article III and basic principles of federalism to

permit private parties to create subject matter jurisdiction by contract. *See, e.g., American Policyholders Ins. Co. v. Nyacol Prods., Inc.*, 989 F.2d 1256, 1258 (1st Cir. 1993) ("Litigants cannot confer subject matter jurisdiction by agreement.").

As a threshold matter, it is unclear which United States laws the Agreement chooses. One interpretation is that the Agreement chooses United States federal law, including federal common law, to govern disputes arising out of the Agreement. Another equally plausible interpretation is that the Agreement simply selects the laws of this country over those of another. For purposes of analyzing LANCOR's claim that the Agreement creates federal jurisdiction, OLPC assumes that the Agreement chooses federal common law to govern, as the Agreement does not specify any particular federal statute and the selection of the United States, versus some foreign jurisdiction, would not confer federal jurisdiction.

LANCOR will no doubt argue that federal common law should apply here, per its interpretation of the Agreement. However, LANCOR cannot simply claim that federal common law would apply and thereby create federal subject matter jurisdiction without more.[4] Rather, LANCOR must show that this Court can and should apply federal common law to this dispute. *See, e.g., Danis Indus. Corp. v. Fernald Envtl. Restoration Mgmt. Corp.*, 947 F. Supp. 323, 328 (S.D. Ohio 1996) (requiring that the choice-of-law provision be valid under choice-of-law rules and that the United States have a substantial interest in the contract being litigated such that interpretation of the contract requires resolution of a substantial question of federal law); *World Sav. and Loan Ass'n v. Fed. Home Loan Bank of San Francisco*, No. 00-4749 MMC, 2002 U.S. Dist. LEXIS 15875, at *8 (N.D. Cal. 2002) (finding that the United States has a substantial

[4] It is well settled that claims governed by federal common law arise under the laws of the United States. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972); *Almond v. Capital Properties, Inc.*, 212 F.3d 20, 22-23 (1st Cir. 2000).

interest in the contract being litigated, making contract's choice of federal common law appropriate); *see also Woodward Governor Co. v. Curtiss-Wright Flight Sys., Inc.*, 164 F.3d 123 (2d Cir. 1999) (rejecting argument that contract chose federal common law to govern and further holding that federal common law did not govern claims arising out of breach of subcontract relating to defense procurement). LANCOR cannot make such a showing.

There is no general federal common law, but federal common law will apply in certain situations. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). For federal common law to apply, a case must implicate "uniquely federal interests," such as the obligations and rights of the United States under its contracts, the liability of federal officers for official acts, and civil liabilities arising out of federal procurement contracts relating to national defense. *Boyle v. United Tech. Corp.*, 487 U.S. 500, 504-506 (1988). Even when "uniquely federal interests" exist, federal common law applies only if there is a "significant conflict between some federal policy or interest and the use of state law." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (internal quotation omitted); *see also Conille v. Sec'y of Hous. and Urban Dev.*, 840 F.2d 105, 109 (1st Cir. 1988) (federal common law should be developed only where there is a significant conflict between a federal policy or interest and the use of state law); *1610 Corp. v. Kemp*, 753 F. Supp. 1026, 1032 (D. Mass. 1991) (refusing to apply federal common law where there is no significant federal interest or policy in conflict with state law and no necessity to provide for federal uniformity in interpretation of parties' contract rights).

LANCOR's Notice of Removal fails to assert any unique federal interest which would necessitate application of federal common law, or any significant conflict between federal policy or interests and Massachusetts law such that application of Massachusetts law to the Agreement would be inappropriate. LANCOR cannot make any such assertion because no basis exists for

the application of federal common law to the Agreement, which purports to govern OLPC's use of software accompanying LANCOR's Konyin Multilingual Keyboard. (Notice, at Exhibit B). It is an agreement between two private parties governing their private conduct -- there is no relationship whatsoever between the Agreement and the federal government, federal property, or any other federal interests. Without any federal interest, much less a unique federal interest necessitating application of federal common law, there is no basis for this Court to apply federal common law. Accordingly, there is no "arising under" jurisdiction.

Furthermore, even if this Court were to find a unique federal interest here, LANCOR has not met its burden of demonstrating a significant conflict between that federal interest and Massachusetts law, such that application of Massachusetts law would be inappropriate. Without a basis to apply federal common law to this dispute, the Agreement's choice of "the laws of the United States" cannot create federal subject matter jurisdiction. Thus, this matter should be remanded to the Middlesex Superior Court.

D. OLPC's claims are not preempted by federal copyright law.

OLPC's complaint does not raise any copyright issues, nor does LANCOR even assert that it does. Rather, LANCOR argues that the complaint refers to "matters governed by federal copyright laws." (Notice at ¶ 5). Even if OLPC's complaint did raise copyright issues, federal copyright law is not automatically applied. *See Venegas-Hernández*, 424 F.3d at 58 ("The Copyright Act does not draw into federal court all matters that pertain to copyright."). For this Court to have jurisdiction, LANCOR must show that OLPC's claims are completely preempted by the federal Copyright Act, which it cannot do. The Copyright Act contains a limited preemption provision,[5] but explicitly provides that "any rights or remedies under the common

[5] The Copyright Act provides that "all legal or equitable rights that are equivalent to any of the exclusive rights

law or statutes of any State with respect to (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103; or … (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106" are not limited by the Copyright Act. 17 U.S.C. § 301(b). In other words, the Act only "precludes enforcement of any state cause of action which is equivalent in substance to a federal copyright infringement claim." *Data Gen. Corp., et al. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1164 (1st Cir. 1994). The Act does not preempt state laws governing non-copyrightable material or conduct outside the scope of § 106.

OLPC's claims are not preempted by federal law for a number of reasons. Primarily, the material LANCOR alleges to be protected by copyright is not copyrightable under the Copyright Act. The Konyin Multilingual Keyboard is a functional object and, therefore, is not copyrightable. *See* 17 U.S.C. § 102(b); *see also Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 816 (1st Cir. 1995) (menu commands are means by which functions are performed and therefore not subject to copyright protection). Further, despite LANCOR's apparent claim that the "information" on its website, www.konyin.com, is protected by copyright because of a "legal notice" on the website, that content is not protected by copyright. (Third Party Complaint, ¶80; Notice at Exhibit C).[6] Information is not copyrightable. *See* 17 U.S.C. § 102(b); *see also Skinder-Strauss Assoc. v. Massachusetts Continuing Legal Educ., Inc.* 914 F. Supp. 665, 671 (D. Mass. 1995) (factual information not copyrightable) (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv.*

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within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 … are governed exclusively by this title." 17 U.S.C. § 301(a).

[6] OLPC looks to the Answer and Third-Party Complaint solely for the purpose of understanding the purported copyright issues. It is well settled that defenses and counterclaims cannot create federal jurisdiction. *In re Whatley*, 396 F. Supp. 2d 50, 54 (D. Mass. 2005).

Co., 449 U.S. 340 (1991)).

Even if the material were subject to copyright protection, OLPC's request for a declaratory judgment is not the equivalent of a federal copyright claim and, thus, is not preempted by the Copyright Act. Section 106 of the Copyright Act establishes specific exclusive rights, none of which are implicated by OLPC's complaint. *See* 17 U.S.C. § 106 (copyright owner has exclusive right "(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission"). LANCOR's bald allegation that the complaint includes "matters governed by federal copyright laws" in no way points to anything specific showing that OLPC's claims involve the legal and equitable rights set forth in § 106. OLPC seeks a declaratory judgment regarding the parties' respective rights in material that does not fall within the scope of the Copyright Act. The Court does not need to construe the Copyright Act, much less decide claims equivalent to copyright infringement, to resolve OLPC's claim. Accordingly, OLPC's declaratory judgment action cannot be preempted by the Copyright Act.[7] Thus, the purported presence of "matters governed

[7] Furthermore, if OLPC's complaint did raise a copyright infringement claim, this Court could not exercise jurisdiction. As the federal courts have exclusive jurisdiction over copyright claims, the Middlesex Superior Court could not exercise subject matter jurisdiction over a copyright claim. 28 U.S.C. § 1338. Removal jurisdiction is

by federal copyright laws" is insufficient to create federal jurisdiction and this action must be remanded to Middlesex Superior Court.

E. OLPC is entitled to attorney's fees and costs.

The removal statute permits this Court to award OLPC's attorney's fees and costs when issuing an order remanding this action to Middlesex Superior Court. *See* 28 U.S.C. § 1447(c) ("An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."). Fees may be awarded where the removing party lacked an objectively reasonable basis for seeking removal. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005); *Fremont*, 2007 WL 4571162, at *3. Fees may be awarded regardless of whether the removal was in bad faith. *Georgetown Condos. Homeowners' Ass'n v. Cmty. Apts. Corp.*, 387 F. Supp. 2d 512 (M.D.N.C. 2005). The court has broad discretion in awarding fees and an award "is particularly appropriate where the lack of jurisdiction is plain in law and would have been revealed to counsel with minimal research." *Township of Whitehall v. Allentown Auto Auction*, 966 F. Supp. 385, 386 (E.D. Pa. 1997).

OLPC is entitled to attorneys' fees and costs associated with remanding this action to Middlesex Superior Court. As demonstrated above, there is no basis for this Court to exercise subject matter jurisdiction over this action. LANCOR's unsubstantiated Notice of Removal makes that clear. A moderate amount of research into the purported bases for federal jurisdiction would have made clear to LANCOR that its alleged bases for federal jurisdiction are unsupported by the law. A fee award under § 1447(c) "should recognize the desire to deter

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derivative in nature and, if the original court lacks subject matter jurisdiction, so does the federal court to which the action is removed. *See Leesona Corp. v. Concordia Mfg. Co., Inc.*, 312 F. Supp. 392, 396 (D.R.I. 1970) (citing *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 377 (1922)). Accordingly, this Court would have to dismiss for lack of subject matter jurisdiction. *Id*. (citing *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916)).

removals sought for the purposes of prolonging litigation." *Martin*, 546 U.S. at 140; *see also Harvard Real Estate-Allston, Inc. v. KMART Corp.*, 407 F. Supp. 2d 317, 322 (D. Mass. 2005) (awarding fees where defendant removed without an objectively reasonable basis for federal jurisdiction). Here, the complaint plainly did not support a claim of federal question jurisdiction and, in seeking removal, LANCOR did not even attempt to establish that OLPC's claims required resolution of a substantial federal question or were completely preempted by federal law. As LANCOR lacked an objectively reasonable basis for removal, OLPC is entitled to an award of attorney's fees and costs.

III. Conclusion

For all of the above reasons, this action should be remanded to the Middlesex Superior Court and OLPC should be awarded its attorneys' fees and costs.

Respectfully submitted,

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Dated: March 28, 2008

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on today's date.

/s/ Katherine B. Schmeckpeper
By: Katherine B. Schmeckpeper