

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

FILED  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D.N.Y.

★ DEC 22 2009 ★

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TRAKAMERICA,

Plaintiff,

- against -

BROOKLYN OFFICE  
CV 09-5602  
NOTICE OF REMOVAL  
TO FEDERAL COURT

TRAUNER, COHEN & THOMAS, LLP,

Defendant.

WALL, M.J. HURLEY, J.

----- x  
**PLEASE TAKE NOTICE** that defendant TRAUNER, COHEN & THOMAS, LLP (“defendant/petitioner”) pursuant to 28 U.S.C. §1441 and based upon this Court’s diversity jurisdiction under 28 U.S.C. §1332, removes this action from the Supreme Court of the State of New York, Nassau County, to the United States District Court for the Eastern District of New York. The grounds for such removal are as follows:

1. Plaintiff commenced this action, on or about October 9, 2009, by filing a Summons and Verified Complaint in the Supreme Court of the State of New York, Nassau County. The action is entitled *TrakAmerica v. Trauner, Cohen & Thomas, LLP*, Index No. 09-020696 (“state court action”).

2. The matter arises, *inter alia*, out of a claim for legal malpractice against defendant/petitioner Trauner, Cohen & Thomas, LLP.

3. Defendant/petitioner Trauner, Cohen & Thomas, LLP is a limited liability partnership organized under the laws of Georgia with its principal place of business in Atlanta, Georgia. The plaintiff in this action, TrakAmerica, is a corporation organized under the laws of New York with its principal place of business in Nassau, New York.

4. The amount in controversy in this suit is in excess, exclusive of interest and costs, of seventy-five thousand dollars (\$75,000.00).

5. Jurisdiction exists in this Court by reason of diversity of citizenship, 28 U.S.C. § 1332.

6. The above-petition for removal was commenced by defendant/petitioner Trauner, Cohen & Thomas, LLP on or about December 22, 2009.

7. Kimberly Jackson, Esq., local Georgia counsel for defendant/petitioner, received a copy of the summons and complaint in the state court action on or about December 7, 2009.

8. No proceedings have occurred in the state court action, and the defendant/petitioner has not yet appeared in that action.

9. This motion is filed within thirty (30) days after receipt by defendant/petitioner of the summons and complaint in the state court action.

10. This removal is timely pursuant to 28 U.S.C. § 1446(b).

11. Written copy of this motion will be given to the plaintiff promptly after the filing of this motion, as is required by law.

12. A true and correct copy of this motion will be filed with the Clerk of the Supreme Court of Nassau, State of New York promptly after the filing of this motion, as required by law.

13. By filing this Notice of Removal, defendant/petitioner does not waive any defense which may be available to it, specifically including, but not limited to, its right to contest *in personam* jurisdiction over the defendant/petitioner, improper service of process upon the defendant/petitioner, and the absence of venue in this Court or in the court from which the action has been removed.

14. Annexed hereto as Exhibit "A" are copies of all pleadings served by the parties to this action.

**WHEREFORE** defendant/petitioner TRAUNER, COHEN & THOMAS, LLP requests that this Court assume jurisdiction over this action and make such further orders as herein as may be required to properly determine its controversy.

Dated: New York, New York  
December 22, 2009

Yours, etc.,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: 

Lauren Rocklin  
Attorneys for Defendant  
TRAUNER, COHEN & THOMAS, LLP  
150 East 42nd Street  
New York, New York 10017  
(212) 490-3000  
File No.: 09120.00184

TO: Saritha Reddy  
Reed Smith, LLP  
Attorneys for Plaintiff  
TRAKAMERICA  
599 Lexington Avenue, 22<sup>nd</sup> Floor  
New York, NY 10022  
(212) 521-5400

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----X  
TRAKAMERICA,

Plaintiff,

-against-

TRAUNER, COHEN & THOMAS, LLP.,

Defendants.  
-----X

Index No.: 09-020696

SUMMONS

*The basis of venue  
designated is that  
Plaintiff's principal office,  
is located in  
Nassau County*

TO THE ABOVE-NAMED DEFENDANTS:

**YOU ARE HEREBY SUMMONED** to answer the complaint to this action and to serve a copy of your answer or, if the complaint is not served with this summons, to serve a notice of appearance, on plaintiff within twenty (20) days after the service of this summons, exclusive of the day of service (or within thirty (30) days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York  
October 9, 2009

REED SMITH LLP

By: 

Saritha C. Reddy

599 Lexington Avenue, 22<sup>nd</sup> Floor

New York, NY 10022

Tel. (212) 521-5400

Fax. (212) 521-5450

*Attorneys for Plaintiff TrakAmerica*

Of Counsel: Abraham J. Colman, Esq.  
Ben Mohandesi, Esq.

Defendants Address:

TRAUNER, COHEN & THOMAS, LLP  
901-C Peachtree Dunwoody Rd  
Suite 500  
Atlanta, GA 30328  
Phone: 404.233.1900

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----X  
TRAKAMERICA,

Plaintiff,

- against -

TRAUNER, COHEN, & THOMAS, LLP,

Defendants.  
-----X

Index No.

**COMPLAINT**

Plaintiff, TrakAmerica ("Trak"), by its attorneys, Reed Smith LLP, brings this action against Defendant Trauner, Cohen, & Thomas, LLP, ("Defendant"), and alleges as follows:

**THE PARTIES**

1. Plaintiff Trak is a New York corporation with its principal place of business located in Nassau County, New York
2. Upon information and belief, Defendant is a Georgia limited liability partnership with its principal place of business in Atlanta, Georgia.

**FACTS**

3. Trak provides law firm selection and account receivable management services for its clients who seek to engage counsel for collection of delinquent and unpaid accounts.
4. Defendant is a law firm authorized to practice law in Georgia, and has attorneys and staff to perform collection activities.
5. On or about September 18, 2007, Trak and Defendant entered into a written legal services agreement ("Agreement"). Pursuant to the Agreement, Trak, on behalf of its clients, would engage Defendant to collect on certain delinquent accounts. The Agreement details numerous obligations

required to be performed by Defendant including, but not limited to, the maintenance of collection files.

Specifically, the Agreement provides, in relevant part, as follows:

I. PARTIES

WHEREAS, TRAKAmerica provides law firm selection and account receivable management services for clients ("Clients") seeking to engage counsel throughout the United States for collection of their delinquent and unpaid Accounts; and

WHEREAS, LAW FIRM is authorized to practice law in the state(s) of GA, and has a sufficient qualified staff to perform collection of Accounts in the above referenced state(s).

II. SCOPE OF ENGAGEMENT.

TRAKAmerica, on behalf of its Clients, will, from time to time and on a non-exclusive basis, engage LAW FIRM to collect on certain delinquent Accounts.

III. STANDARD OF CARE.

LAW FIRM shall use its best efforts in the performance of the services for which it is engaged. LAW FIRM represents that its entry into this Legal Services Agreement and its performance of the services required thereunder shall comply with all applicable Federal, State, County, and local laws, regulations, ordinances, and codes, including, but not limited to, the Fair Debt Collection Practices Act and the Fair Credit Reporting Act and the procurement of any licenses if applicable, in the performance of the services and any other obligations hereunder, in the state(s) or jurisdiction(s) where LAW FIRM will be collecting Accounts placed by TRAKAmerica on behalf of its Clients ("the Accounts"). In conjunction with such services, LAW FIRM agrees to the following specific items; all of which with the exception of item (C), shall survive any termination of this Agreement

A. LAW FIRM shall maintain collection files in accordance with and pursuant to the instructions of TRAKAmerica and shall follow all policies, instructions and guidelines, including but not limited to all requirements as set forth in the TRAKAmerica Supplier Work Standards manual...;

B. LAW FIRM shall, on request by TRAKAmerica, within a reasonable time in a format prescribed by TRAKAmerica, furnish information in its files regarding the Accounts;

C. LAW FIRM shall, as and if required by law, forward to the debtor any and all required notices on all Accounts;

D. LAW FIRM shall report to TRAKAmerica on the status of Accounts at times and in a manner and in a form required by TRAKAmerica as set forth in the TRAKAmerica Supplier Work Standards;

E. LAW FIRM shall, on request by TRAKAmerica, within a reasonable time, in a form prescribed by TRAKAmerica, furnish performance or production analysis reports on all Accounts;

F. LAW FIRM must obtain permission from TRAKAmerica to refer Accounts to other counsel, and such referrals shall be contingent on such other counsel's execution of an engagement letter in a form acceptable to TRAKAmerica;

G. LAW FIRM must close and return any and all Accounts as directed by TRAKAmerica, regardless of the status of any such Accounts, and shall cooperate fully and promptly with TRAKAmerica and/or successor counsel to ensure that collection efforts are neither delayed nor impeded.

H. LAW FIRM shall provide TRAKAmerica with a list of specific contact personnel who will be responsible for daily management of Accounts;

I. LAW FIRM hereby waives any Attorney Lien or Possessory Lien as to any recalled or closed Accounts;

J. Except as may be prohibited by applicable law or ethical code, LAW FIRM agrees to accept all Accounts submitted to it by TRAKAmerica for collection;

K. TRAKAmerica represents that it has been authorized by its Clients to receive all monies collected and to pay all properly incurred costs and expenses on their behalf. Accordingly, in accordance with TRAKAmerica's Supplier Work Standards and applicable ethical requirements, LAW FIRM shall remit to TRAKAmerica all gross monies collected on behalf of Clients and submit to TRAKAmerica, for payment on behalf of Clients, invoices for all "costs and expenses" properly incurred by LAW FIRM during the term of this Agreement. LAW FIRM acknowledges that TRAKAmerica is acting solely as a representative of Clients in receiving funds and paying invoices, and that TRAKAmerica itself has no independent obligation to pay such invoices;



L. LAW FIRM shall maintain all client funds in segregated escrow accounts in accordance with applicable state laws and regulations;

M. TRAKAmerica shall have the right, directly or through an authorized agent, to inspect and audit LAW FIRM's operations and records at any time, either electronically or in person to determine LAW FIRM'S compliance with the requirements of this Agreement, including but limited to the TRAKAmerica Supplier Work Standards manual. On-premise audits and inspections shall be conducted at LAW FIRM's expense, and shall require access to LAW FIRM's premises and computer network. LAW FIRM shall grant TRAKAmerica access to its system of record via electronic access means as prescribed by TRAKAmerica to permit remote audits. All audits and inspections may take place with or without prior notice...

6. As set forth above, Defendant agreed to, among other things, "use its best efforts in the performance of the services for which it is engaged."

7. The Agreement also provides specific procedures for remitting accounts collected and for the reimbursement of permissible costs and expenses incurred in the course of collecting accounts.

#### IV. PAYMENT / REMITTANCE.

A. TRAKAmerica shall reimburse LAW FIRM for all reasonable costs and expenses incurred in the course of collecting on the Accounts, within thirty (30) days of receipt of an itemized bill by TRAKAmerica. The following expenses, however, are not reimbursable absent the prior written approval of TRAKAmerica: counsel fees from any other LAW FIRM, depositions, long distance travel, hotel and related expenses.

B. The LAW FIRM shall bill TRAKAmerica for any of these reasonable costs incurred on a weekly basis, on a day set forth and agreed to, between TRAKAmerica and LAW FIRM.

C. The term "costs and expenses" shall include sheriffs fees, private process service fees, court filing fees, garnishment fees and other reasonable and customary costs of collection.

D. Specifically excluded as reimbursable costs and expenses are photocopy charges, long distance telephone charges, credit bureau charges and other overhead items.

E. LAW FIRM shall not charge service fees to debtors making payments, including but not limited to fees associated with telephone, debit card, credit card or other payment mechanisms.

F. By the dates specified by TRAKAmerica each week, LAW FIRM shall remit to TRAKAmerica all gross sums collected together with such statements and reports as TRAKAmerica may require. LAW FIRM shall be responsible for any loss or theft of funds collected while such funds are in its custody and/or control. Such remittances and funds shall be sent in the manner and form specified by TRAKAmerica and in accordance with the TRAKAmerica Supplier Work Standards

8. In the course of performing its duties under the Agreement, Defendant often filed lawsuits against debtors. Pursuant to the terms of the Agreement, as detailed above, Defendant was to be reimbursed for certain permissible costs and expenses incurred in the course of collecting accounts, such as sheriff's fees, private process service fees, court filing fees, garnishment fees and other reasonable and customary costs of collection. Photocopy charges, long distance telephone charges, credit bureau charges and other overhead items were specifically excluded under the Agreement as reimbursable costs and expenses.

9. The Agreement further provides that Defendant shall remit to Trak all gross sums collected. (*See* reference to Section IV above)

10. Defendant expressly agreed to comply with all federal, state, and local laws and regulations. (*See* reference to Section III above) Defendant further agreed to maintain collection files in accordance to the instructions of Trak and to follow all policies, instructions and guidelines, including but not limited to all requirements set forth in the Trak Supplier Work Standards manual. (*Id.*)

11. In 2009, Trak discovered several irregularities and problems regarding Defendant's collection activities and reporting. For example, Trak discovered that Defendant reported to Trak that numerous collection lawsuits were filed, when in fact they had not been filed. What is more, Defendant

requested and received reimbursement for filing fees associated with lawsuits that were never filed. When actual lawsuits were filed by Defendant, Defendant sought reimbursement for costs in excess of those actually incurred. Furthermore, Trak is informed and believes that Defendant collected funds on Trak's behalf, but subsequently failed to report or remit the funds to Trak.

12. As detailed below, Defendant breached the terms of the Agreement, breached its fiduciary duties to Trak, and was negligent in performing its duties. As a result of its wrongful actions and omissions, Defendant was unjustly enriched and Trak suffered damages in excess of \$520,000. A full accounting is necessary to determine the actual amount. Trak has also suffered damages pertaining to its client relationship in an amount to be determined at trial.

#### **FIRST CAUSE OF ACTION – BRACH OF CONTRACT**

13. Trak restates, realleges, and incorporates herein by reference, the allegations contained in paragraphs 1 through 12 of the Complaint, inclusive, as if fully set forth herein.

14. As detailed above, Trak and Defendant entered into the Agreement. Trak performed all of its obligations under Agreement, except those that were discharged as a result of Defendant's material breach.

15. Defendant breached the Agreement by, among other things, inaccurately reporting that lawsuits were filed when in fact they were not filed; seeking reimbursement for costs not incurred or advanced by Defendant; seeking reimbursement for costs in excess of those actually incurred; failing to timely and accurate remit funds collected for Trak; and failing to file lawsuits that should have been filed. Defendant's actions and omissions resulted in a material breach of Sections III and IV Agreement, which required Defendant to, among other things, "use its best efforts in the performance of the services for which it is engaged."

16. Trak has suffered substantial damages as a result of Defendant's material breach in excess of \$520,000. Accordingly, Trak requests that the Court award Trak damages, reasonable costs, expenses, interest, attorneys' fees to the extent available by law or contract, and any other relief to which Trak is entitled as a result of Defendant's breach.

**SECOND CAUSE OF ACTION – BREACH OF FIDUCIARY DUTY**

17. Trak restates, realleges, and incorporates herein by reference, the allegations contained in paragraphs 1 through 16 of the Complaint, inclusive, as if fully set forth herein.

18. At all times relevant herein, Defendant, who was retained as counsel by Trak, owed a fiduciary duties to Trak. Specifically, Defendant owed to Trak a duty of loyalty, a duty to safeguard the accounts of Trak's customers, and a duty to not use its position for its own benefit and to Trak's detriment.

19. As attorneys retained by Trak, Defendant breached these fiduciary duties in failing to adhere to the terms of the Agreement by using Defendant's position to obtain reimbursement for costs not incurred or advanced by Defendant; obtaining reimbursement for costs in excess of those actually incurred; and inaccurately reporting or remitting funds collected on Trak's behalf.

20. Trak has suffered substantial damages as a result of Defendant's breach. Accordingly, Trak requests that the Court award Trak damages, reasonable costs, expenses, interest, attorneys' fees to the extent available under contract or law, and any other relief to which Trak is entitled as a result of Defendant's breach.

**THIRD CAUSE OF ACTION**

**PROFESSIONAL NEGLIGENCE / LEGAL MALPRACTICE**

21. Trak restates, realleges, and incorporates herein by reference, the allegations contained in paragraphs 1 through 20 of the Complaint, inclusive, as if fully set forth herein.

22. At all times relevant herein, Defendant owed a duty to Trak as its legal counsel. Specifically, Defendant owed to Trak a duty to exercise reasonable care and skill in pursuing collection accounts on Trak's behalf. Defendant failed to do so.

23. Defendant breached its duty to Trak by, among other things, failing to file lawsuits that may now be time-barred; delaying to file lawsuits in a timely fashion resulting in a diminished likelihood of collecting debts owed; in inaccurately reporting that lawsuits were filed when in fact they were not filed; seeking reimbursement for costs not incurred or advanced by Defendant; seeking reimbursement for costs in excess of those actually incurred; failing to timely and accurate remit funds collected for Trak; and failing to file lawsuits that should have been filed.

24. Defendant's negligence was a substantial factor in causing Trak's harm. As a result of Defendant's negligence, Trak has suffered damages in excess of \$520,000, plus reasonable costs, expenses, interest, and any other relief to which Trak is entitled as a result of Defendant's negligence.

**FOURTH CAUSE OF ACTION – MONEY HAD AND RECEIVED**

25. Trak restates, realleges, and incorporates herein by reference, the allegations contained in paragraphs 1 through 24 of the Complaint, inclusive, as if fully set forth herein.

26. Upon information and belief, Defendant has received and is holding funds that are due and owing to Trak.

27. Trak is entitled to recover these funds and hereby demands that Defendant immediately pay the funds that are due and owing.

28. Defendant is not entitled to keep the subject funds, which were received for Trak's benefit pursuant to the Agreement. Defendant should be required to pay the subject funds to Trak, plus any interest or profit earned on those funds.

**FIFTH CAUSE OF ACTION – UNJUST ENRICHMENT**

29. Trak restates, realleges, and incorporates herein by reference, the allegations contained in paragraphs 1 through 28 of the Complaint, inclusive, as if fully set forth herein.

30. By obtaining reimbursement from Trak for costs and expenses that were not actually incurred, Defendant received monetary benefits to which it was not entitled.

31. It is unjust for Defendant to retain any monetary benefit from Trak at Trak's expense. All such monetary benefits received and retained by Defendant should be returned to Trak.

**PRAYER FOR RELIEF**

**WHEREFORE**, Trak demands judgment against the Defendant as follows:

- A. For compensatory damages in an amount according to proof at trial, but not less than \$520,000, plus interest;
- B. For restitution in an amount according to proof at trial, plus interest;
- C. For attorneys' fees and costs to the extent available by law or contract;
- D. For costs of suit herein;
- E. For any other and further relief that the Court may deem just and equitable under the circumstances herein.

Dated: October 8, 2009.

REED SMITH LLP

By: \_\_\_\_\_

  
Saritha C. Reddy

599 Lexington Avenue  
New York, New York 10022  
Tel. (212) 521-5400  
Fax. (212) 521-5450  
*Attorneys for Plaintiff TrakAmerica*

Of Counsel: Abraham J. Colman, Esq.  
Ben Mohandesi, Esq.

**LEGAL FILE**

Index No.:

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NASSAU

TRAKAMERICA,

Plaintiff,

vs.

TRAUNER, COHEN & THOMAS, LLP.,

Defendants.

Clerk	8
Filed	
Obtained	
Attorney(s) for	10/19/09
Served	
D.K.T.D.	10/14/09
<b>DOCKET STAMP</b>	

**SUMMONS AND COMPLAINT**

**REED SMITH LLP**

*Plaintiff - TrakAmerica*  
 Office Address & Tel. No.:  
 599 Lexington Avenue  
 New York, New York 10022  
 (212) 521-5400

*Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.*

Dated: ..... Signature: .....  
 Print Signer's Name: .....

Service of a copy of the within is ..... is herby admitted.

Dated: .....  
 Attorney(s) for .....

**PLEASE TAKE NOTICE**

Check Applicable Box

that within is a (certified) true copy of a  
 NOTICE OF entered in the office of the clerk within named Court on 20

that an Order of which the within is a true copy will be presented for settlement to the  
 NOTICE OF Hon. one of the judges of the within named Court,  
 SETTLEMENT at 20 at M.