

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UMG RECORDINGS, INC., *et al.*)
)
)
 Plaintiffs,)
) Case No.: 08-4040-RDR-KGS
 vs.)
)
 MANDY JOHNSON,)
)
)
 Defendant.)
)

**DEFENDANT’S RESPONSE IN OPPOSITION TO PLAINTIFFS’ MOTION TO DISMISS
COUNTERCLAIMS**

I. **HISTORY**

On September 8, 2003, five years ago today, the recording industry sued 261 American music fans for sharing songs on peer-to-peer file sharing networks, embarking on an unprecedented legal campaign against its own customers.¹ Since then, over 30,000 lawsuits have been filed against alleged copyright infringers.² These lawsuits include actual pirates and infringers, uninformed consumers, and apathetic youth, disgruntled by the record industry’s lackluster offerings and antiquated business model. But among those lawsuits are also suits against dead people³, children⁴, the disabled⁵, people who do not own computers⁶, or simply the wrong person.⁷

¹ David Kravets, *File Sharing Lawsuits at a Crossroads, After 5 years of RIAA litigation*. Wired.com, September 4, 2008, available at <http://blog.wired.com/27bstroke6/2008/09/proving-file-sh.html> (last visited September 8, 2008).

² David Kravets, *File Sharing Lawsuits at a Crossroads, After 5 years of RIAA litigation*. Wired.com, September 4, 2008, available at <http://blog.wired.com/27bstroke6/2008/09/proving-file-sh.html> (last visited September 8, 2008).

³ Toby Coleman, *Deceased Woman Named in File-Sharing Suit*, CHARLESTON GAZETTE, Feb. 4, 2005 at P1A.

⁴ *Elektra Entertainment Group, Inc. et al. v. Santangelo*, 06-cv-11520 (S.D.N.Y. 2006).

⁵ *Elektra Entertainment Group, Inc. et al. v. Schwartz*, 06-cv-03533 (E.D.N.Y. 2006).

⁶ *UMG Recordings, Inc., et al. v. Lindor*, 05-cv-1095 (E.D.N.Y. 2005).

⁷ *Atlantic Recording Corp., et al. v. Zuleta*, 06-cv-1221 (N.D.Ga. 2006); *BMG Music et al. v. Thao*, 07-cv-143 (E.D. Wis 2007); *Capitol Records, Inc. et al. v. Foster*, 04-cv-1569 (W.D. Okla. 2004).

Since the late nineties, various file sharing protocols have been used to download and to distribute computer files in a quick and efficient manner. Among the various files downloaded and distributed are digital audio files stored in a format known as MP3. This format allowed for music to be adapted to the digital age of the Internet. Unfortunately, it also allowed an unprecedented level of unauthorized and illegal duplication of music in violation of the federal Copyright Act, 17 U.S.C. § 101 *et seq.*

This case represents yet another conflict in the RIAA's five-year war to use the Federal Courts to preserve the record industry's failing business model.

II. BACKGROUND

Defendant Mandy Johnson ("Ms. Johnson" or "Defendant") is a full-time stay at home day care worker for young children. Ms. Johnson has been irresponsibly and falsely accused of downloading "gangster rap" music at 5:55 in the morning. Ms. Johnson does not like "gangster rap" and has never downloaded music. The record companies, acting upon information collected from a third-party, contacted Ms. Johnson and accused her of being a copyright thief and pirate. The record companies have recklessly targeted and harassed Ms. Johnson much to her great worry and distress. Prior to the filing of the present lawsuit and upon receipt of the pre-litigation threat letter, Ms. Johnson attempted to contact Plaintiffs to prove her innocence to the Plaintiffs and explained that this must be a case of mistaken identity. She tried to explain that she listens to country music, not the music selection found in the Complaint, which include songs titled, "Fuckers And Friends" [sic], "You Know I'm a Hoe" [sic], and "I Wanna Fuck Your Sister." [sic] The record companies responded by bringing suit in federal court.

Plaintiffs filed suit on March 11, 2008, alleging Ms. Johnson's infringing activities occurred on March 9, 2007 at 5:55 A.M. The complaint further alleged that Ms. Johnson's infringing activities are continuous and ongoing. On April 28, 2008, Defendant filed her Answer and Counterclaim, denying any knowledge of the alleged infringing activities. On June 23, 2008, in lockstep fashion, the Plaintiffs filed a Motion to Dismiss Defendant's Counterclaims. The Defendant responded on July 16, 2008, with Defendant's First Amended Answer and Counterclaims. Like clockwork, on August 5, 2008, the Plaintiffs filed Motion to Dismiss Defendant's Amended Counterclaim.

Now Ms. Johnson files this Response in Opposition to Plaintiff's Rule 12(b)(6) Motion to Dismiss Defendant's Declaratory Judgment Counterclaim and other counterclaims.

III. ARGUMENT

Initially, Ms. Johnson objects many of to Plaintiffs' wholly unsupported and conclusory factual assertions. Additionally, there are many instances in Plaintiffs' Motion to Dismiss Defendant's Amended Counterclaims where the Plaintiffs misstate or misquote Defendant's Amended Counterclaims. To this end, Ms. Johnson has responded where feasible.

In determining whether to grant a Fed. R. Civ. P. 12(b)(6) motion, the Court shall not dismiss a claim if it includes “enough facts to state a claim for relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007) (dismissing complaint because plaintiffs had not “nudged their claims across the line from conceivable to plausible”). Further, it is well established that a "complaint should not be dismissed for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). To survive a motion to dismiss under Twombly, a complaint’s factual allegations, if assumed to be true, “must be enough to raise the right to relief above the speculative level.” Twombly, at 1965.

Plaintiffs improperly and without any support assert that (1) Ms. Johnson engaged in infringing activities; (2) plaintiffs’ agent MediaSentry used a lawful computer program to gain authorized access to Ms. Johnson’s computer; (3) was able to determine that Ms. Johnson was distributing 376 audio files; (4) and was using the LimeWire program. In ruling on a Rule 12(b)(6) motion to dismiss counterclaims, all allegations of material fact contained in the counterclaims are taken as true and construed in the light most favorable to the non-moving party. Ramirez v. Oklahoma Dept. of Mental Health, 41 F. 3d 584, 586 (10th Cir. 1994).

Ms. Johnson’s counterclaims more than adequately state sufficient facts to support all causes of action, and the record companies’ motion should be rejected.

A. DEFENDANT’S CLAIM FOR DECLARATORY JUDGMENT IS PLAUSIBLE

Following the decision in Twombly, the 10th Circuit has adopted the “plausibility” standard under which a complaint must include "enough facts to state a claim to relief that is plausible on its

face." TON Servs. v. Qwest Corp., 493 F.3d 1225, 1236 (10th Cir. Utah 2007) (Citing Twombly, 127 S. Ct. at 1974). Under the "plausibility" standard, Defendant has adequately pleaded the elements of a Declaratory Judgment Counterclaim.

The Plaintiffs have a history of continually using a motion to dismiss defendant's counterclaims to deprive defendants of their day in court. See e.g., Warner Bros. Records, Inc., et al., v. Stubbs, Case No. CIV-06-793-M, U.S.D.C. W.D. OK. In this case, Plaintiffs seek dismissal of the First Counterclaim, arguing that it is the "mirror image" of their main claim against defendant, and that it is duplicative and unnecessary. Defendant bases this on the argument that a finding of no liability on the main claim of Plaintiffs copyright infringement complaint would be tantamount to a ruling in the defendant's favor on Defendant's counterclaim. However, the Defendant's Declaratory Judgment counterclaim is not a "mirror image" of plaintiffs' infringement claim. It goes considerably beyond the claim in that it seeks to have a determination of infringement or non-infringement of Plaintiffs' works. Plaintiffs' have a strategy of voluntary dismissal in cases where it has been unable to prove that the defendant engaged in file sharing. In those cases without counterclaims, when the Plaintiffs have voluntarily dismissed and re-filed, the defendant has no recourse but to expend substantial sums and attorneys fees to protect themselves. This strategy could be repeatedly exercised by Plaintiffs, multi-national corporations who have filed over 30,000 lawsuits against individuals, until a defendant, one of limited resources, is unable to do anything but accept default judgment. A declaration of non-infringement can resolve this matter once and for all even if Plaintiffs' seek voluntary dismissal. The declaratory judgment counterclaims insure that the Defendant can obtain a resolution of this matter on the merits through an independent adjudication of the issues raised in the counterclaims. The Declaratory Judgment

Counterclaim further alleges that Plaintiffs' copyright infringement claim is defective for failing to allege specific details of infringement.

Although Defendant's declaratory judgment counterclaim does raise a number of the same issues that are asserted as corresponding affirmative Defenses in Defendant's Amended Answer, this declaratory judgment counterclaim serves a critically important purpose in this case, and can avert misuse of judicial resources if and when its function arises. Defendant's declaratory judgment counterclaim serves as protection for the Defendant against the plaintiff's inevitable attempt to withdraw their claims in this case without prejudice. As the issues raised by Defendant are ready to be addressed by the Court, the Plaintiffs will be at risk of having an adverse ruling issued that may place their thousands of other cases at risk. Plaintiffs would like to have the option to terminate this case by voluntarily dismissing their claims against the Defendant under Rule 41(a)(2). If Defendant has no counterclaims pending at the time, Plaintiffs may be successful in terminating this case by obtaining from this Court a voluntary dismissal "without prejudice" under rule 41(a)(2). See e.g., Priority Records LLC, et al., v. Chan, Case No. 04-CV-73645-DT, U.S.D.C. E.D. MI. See e.g., Capitol Records, Inc., et al., v. Foster, Case No. Civ. 04-1569-W, U.S.D.C. W.D. OK. See e.g., Warner Bros. Records, Inc., et al., v. Stubbs, Case No. CIV-06-793-M, U.S.D.C. W.D. OK. See e.g., Virgin Records America, Inc., et al., v. Marson, Case No. 05CV-03201 RGK, U.S.D.C. C.D. CA.

Furthermore, with respect to Ms. Johnson, as a stay at home daycare worker with limited income, she will devote substantial resources in this case to defend against Plaintiffs' claims and present to this Court potentially dispositive issues raised in her affirmative defenses that correspond to the declaratory judgment counterclaim at issue. If the declaratory judgment counterclaim is dismissed as Plaintiffs are requesting (as duplicative, redundant, and unnecessary),

the Plaintiffs will be able to voluntarily withdraw their claims against Ms. Johnson without prejudice, leaving Plaintiffs' allegations of copyright infringement unresolved. Ms. Johnson's declaratory judgment counterclaim will protect her and others against further harassment and force the Plaintiffs to dismiss their claims with prejudice, which they will likely do as soon as the Plaintiffs sense that they are nearing an adverse ruling on their claims.

Allowing Ms. Johnson's Declaratory Judgment counterclaims to remain in this case, will force Plaintiffs to dismiss their claims against Ms. Johnson with prejudice, negotiate a covenant not to sue, or Ms. Johnsons will be allowed to move forward with her declaratory judgment counterclaim to obtain resolution and closure through an independent adjudication of these issues. By adjudication in these issues, the Court will provide a solid legal argument from which to prevent future harm by Plaintiffs' litigation campaign.

Other courts in the Tenth Circuit have properly considered the Rule 41(a)(2) dismissal without prejudice issues in addressing Plaintiffs' motion seeking dismissal of declaratory judgment counterclaims. In Foster, the Oklahoma district court properly found that the defendant's declaratory judgment counterclaim provided an independent basis for adjudication by the court, and dismissed the declaratory judgment counterclaim only after finding that the Plaintiffs Rule 41(a)(2) dismissal with prejudice terminated the controversy required to maintain declaratory judgment jurisdiction. (See Ex. B attached hereto Capitol Records, Inc. v. Foster, Case No. 04-1569, Order at 126 (W.D. Okla. July 13, 2006).) In Stubbs, a different Oklahoma district court, granted the Plaintiffs' Rule 41(a)(2) voluntary dismissal of their claims without prejudice. However, they denied Plaintiffs' motion to dismiss defendant's declaratory judgment counterclaims, finding that an independent basis existed for adjudicating the declaratory judgment

counterclaims. (See Ex. C attached hereto Warner Bros. Records, Inc. v. Stubbs, Case No. 06-793, Order at 25 (W.D. Okla. March 13, 2007).)

The critical purpose of the declaratory judgment counterclaim is to make sure that Ms. Johnson will be able to obtain closure as to the infringement claims asserted against her, either through having her day in Court, or through Plaintiffs being forced to dismiss their claims with prejudice. Based on Plaintiffs' historical practices, the only reason the Plaintiffs wish to dismiss the declaratory judgment counterclaim is to insure they are still able to use Rule 41(a)(2) dismissal, without prejudice, to prevent an adverse ruling against them. Plaintiffs' litigation campaign strategy consists of filing thousands of lawsuits and obtaining thousands of default judgments. When Plaintiffs are challenged by a possible adverse ruling, they withdraw their suit without any impediment to future litigation. Ms. Johnson's declaratory judgment counterclaim would prevent her from obtaining resolution as to the infringement claims asserted against her by Plaintiffs preventing further harm by the bullying tactics of some of the world's largest record companies who have initiated a campaign against her and hundreds, if not thousands, of other citizens of the State of Kansas.

B. DEFENDANT HAS ADEQUATELY PLEADED THE ELEMENTS OF A CLAIM UNDER COMPUTER FRAUD AND ABUSE ACT

Likewise, under the "plausibility" standard, Defendant has adequately pleaded the elements of a claim under the Computer Fraud and Abuse Act.

The Computer Fraud and Abuse Act, 18 U.S.C. § 1030 ("CFAA") prohibits illicit and fraudulent computer-related activities and allows for civil recovery under the circumstances provided in § 1030(g). That subsection specifically provides:

Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief.

Furthermore, the statute requires that the offending activity violate one of the five prongs of § 1030(a)(5)(B). In this case, the applicable provision is § 1030(a)(5)(B)(i), addressing “loss to 1 or more persons during any 1-year period...aggregating at least \$5,000 in value” where such loss was caused by qualified conduct under § 1030(a)(5)(A), prohibiting, among other things, intentionally accessing a computer, without authorization, and causing damage.

The statute further defines “loss” in § 1030(e)(11) as:

any reasonably cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service;

and “damage” in § 1030(e)(8):

any impairment to the integrity or availability of data, a program, a system, or information.

Under the statute, then, the elements of a CFAA claim are: (1) intentional access to a computer; (2) without authorization, (3) resulting in any impairment to the integrity or availability of data, a program, a system, or information, (4) that causes “any reasonable cost to any victim” in excess of \$5,000 in the course of a year.

Plaintiffs assert, without any citation to Count II of the Amended Counterclaim, that Ms. Johnson authorized their intrusion by means of creating a “shared folder” which she made available to all other users of the peer-to-peer networks. (Motion to Dismiss Am. Counterclaim. at 10 ¶ 3.) The Plaintiffs further assert that Defendant’s amended counterclaim under CFAA requires an admission that she infringed their rights by sharing files over the internet. If this was done, any intrusion was voluntary on Ms. Johnson’s part. However, this argument is flawed. Ms. Johnson’s CFAA counterclaim is based on Plaintiffs’ allegations of accessing her hard drive and not based on any admission of Ms. Johnson.

According to Exhibit A, attached to Plaintiffs' own Motion to Dismiss, a listing of 376 files which were allegedly located on Defendant's computer, was specifically incorporated by reference within Ms. Johnson's amended counterclaim. Plaintiffs allege to have obtained Ms. Johnson's IP address and allegedly captured a list of recordings which Defendant purportedly downloaded and/or distributed to the public. (Complaint at 4). In ruling on a 12(b)(6) motion to dismiss counterclaims, all allegations of material fact contained therein are taken as true and construed in the light most favorable to Ms. Johnson. Ms. Johnson has stated she has not infringed Plaintiffs' rights. Plaintiffs' unsupported conclusory arguments to the contrary cannot be considered in this motion. Construing the facts in the light most favorable to the non-moving party, the value of the intrusion is in excess of \$5,000 based in part on the pre-litigation demands, cost of federal court litigation, and harm to her business.

For the reasons set forth above, Defendant respectfully requests that this Court exercise its discretion to allow Defendant's counterclaim under the CFAA.

C. DEFENDANT HAS PLEAD THE ELEMENTS OF A CIVIL CONSPIRACY CLAIM

Plaintiffs object to Ms. Johnson's conspiracy claim on two main grounds: first, that they are immune under the *Noerr-Pennington* doctrine; and second, that the conspiracy has underlying acts which are not actionable.

1. Noerr Pennington

Plaintiffs' allege that the *Noerr-Pennington* doctrine provides immunity to Plaintiffs' actions. The *Noerr-Pennington* doctrine protects the right of the people to petition the government for redress of grievances. While the *Noerr-Pennington* doctrine has its roots in the antitrust arena, it has been expanded to include other litigation aspects. However, there is some dispute about

whether it applies in commercial civil litigation cases. Even assuming that it would be applicable in a commercial litigation matter, the *Noerr-Pennington* doctrine does not apply to sham litigation.

A sham suit is one that is an abuse of the judicial processes. California Transport v. Trucking Unlimited, 404 U.S. 508, 513 (1972). In California Transport, the Supreme Court identified two types of sham activity: "misrepresentations ... in the adjudicatory process" and the pursuit of "a pattern of baseless, repetitive claims." Id. Thus, in California Transport, the Court held that a complaint alleging that the petitioner's competitors initiated administrative proceedings against the petitioner "without probable cause, and regardless of the merits," stated an antitrust cause of action. Id. at 512.

In this case, Plaintiffs' claim of immunity under the doctrine is unjustified not only because the *Noerr-Pennington* doctrine does not protect suits that are systematically "objectively baseless" or a sham, but also because they have overstepped the boundary of what is covered by the *Noerr-Pennington* doctrine. As previously stated, plaintiffs initiated and maintain a systematic litigation campaign across the U.S. against thousands of individuals which at the time of bringing the suit, are not based in fact. These suits often involve activities which have been characterized as extortion, harassment, and in bad faith, even if the *Noerr-Pennington* doctrine does apply, it does not cover Plaintiffs' pre-suit computer invasions, extortion attempts and related activity. These activities would be excluded in any event, because no privilege extends to such activities which are objectively baseless in themselves. This was the conclusion of the court in Thoefel v. Farey-Jones, 359 F.3d 1066, 1078-79 (9th Cir. 2004) (rejecting *Noerr-Pennington* doctrine application to a claim including one under the Computer Fraud and Abuse Act):

We are skeptical that *Noerr-Pennington* applies at all to the type of conduct at issue. Subpoenaing private parties in connection with private commercial litigation bears little

resemblance to the sort of governmental petitioning the doctrine is designed to protect. Nevertheless, assuming arguendo the defense is available, it fails. *Noerr-Penning* does not protect “objectively baseless” sham litigation.

Plaintiffs’ advance the same *Noerr-Pennington* immunity argument they urged in UMG v. Del Cid , which that Court rejected, holding that the *Noerr-Penning* doctrine does not serve as a shield for sham litigation. ((See Ex. D attached hereto UMG Recordings, Inc., 07-368, Order at 23 (M.D.Fla. 2007) (citing Professional Real Estate Investors, Inc., v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993)). In the present case, Ms. Johnson has made similar allegations, namely that the purpose of this lawsuit (and those against many thousands of other individuals) is intended to spread public fear and intimidation by harassment, extortion and coercion. (Amended Counterclaim ¶20, 34). Further, Ms. Johnson stated that the alleged claims are neither well grounded in fact nor warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. (Amended Counterclaim ¶18).

By asserting the factual allegations set forth in Defendant’s First Amended Answer and Counterclaim (particularly, but not limited to those contained in paragraphs 1-34 of the Amended Counterclaims), Ms. Johnson has raised allegations which, if proven would entitle her to a finding that Plaintiffs’ copyright infringements suits amount to a sham litigation. Ms. Johnson has raised facts from which a jury could conclude both that Plaintiffs’ suit is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and that the Plaintiffs bringing the suit did so with an illegal subjective motivation to interfere with her lawful activity. The objective baselessness of Plaintiffs’ copyright infringement claims against Ms. Johnson is evident in the complete absence of any reasonably-reliable investigation of facts which they allege, which is indicative of the fact that they have also sued other innocent individuals through the United States, including disabled individuals, children and even dead persons.

Despite notifying Plaintiffs that Ms. Johnson did not engage in any copyright infringement, the Plaintiffs filed this action against Ms. Johnson. (Amended Counterclaim ¶20). In addition, despite voluntarily providing an image of Defendant's hard drive to Plaintiffs, which Defendant believes illustrates that Plaintiffs' case is neither warranted nor well grounded, Plaintiffs have continued to impugn Mandy's character and subject her to demands which are closely akin to extortion. (Amended Counterclaim ¶20). These actions along with the characterization that these suits and Plaintiffs' actions amount to "sham" litigation, extortion, harassment, and bad faith are sufficient to overcome a Rule 12(b)(6) motion to dismiss based upon the *Noerr-Pennington* doctrine. Finally, *Noerr-Pennington* is an affirmative defense as to which plaintiffs have the burden of proof, rather than a basis for challenging the legal sufficiency of the claim to which it responds. Therefore, because the actions complained of are not covered by the *Noerr-Pennington* doctrine, and even if they were, suits like the present one has been repeatedly characterized as a sham litigation, the Plaintiffs acts are not with immunity.

2. Civil Conspiracy

Plaintiffs wrongly claim that Ms. Johnson has not sufficiently stated a claim for civil conspiracy. Under Kansas law, the following elements are required to establish such a claim:

(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds in the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof. *Stoldt v. City of Toronto*, 234 Kan. 957, 967, 678 P.2d 153 (1984). In order for civil conspiracy to lie, the claim must base itself on a valid, actionable underlying tort. *Stoldt*, 234 Kan. at 967; *Knight v. Neodesha Police Dept.*, 5 Kan. App. 2d 472, 476, 620 P. 2d 837 (1980).

Plaintiffs maintain Ms. Johnson fails to plead any of these required elements. However, ¶¶ 46-55 of the Defendant's First Amended Answer and Counterclaims ("Count III – Civil

Conspiracy”) set out the elements of a civil conspiracy and ¶¶ 14-34 (“General Allegations”) provide additional information to allege adequate facts to support these elements.

Although plaintiffs argue that Ms. Johnson fails to plead any underlying tort or wrong, she has stated an invasion of privacy and emotional distress. Specifically, at ¶ 50 of Defendant’s First Amended Answer and Counterclaim, Ms. Johnson alleges that:

As a result of the civil conspiracy between Plaintiffs and MediaSentry, Inc., Mandy has suffered damages including emotional distress and monetary damages associated with the expense of resources and time necessary to defend this meritless lawsuit. As a result of the civil conspiracy between Plaintiffs and MediaSentry, Inc., Mandy has suffered damages including Invasion of Privacy, *supra*.

Invasion of Privacy being a recognized tort in Kansas, Ms. Johnson’s civil conspiracy counterclaim, Amended Counterclaim ¶¶ 46-55, is premised upon an underlying actionable tort or wrong and therefore should not be dismissed. Stoldt. Further, contrary to Plaintiffs assertions, Am. Counterclaims ¶ 47 does not state “that the purpose of the conspiracy was to ‘engage in the unlicensed and unlawful acts of private investigations.’” Ms. Johnson can not anticipate Plaintiff’s argument without an accurate factual basis on which to reply and therefore she simply denies Plaintiff’s argument.

Ms. Johnson has asserted enough facts to state a claim to relief that is plausible on its face. Twombly at 1974. Specifically, Ms. Johnson stated that MediaSentry, Inc. collected listing of recordings from peer-to-peer file sharing programs, was hired to provide private investigation services, produced evidence to be used against Ms. Johnson, including a listing of files, IP addresses and other evidence, engaged in private investigation services and provided evidence for this lawsuit within the State of Kansas. (See Am. Counterclaims. ¶¶ 22-24, 28, 51-52).

Further, Plaintiffs Complaint for Copyright Infringement alleges several facts in which they “identified an individual” using LimeWire and distributing audio files over the internet. In

addition, Plaintiff's claim they are "informed" that Ms. Johnson had continuously used and continued to use a P2P network to download and/or distribute to the public Copyright Recordings which is incorporated by reference to the Amended Counterclaims in ¶ 1. As further stated by Plaintiffs, "MediaSentry, a company retained by Plaintiffs, detected an individual who was engaged in the unlawful distribution of Plaintiffs' copyrighted sound recordings...." (See Page 5 of Plaintiffs Motion to Dismiss Defendant's Amended Counterclaims). Therefore, for the reasons previously stated, Defendant's Civil Conspiracy Counterclaim has been sufficiently pled at this early stage in the litigation proceedings. TON at 1236 (10th Cir. Utah 2007).

D. PLAINTIFFS INVASION OF DEFENDANT'S PRIVACY IS NOT IMMUNE UNDER NOERR-PENNINGTON

Ms. Johnson's Invasion of Privacy Counterclaim (Count IV), is based upon Plaintiffs allegations of employing an investigator to access Ms. Johnson's computer and accessing private files without Ms. Johnson's knowledge or consent and publishing outrageously offensive statements regarding Ms. Johnson, which are not true.

Under Kansas Law, one is liable for false light/invasion of privacy when one gives to another publicity which places a person before the public in a false light of a kind highly offensive to a reasonable man. Further, the Court in Castleberry v. Boeing Co., 880 F.Supp. 1435, 1442 (D. Kan. 1995), stated that false light/invasion of privacy is one of four types of invasion of privacy and the elements of the false light type are: "(1) publication of some kind must be made to a third party; (2) the publication must falsely represent the person; and (3) that representation must be highly offensive to a reasonable person." [Citations omitted.]

As stated in Defendant's Amended Counterclaim and Plaintiffs' Complaint, Plaintiff's have repeatedly and publicly falsely stated that Ms. Johnson has violated plaintiffs' copyrights to various individuals, companies and to the public at large, and have listed various outrageous

recordings which it states Ms. Johnson, a stay at home day care worker, downloaded. (See Amended Counterclaim ¶¶ 56-71).

Firstly, as previously stated in light of a motion to dismiss, Defendant's Amended Counterclaims should be taken as true and in a light most favorable to the non moving party. As discussed above, Plaintiffs are incorrect in assuming that they were absolutely privileged in their belief that they are immune from publicly making statements regarding Ms. Johnson, including that she is a criminal, copyright thief, infringer and pirate, who is associated with downloading, listening, stealing gangster rap music with offensive, obscene and vulgar lyrics. While it is generally true that statements made in a legal pleading are privileged, the statements must be pertinent or relevant to the litigation at hand. In this case, plaintiffs do not allege they own the rights to all of the attached music and therefore, their listing of those files in Exhibit A to their Motion to Dismiss Defendant's Amended Counterclaims can not reasonably be considered probative of any claim that they assert regarding the alleged copyright infringement. In filing the Exhibit A in any way other than under seal, they falsely represented Ms. Johnson to the public. While Plaintiff's contend that the Exhibit A was found in a publicly-available shared file on her computer, they miss the point. Ms. Johnson has never used a file sharing program to download these files and therefore has not opened her computer up to the world nor invited the types of invasion Plaintiff has committed. This is just one other example of Plaintiffs' "pay, or else" tactic where they harass innocent individuals into a forced settlement or risk the consequences of their litigation campaign being played out before the public.

Ms. Johnson respectfully submits that the Court must not deprive her of an opportunity to prove her innocence of the gratuitously proffered claims of Plaintiffs made in Exhibit A to their Motion to Dismiss Defendant's Amended Counterclaims which Plaintiffs made, or relieve

Plaintiffs from their burden of proof by dismissing her counterclaim without a trial. Defendant's Invasion of Privacy counterclaim meets all of the essential requirements and should stand as a matter of law.

E. DEFENDANT'S CLAIM FOR DECLARATORY RELIEF COMPLIES WITH THE PURPOSE AND REQUIREMENTS OF THE DECLARATORY JUDGEMENT ACT

Plaintiffs believe that Count V of Ms. Johnson's Amended Counterclaim has no basis in either statutory or case law under a "replication" theory. However, there is nothing in the Declaratory Judgment Act ("DJA") or the relevant case law interpreting it to suggest that a court must eliminate that remedy simply because another avenue for making that declaration exists, as is currently the case here. That alternative avenue may disappear at any time, without the concomitant disappearance of a substantial controversy between the adverse parties. As long as the controversy remains, Ms. Johnson deserves her day in court. Her declaratory judgment claim will ensure that she gets it. Therefore, this Court should deny Plaintiffs' motion to dismiss.

Ms. Johnson's declaratory judgment counterclaim is an independent cause of action arising under and fully compliant with the DJA. Under the Declaratory Judgment Act, an individual may file suit in federal court or counterclaim in an existing suit to obtain a declaration of rights with respect to another party – whether or not other relief (such as damages or an injunction) is or could be sought. 28 U.S.C. § 2201 (2006). To maintain a declaratory judgment action, a party need only file an "appropriate pleading" (e.g., a counterclaim) that establishes (1) jurisdiction; and (2) the existence of an actual case or controversy between parties having adverse legal interests. Horton v. Liberty Mut. Inc. Co., 367 U.S. 348, 357 (1961). There is no universal rule for compliance with the latter element; rather, the analysis is necessarily tied to the facts of the case. "[T]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to

warrant the issuance of a declaratory judgment.” Maryland Cas. Co v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941); quoted and affirmed in MedImmune Inc. v. Genentech, Inc., 127 S. Ct. 764, 771-72 (2007).

Ms. Johnson’s counterclaim easily meets these requirements. Plaintiffs do not claim, nor could they, that this Court lacks jurisdiction over this controversy. They do not claim – nor could they – that there is no real substantial controversy between the parties. At this early stage in the litigation, that is enough to warrant denial of Plaintiffs’ motion.

In addition, the nature of Ms. Johnson’s claim also weighs against dismissal, for it embodies the guiding purpose of the DJA: to guarantee the target of legal threats an opportunity to obtain a judicial declaration of his or her rights. Numerous courts have held that the DJA “should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of adjudicating legal disputes without invoking coercive remedies of old procedures, and to settle legal rights and remove uncertainty and insecurity from legal relationships” Beacon Const. Co. v. Matco. Elec. Co., 521 F.2d 392, 397 (2nd Cir. 1975); see also Allstate Ins. Co. v. Employers Liability Assur. Co., 445 F.2d 1278, 1280 (5th Cir. 1971) (“[This chapter] is remedial and is to be liberally construed as to achieve its wholesome and salutary purpose.”)

Relevant guidance may also be found in patent law, keeping in mind “the historic kinship between patent law and copyright law.” Sony Corp. of America v. Univ. City Studios, Inc., 464 U.S. 417, 439 (1984); see also Texas v. West Pub. Co., 882 F.2d 171, 175 (5th Cir. 1989) (acknowledging Federal Circuit provides a “wealth of precedent” in the intellectual property field). With respect to the actual controversy requirement, the Supreme Court has recently reaffirmed that it is satisfied in patent as in other cases if the dispute is “definite and concrete, touching the legal relations of parties having adverse interests” and “real and substantial” such that it will permit

“specific relief through a decree of conclusive character.” MedImmune, Inc., 127 S. Ct. at 771. In Sandisk Corp v. ST Microelectronics, Inc., 480 F.3d 1372 (Fed. Cir. 2007), for example, the Federal Circuit Court of Appeals held that a party had standing to seek a declaratory judgment of noninfringement of patents where a patentee took a position that forced the declaratory judgment plaintiff to choose between pursuing arguably illegal behavior or abandoning that which he claimed to have a right to do. See also Uniform Product Code Council, Inc. v. Kaslow, 460 F. Supp. 900, 903 (S.D.N.Y. 1978) (finding plaintiff had standing to bring DJ action where patentee defendant had publicly asserted its intent to enforce its patent and such enforcement would expose plaintiff to damages and plaintiff would then be guilty of actively inducing such infringement; “ultimate exposure of plaintiff to an action by defendant for damages clearly gives plaintiff standing to bring an action for declaratory judgment in its own right.”)

The converse is also worth noting: courts have recognized that a declaratory judgment counterclaim may not be viable if the “actual controversy” requirement is extinguished. In Super Sack Manufacturing Corp. v. Chase Packaging Corp., 57 F.3d 1054 (Fed. Cir. 1995), cert. denied, 516 U.S. 1093 (1996), for example, a declaratory judgment counterclaim was dismissed because plaintiff had promised not to sue the defendant for infringement. But see Sandisk Corp. v. ST Microelectronics, Inc., 480 F.3d 1372 (Fed. Cir. 2007) (“direct and unequivocal statement” that declaratory judgment defendants had “absolutely no plan” to sue plaintiffs did not eliminate declaratory judgment jurisdiction).

Thus, contrary to Plaintiffs’ implication here, declaratory judgment standing does not depend on whether the declaratory judgment claims are arguably similar to other issues in dispute, but whether the declaratory judgment claims pertain to a real and substantial controversy. Small wonder, then, that patent courts have had no difficulty allowing suits or counterclaims brought by

persons charged with infringement against the patent owner for a declaratory judgment of noninfringement and/or invalidity. See Donald S. Chisum, Chisum on Patents § 21.02[1][d] (2003); See Also, e.g. Altwater v. Freeman, 319 U.S. 359 (1943) (declaratory judgment counterclaim by licensees justiciable); cited with approval in MedImmune, Inc., 127 S. Ct. at 772; Kemin Foods, L.C. v. Pigmentos Vegetales del Centro, 464 F.3d 1339, 1343 (Fed. Cir. 2006) (DJ counterclaim for patent infringement).

Ms. Johnson, like the plaintiff in Sandisk, is exposed to an action by an adverse party. And, unlike the plaintiffs in Super Sack, Plaintiffs have not covenanted to anything, much less not to sue, and thus a substantial controversy between parties having adverse legal interests remains even if the plaintiffs' affirmative case is dismissed. Unless and until this court rules on the issue of infringement, Ms. Johnson is vulnerable to Plaintiffs' legal threats and, therefore, has standing to seek adjudication of the issue.

- (1)
- (2)
- (3)

IV. CONCLUSION

For all the above reasons Defendant asks this court to deny Plaintiffs' Motion to Dismiss Defendant's First Amended Answer and Counterclaims in its entirety. Ms. Johnson's counterclaims adequately pleaded the elements with sufficient basis and Plaintiffs' actions are not privileged nor are they immune pursuant to the *Noerr-Pennington* doctrine. Furthermore, there is no basis at law for dismissing Ms. Johnson's counterclaims for declaratory judgment, civil conspiracy, or invasion of privacy. Plaintiffs' motion must be denied in its entirety and Plaintiffs ordered to file their answer.

Respectfully submitted,

Dated: September 11, 2008

By: s/ Arthur K. Shafer

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant's Response In Opposition to Plaintiffs' Motion to Dismiss Defendant's Amended Counterclaims as been served upon the attorney for Plaintiffs by deposit in the United States Mail at Kansas City, Missouri, in a sealed envelope with first class postage thereon fully prepaid, this 8th day of September, 2008:

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s/ Arthur K. Shaffer

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