

Kenneth R. Davis, II, OSB No. 97113
davisk@lanepowell.com
William T. Patton, OSB No. 97364
pattonw@lanepowell.com
Parna A. Mehrbani, OSB No. 05323
mehrbanip@lanepowell.com
LANE POWELL PC
601 SW Second Avenue, Suite 2100
Portland, Oregon 97204-3158
Telephone: 503.778.2100
Facsimile: 503.778.2200

Timothy Reynolds, *Admitted Pro Hac Vice*
HOLME ROBERTS & OWEN LLP

Jeffrey S. Jacobson, *Admitted Pro Hac Vice*
DEBEVOISE & PLIMPTON LLP

Attorneys for Defendants Atlantic Recording Corporation, Priority Records LLC,
Capitol Records, Inc., UMG Recordings, Inc. BMG Music, Recording Industry Association
of America, and Settlement Support Center, LLC

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

TANYA ANDERSEN,

Plaintiff,

v.

**ATLANTIC RECORDING
CORPORATION**, et al.,

Defendants.

No. 3:07-CV 07-934 BR

**DEFENDANTS' MEMORANDUM IN
SUPPORT OF MOTION FOR
JUDGMENT ON THE PLEADINGS**

MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT.....	2
FACTUAL BACKGROUND	7
ARGUMENT	10
I. Noerr-Pennington Sets A High Standard For Tort Claims And Should Be Applied In Favor Of Finding Immunity.....	10
II. The Record Companies Had An Objective Basis For Initiating Proceedings Against Ms. Andersen.	12
A. Other Enforcement Program Cases Have Upheld The Use Of IP Addresses As A Basis For Commencing Actions.	12
B. The Use Of IP Addresses Provided An Objective Basis For Litigation Even Stronger Than That Found Sufficient In <i>Sosa</i>	15
C. Internet Protocol Addresses Repeatedly Have Been Upheld, In Other Criminal And Civil Contexts, As Providing Probable Cause.	17
D. Neither The Supposed Need For “Private Investigator” Licenses, The Use Of Doe Proceedings, Nor Allegations About “Entered Computers” Establish Sham Litigation.	21
III. The Record Companies’ Post-Filing Conduct Against Ms. Andersen Also Enjoys Noerr-Pennington Immunity.	24
CONCLUSION.....	26

TABLE OF AUTHORITIES

CASES

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)8, 17, 20

Arista Records LLC v. Does 1-11, Civ. A. No. 07-568
(W.D. Okla. Nov. 14, 2007)23

Arista Records LLC v. Does 1-43, 2007 WL 4538697 (S.D. Cal. Dec. 20, 2007).....22-23

Arista Records LLC v. Does 1-19, 155 F. Supp. 2d 1 (D.D.C. 2008)22

Atlantic Recording Corp. v. Heslep, 2007 WL 1435395
(N.D. Texas, May 16, 2007).....9, 14

Atlantic Recording Corp. v. Raleigh, No. 4:06-CV-1708,
2008 WL 3890387 (E.D. Mo. Aug. 18, 2008).....13, 14

BMG Music v. Gonzalez, 430 F.3d 888 (7th Cir. 2005).....7-8

Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.,
944 F.2d 1525 (9th Cir. 1991)1-2, 11

DirecTV, Inc. v. Lewis, No. 03-CV-6241-CJS-JWF, 2005 WL 1006030
(W.D.N.Y. Apr. 29, 2005).....16

DirecTV, Inc. v. Weikel, No. Civ. 03-5300(JBS),
2005 WL 1243378 (D.N.J. May 25, 2005).....16

Doe I v. Individuals, 561 F. Supp. 2d 249 (D. Conn. 2008).....19-20

Doe v. Cahill, 884 A.2d 451 (Del. 2005)20

Eastern R.R. President’s Conference v. Noerr Motor Freight, Inc.,
365 U.S. 127 (1961)3

Ellebracht v. DirecTV, Inc., No. 4:05CV02180 ERW,
2006 WL 1698329 (E.D. Mo. June 7, 2006).....16

Fonovisa, Inc. v. Does 1-9, 2008 WL 919701 (W.D. Pa. Apr. 3, 2008)22, 23-24

In re Aimster Copyright Litig., 334 F.3d 643 (7th Cir. 2003)8, 9, 20

In re Verizon Internet Servs., Inc., 257 F. Supp. 2d 244 (D.D.C. 57)23

<i>Interscope Records v. Does 1-12</i> , Civ. No. 08-187, 2008 WL 4939105 (N.D. Ind. Nov. 14, 2008)	14, 22
<i>Kimberlite Corp. v. John Does 1-20</i> , Civ. No. 08-2147, 2008 WL 2264485 (N.D. Cal. Jun. 2, 2008)	20
<i>McGlinchy v. Shell Chemical Co.</i> , 845 F.2d 802 (9th Cir. 1988).....	2
<i>Mejia v. City of News York</i> , 119 F. Supp. 2d 232 (S.D.N.Y. 2000)	21
<i>Metro-Goldwyn-Mayer Studios, Inc., v. Grokster Ltd.</i> , 545 U.S. 913 (2005).....	7, 8, 20
<i>Motown Record Co., L.P. v. Kovalcik</i> , 2009 WL 455137 (E.D. Pa. Feb. 23, 2009).....	12-13
<i>Nutrasweet Co. v. X-L Eng'g Corp.</i> , 926 F. Supp. 767 (N.D. Ill. 1996)	21-22
<i>Oregon Natural Desert Ass'n v. United States Forest Svc.</i> , 312 F. Supp. 2d 1337 (D. Or. 2004)	2
<i>Pennsylvania Bd. of Probation & Parole v. Scott</i> , 524 U.S. 357 (1998)	21
<i>Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.</i> , 508 U.S. 49 (1993)	3-4, 7, 11, 12, 24
<i>Sony Music Entertainment Inc. v. Does 1-40</i> , 326 F. Supp. 2d.....	17-18, 23
<i>Sony Pictures Home Entertainment Inc. v. Lott</i> , 471 F. Supp. 2d 716 (N.D. Tex. 2007)	17
<i>Sosa v. DirecTV, Inc.</i> , 437 F.3d 923 (9th Cir. 2006).....	2, 3, 5, 15-17
<i>Theme Promotions, Inc. v. News America Marketing FSI</i> , 546 F.3d 991 (9th Cir. 2008)	2
<i>TNT Road Co. v. Sterling Truck Corp.</i> , 2004 WL 1626248 (D. Me. July 19, 2004)	22
<i>United Mine Workers v. Pennington</i> , 381 U.S. 657 (1965).....	3
<i>United States v. Carter</i> , 549 F. Supp. 2d 1257 (D. Nev. 2008).....	19
<i>United States v. Ganoë</i> , 538 F.3d 1117 (9th Cir. 2008)	18
<i>United States v. Hay</i> , 231 F.3d 630 (9th Cir. 2000)	18
<i>United States v. Perez</i> , 484 F.3d 735 (5th Cir. 2007).....	18-19

United States v. Sloan, 2009 WL 118080 (9th Cir. Jan. 8, 2009) 18
Virgin Records America, Inc. v. Doe, 2009 WL 700207 (E.D.N.C. Mar. 16, 2009) 21, 23
White v. Lee, 227 F.3d 12 (9th Cir. 2000) 3-4, 11-12
Yang v. Daral-Handash Consultants, 250 Fed. Appx. 771 (9th Cir. 2007) 2

The record on which Ms. Andersen relies for her recently-filed motion for class certification makes clear that each of her claims is barred as a matter of law by *Noerr-Pennington* immunity. For that reason, defendants Atlantic Recording Corporation, Priority Records, LLC, Capitol Records, Inc., UMG Recordings, Inc., BMG Music, Recording Industry Association of America and Settlement Support Center, LLC (collectively “Record Companies”) respectfully move, in conjunction with their opposition to Ms. Andersen’s motion for class certification, for judgment on the pleadings dismissing each of her claims as inadequate to overcome that immunity.¹

Given the way Ms. Andersen now has spelled out the factual theories underlying her claims, well-settled Supreme Court and Ninth Circuit decisions make clear that that *Noerr-Pennington* immunity is a pure, threshold “legal question” that can, and should, be decided under Rule 12(c).² *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*,

¹ During the February 13, 2008 hearing, this Court ruled that any further dispositive motions should be based on a factual record, not just the allegations in the Fourth Amended Complaint (“Compl.”). See 2/13/08 Tr. At 49:16-19. In the last year, as this Court knows, the Record Companies have produced extensive documentary discovery and Plaintiff has now spelled out the purported factual basis for her claims in her Motion for Class Certification. These pleadings, along with cases decided since the Court last considered the *Noerr-Pennington* immunity issue, now permit the Court to render a dispositive ruling on a developed record.

² Because this motion is brought under Rule 12(c), the Court should accept “[t]he allegations of the nonmoving party . . . as true,” and construe “[a]ll inferences reasonably drawn from the alleged facts . . . in favor of the nonmoving party.” *Oregon Natural Desert Ass’n v. United States Forest Svc.*, 312 F. Supp. 2d 1337, 1341 (D. Or. 2004). “[C]onclusory allegations,” however, cannot withstand a Rule 12(c) motion because, as a practical matter, they are without substance. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). Nor should a court “blindly accept allegations . . . as true if these allegations are contradicted by uncontested facts set forth in either . . . documents that are referred to in the non-moving party’s pleading, or . . . facts that are included in materials that can be judicially noticed.” *Yang v. Daral-Handash Consultants*, 250 Fed. Appx. 771, 772 (9th Cir. 2007) (unpublished opinion).

944 F.2d 1525, 1532 (9th Cir. 1991), *aff'd*, 508 U.S. 49 (1993). Since the Court last considered this issue, several other courts have dismissed, on *Noerr-Pennington* grounds, counterclaims against the Record Companies similar or identical to Ms. Andersen's, brought by some of the very persons Ms. Andersen claims are within her class. These decisions also make clear that immunity is a pure legal question suitable for decision under Rule 12.

PRELIMINARY STATEMENT

Ms. Andersen alleges, in five causes of action,³ that the copyright enforcement program ("Enforcement Program") undertaken by the Record Companies against certain users of peer-to-peer ("P2P") networks was tortious. The central theory of liability on which she relies, however, already has been considered and rejected by the Ninth Circuit as a matter of law. *See Sosa v. DirecTV, Inc.*, 437 F.3d 923 (9th Cir. 2006). *Sosa* held that the First Amendment right to petition courts for redress, as applied through the *Noerr-Pennington* doctrine, protects a broad-scale intellectual property enforcement program if the plaintiffs reasonably believed that those falling within the program ultimately could be found to have infringed. The Record Companies had such a reasonable belief in Ms. Andersen's case and numerous courts consistently have held that the central piece of evidence they had against Ms. Andersen — the confirmation that she was the person registered as the user of the Internet

³ Ms. Andersen asserts five claims for relief: (1) civil conspiracy, (Fourth Amended Complaint ("Compl.") (doc. no. 58) ¶¶ 8.1-8.5; (2) wrongful initiation of civil proceedings, Compl. ¶¶ 8.6-8.16; (3) abuse of legal process, Compl. ¶¶ 8.17-8.30; (4) negligence, Compl. ¶¶ 8.31-8.46; and (5) injunctive and declaratory relief, Compl. ¶¶ 8.47-8.49. The first and fifth causes of action add substantive elements to the middle three. In *Theme Promotions, Inc. v. News America Marketing FSI*, 546 F.3d 991, 1007 (9th Cir. 2008), the Ninth Circuit expressly held that *Noerr-Pennington* bars not only federal statutory claims that would chill the First Amendment right to petition, but also state law claims precisely like the five alleged by Ms. Andersen.

Protocol (“IP”) address that was seen being used for unlawful Internet activity — provided probable cause for initiating suit against her.

Sosa is one of several Supreme Court and Ninth Circuit decisions holding that *Noerr-Pennington* immunity sets an extremely high hurdle for tort-related claims based on litigation activities. This is because “[t]he *Noerr-Pennington* doctrine derives from the First Amendment’s guarantee of ‘the right of the people . . . to petition the Government for a redress of grievances.’” *Sosa*, 437 F.3d at 929, citing *Eastern R.R. President’s Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The doctrine holds that “those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct.” *Id.* For that reason, application of *Noerr-Pennington* immunity is a threshold “legal question,” suitable for determination on a Rule 12 motion. *Columbia Pictures*, 944 F.2d at 1532. See also *White v. Lee*, 227 F.3d 1214, 1232 (9th Cir. 2000) (“We do not lightly conclude in any *Noerr-Pennington* case that the litigation in question is objectively baseless, as doing so would leave that action without the ordinary protections afforded by the First Amendment, a result we would reach only with great reluctance.”)

In *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993), the Supreme Court made clear that claims like Ms. Andersen’s cannot proceed unless a plaintiff has pled that the underlying litigation-related activities were “objectively baseless in . . . that no reasonable litigant could realistically expect success on the merits.” The Court further held that the existence of “probable cause,” defined as a “reasonable belief that there is a chance . . . that [a] claim may be held valid upon adjudication,” is an absolute

bar to claims like Ms. Andersen's, *id.*, because "*an objectively reasonable effort to litigate cannot be sham*" for *Noerr-Pennington* purposes "regardless of subjective intent." *Id.* at 57 (emphasis added). Therefore, as long as probable cause existed for the Enforcement Program and the suit against Ms. Andersen, her numerous (and totally unsupported) allegations about the Record Companies' motives are legally irrelevant. *See, e.g.*, Fourth Amended Complaint ("Compl.") (doc. no. 58) ¶¶ 1.3, 6.2 (purpose was to spread fear and intimidation; not to protect copyrights); Brief in Support of Plaintiff's Motion for Class Certification ("Pl. Br.") (doc. no. 121) at 3 (purpose was to preserve a monopoly over the distribution of recorded music).

Notwithstanding ample opportunity for discovery, Ms. Andersen's case has not advanced beyond unsubstantiated, conclusory argument. This is perhaps best illustrated by the five reasons she has asserted as to why she believes, mistakenly, that the Enforcement Program falls within the extremely narrow (and rarely successful) "sham litigation" exception to *Noerr-Pennington* immunity. *See* Pl. Br. at 3-16.

First, and most significantly, Ms. Andersen objects to the Enforcement Program because it was based on the use of a specific IP address, assigned to a computer by an Internet Service Provider ("ISP"), "to identify and sue an ISP account." Pl. Br. at 4. Ms. Andersen contends that an IP address is too circumstantial a basis on which to claim that any specific individual is engaged in infringement, because it does not exclude the possibilities that the acts of infringement actually may have been committed (1) by someone "spoofing" the IP address, (2) by someone purloining another person's broadband Internet access (wired or wireless), (3) by a third party visitor to an account holder's home, or (4) as a result of some other possible explanation of innocence.

Ms. Andersen's effort to attack IP addresses as a basis on which to proceed towards litigation is misplaced. It is well-settled that collection of an IP address, which has been documented as having engaged in improper activity, suffices as probable cause, in both criminal and civil cases (including prior analyses of this Enforcement Program) to proceed against the person to whom that IP address was registered. *See infra* pp. 12-21.

Ms. Andersen's factual record does not contest either that her ISP, on three separate occasions, confirmed to the Record Companies that the particular IP address in dispute was registered to her, or that this same IP address was in fact used to share copyrighted music. Her only factual challenge to probable cause is the unspecified contention that, somehow, someone else mistakenly was linked to her IP address. Compl. ¶¶ 7.18-7.22. Ms. Andersen argues that this possibility rendered the entire Enforcement Program invalid. *Id.* ¶ 8.7. Even accepting as true, for purposes of this motion, that she was not responsible for the infringement committed on the IP address her ISP said was registered to her, however, her complaint runs headlong into the Ninth Circuit's *Sosa* ruling.

As discussed in detail below, *Sosa* affirmed the existence of probable cause, and thus the applicability of *Noerr-Pennington* immunity, on much more general evidence and legal theories than that on which the Enforcement Program and the litigation against Ms. Andersen were based. The Ninth Circuit held that even though DirecTV had no proof of infringement of its signal, records showing that 100,000 persons were in possession of devices that *could have* been used for piracy (a) satisfied the probable cause standard, (b) justified DirecTV's enforcement program against these 100,000 persons and (c) triggered *Noerr-Pennington* immunity. By definition, *Sosa* countenances the possibility that liability ultimately might not

be established. Because *Sosa* nonetheless found probable cause existed, it disposes of Ms. Andersen's principal objection to the Enforcement Program. *See infra* pp. 15-17.

Second, Ms. Andersen argues that Media Sentry was required to hold state "private investigator" licenses, but did not. That allegation, however, is irrelevant to the application of *Noerr-Pennington* immunity in this case. The IP address of a computer attached to a P2P network, and screen shots of the names of songs the user of that computer seeks to download or offers to upload, are readily and publicly available to any user of a P2P network. The only relevant question is whether that evidence meets the probable cause standard. Multiple cases, in a variety of contexts, hold that it does. *See infra* pp. 21-22.

Third, Ms. Andersen claims, in conclusory fashion without any factual support or citation, that the Record Companies acted improperly by "enter[ing]" publicly-available shared file folders. Pl. Br. at 4-5. This allegation also fails as a matter of law. It is well-settled that one has no basis for objecting to the "entry" into shared file folders which, by definition, one has made publicly available to the online world. *See infra* p. 24.

Fourth, Ms. Andersen's objections to the use of *Doe* proceedings and *ex parte* subpoena requests also fail as a matter of law, particularly given the number of contested *Doe* subpoena proceedings resolved in the Record Companies' favor. *See infra* pp. 22-24.

Fifth, and finally, in a set of allegations that relate solely to her, but not to any other member of the class she purports to represent, Ms. Andersen also contends the Record Companies continued to litigate against her even after they knew or should have known that she was not the "Gotenkito@kazaa" infringer they contended she was and that she had been misidentified as such by her Internet Service Provider. Compl. ¶ 7.12. These allegations,

however, also fall well short of demonstrating that the case against her had become “objectively baseless,” and also are barred by *Noerr-Pennington*. See *infra* pp. 24-25.

Because the existence of probable cause absolutely precludes a finding of sham litigation, *Prof. Real Estate*, 508 U.S. at 60, and because Ms. Andersen’s challenge to probable cause (1) is based only on conclusory statements and (2) rests on theories courts already have uniformly rejected, her claims fail as a matter of law.

FACTUAL BACKGROUND

The Record Companies face the systemic problem of massive digital piracy of copyrighted works over the Internet. Individuals, acting without authorization, have downloaded (copied) and uploaded (distributed) billions of perfect digital copies of copyrighted sound recordings over P2P networks. See, e.g., Lev Grossman, “It’s All Free,” *TIME*, May 5, 2003. The Supreme Court has characterized this problem as “infringement on a gigantic scale,” see *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 940 (2005) and it has wreaked financial havoc in the recording industry.

In 2004, the Department of Justice concluded that online media distribution systems are “one of the greatest emerging threats to intellectual property ownership.” See Report of the Department of Justice’s Task Force on Intellectual Property, available at <http://www.cybercrime.gov/IPTaskForceReport.pdf> at 39 (October 2004) (“Task Force Report”). It estimated that “millions of users access P2P networks” and “the vast majority” of those users “illegally distribute copyrighted materials through the networks.” *Id.* See also *Grokster*, 545 U.S. at 923 (users employed P2P software “primarily to download copyrighted files.”) As the Seventh Circuit held in *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir.

2005), “[m]usic downloaded for free from the Internet is a close substitute for purchased music; many people are bound to keep the downloaded files without buying the originals.”

Recording companies, motion picture producers and others similarly affected by the massive scope of the online infringement problem plainly have the right to petition the federal government, including the federal courts, to stop this piracy. They exercised that right judiciously. They did not begin by pursuing individual infringers, but first established in the specific context of the unauthorized online “sharing” of copyrighted works that (1) when individuals use a system or network directly to infringe copyrighted material, the proprietors of that system can be secondarily liable for copyright infringement, *Grokster*, 545 U.S. at 940, and (2) (most importantly for purposes of this motion) that, in all cases, the individuals who “swap” music files over the Internet ultimately remain “the direct infringers.” *In re Aimster Copyright Litigation*, 334 F.3d 643, 654-55 (7th Cir. 2003). *See also Gonzalez*, 430 F.3d at 889 (those who post or download music files are “primary infringers”); *A&M Records, Inc. v. Napster*, 239 F.3d 1004, 1022-24 (9th Cir. 2001).

The successful secondary liability litigation against the proprietors of P2P networks did not, in and of itself, stop those networks from being used by individuals engaged in the unauthorized copying of sound recordings. As the *Aimster* court noted, individuals remained “disdainful of copyright and in any event ***discount the likelihood of being sued or prosecuted for copyright infringement.***” 334 F.3d at 645 (emphasis added). That “discount” was attributable, in large part, to the mistaken belief by end-users that they could not be located online, or, if located, could not be personally identified. *See* Task Force Report at 39-40. Accordingly, in 2002, the Record Companies decided, reluctantly, to commence the more

broadly-based Enforcement Program, designed to identify and pursue the direct infringers pirating a large number of their works. *See* Compl. ¶ 7.1.

The relevant elements of the Enforcement Program are well known and of public record. The Record Companies engaged a firm, MediaSentry, to create a documented, replicable process for gathering evidence of infringement associated with users identified by their IP addresses. To perform this task, MediaSentry searched P2P networks for individuals distributing infringing files for download and gathered evidence concerning that infringement, including the IP address of each individual. Once those IP addresses had been identified, the Record Companies chose cases they wished to pursue and commenced “Doe” actions against the individuals responsible for the IP addresses seen unlawfully distributing copies of sound recordings. The Record Companies then used the discovery process to obtain the ISPs’ records identifying these individuals. *See Atlantic Recording Corp. v. Heslep*, 2007 WL 1435395 at *1-*3 (N.D. Texas, May 16, 2007) (explaining MediaSentry’s actions and the subsequent *Doe* proceedings, emphasizing “that MediaSentry uses the very program employed by the alleged infringing user.”)

In Ms. Andersen’s case, MediaSentry identified a person with the screen name “gotenkito” as being logged on to the KaZaA P2P network to share copyrighted music unlawfully, early in the morning of May 20, 2004. Compl. ¶ 7.18. Nowhere in Ms. Andersen’s complaint or class certification motion does she contest that the IP address used by “gotenkito” was 4.41.209.23, nor does she contest that Verizon identified this address as having been assigned to her Verizon account. After verifying that the files “gotenkito”

distributed were, in fact, copies of the Record Companies' copyrighted material, the Record Companies filed a Doe case against the alleged infringer using this IP address.

Once Verizon connected Ms. Andersen's account to that address, the Record Companies sent her a Presuit-Naming Letter ("PNL"). Ms. Andersen's letter, to which she refers in her Complaint (¶ 7.13), is attached as Exhibit A to the annexed Declaration of Jeffrey S. Jacobson ("Jacobson Decl."). The PNL invited the recipient to contact the Record Companies' settlement agent to discuss a resolution. If a mutually satisfactory resolution was not reached, the Record Companies might (and, in Ms. Andersen's case, did) pursue a claim for copyright infringement.

The Court may take judicial notice that multiple other courts have examined this same Enforcement Program and rejected claims, similar or identical to Ms. Andersen's. *See infra* pp. 15-16. The only difference in Ms. Andersen's case is that, although the Record Companies developed significant evidence of her liability, they also had conflicting evidence. That evidence, while not completely exculpating Ms. Andersen, ultimately led them to discontinue the litigation against her. When the Record Companies dismissed her lawsuit, Ms. Andersen moved to recover attorneys' fees as a prevailing party under Section 505 of the Copyright Act. Magistrate Judge Ashmanskas awarded her \$107,834.00, which the Record Companies objected to, but paid.

ARGUMENT

I. *Noerr-Pennington* Sets A High Standard For Tort Claims And Should Be Applied In Favor Of Finding Immunity.

Ms. Andersen claims that, at the time the Record Companies pursued her and others, they lacked a reasonable belief or probable cause to bring suits or even write demand letters,

because the information they had was “known to result in the misidentification” of individuals and was, therefore, not irrefutable. Compl. ¶ 8.7, Pl. Br. at 14. The standard for *Noerr-Pennington* immunity, however, is not irrefutable evidence, conclusive evidence or 100% perfect knowledge. Because liberal application of “the sham exception to the *Noerr-Pennington* rule may have a chilling effect on those who seek redress in the courts . . . the exception should be applied with caution.” *Columbia Pictures*, 944 F.2d at 1531.

For that reason, when considering whether litigation related activities were a “sham,” a court cannot simply assess, by looking at the end result, that a suit should not have been brought or maintained. Rather, in analyzing Ms. Andersen’s claim that the Enforcement Program and suits filed under it were a “sham,” the applicable standard, as set forth by the Supreme Court, is whether the Record Companies had, at the outset, absolutely no “*reasonable belief* that there [was] *a chance* that [their] claim [would] be held valid upon adjudication.” *Professional Real Estate Investors*, 508 U.S. at 60 (emphasis added).

Measured this way, it is clear that the record on which Ms. Andersen relies does not satisfy Supreme Court and Ninth Circuit standards for establishing sham litigation. In *Professional Real Estate Investors*, the Supreme Court held that “[t]he existence of probable cause . . . precludes a finding . . . [of] sham litigation, *id.* at 62, and sham litigation exists only if “a lawsuit is . . . *i.e.*, ‘objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.’” The Ninth Circuit, elaborating on this test, wrote that “an objectively reasonable effort to litigate cannot be sham regardless of subjective intent,” and “proof of a lawsuit’s objective baselessness is the ‘threshold prerequisite: A court may not even consider the defendant’s allegedly illegal objective unless it first determines that

his lawsuit was objectively baseless.” *White*, 227 F.3d at 1232, quoting *Professional Real Estate Investors*, 508 U.S. at 55-57.

II. The Record Companies Had An Objective Basis For Initiating Proceedings Against Ms. Andersen.

Ms. Andersen contends that the lawsuits against her and others were a “sham” principally because, as she views it, the method the Record Companies used to initially identify suspected infringers (IP addresses, which she contends do not definitively prove that the owner of the address was the actual infringer), lacked precision. Compl. ¶ 8.74; Pl. Br. at 4, 10-13. Viewed through the *Noerr-Pennington* lens, however, and against the backdrop of extensive authority holding that IP addresses *do* provide probable cause to commence litigation against the ISP account owners associated with those addresses, Ms. Andersen’s allegations fall far short of stating a claim that the Record Companies could not have had a reasonable belief in at least a chance of success against her.

A. Other Enforcement Program Cases Have Upheld The Use Of IP Addresses As A Basis For Commencing Actions.

Numerous courts already have considered and rejected the argument that the Enforcement Program was a “sham” because the complaints did not allege all of the necessary facts supporting individual liability. As a court stated recently when dismissing, on *Noerr-Pennington* grounds, similar counterclaims in another Enforcement Program case:

Plaintiffs have well-pleaded that their protected, copyrighted materials were being shared over a specific IP address that has been identified as belonging to the Defendant. Defendant’s retort that Plaintiffs cannot establish that he actually used the computer on the occasion charged in the Complaint does not diminish Plaintiffs’ claim that songs were being illegally shared, thereby creating ample probable cause to institute a copyright infringement action. The Court finds that Plaintiffs’

Complaint is not “objectively baseless,” and that the “sham litigation exception” does not apply.

Motown Record Co., L.P. v. Kovalcik, 2009 WL 455137, at *4 (E.D. Pa. Feb. 23, 2009).

Similarly, in *Atlantic Recording Corp. v. Raleigh*, No. 4:06-CV-1708, 2008 WL 3890387, (E.D. Mo. Aug. 18, 2008), the defendant “d[id] not deny that plaintiffs linked the allegedly infringing activity to the IP address of a computer to which she had access[,] . . . but state[d] that she *resided in a sorority house* and owned a computer that was not password-protected, and *thus any one of the house’s residents could have used her computer* to engage in unlawful infringement.” *Id.* at *3 (emphasis added). Ms. Andersen repeatedly urges this same rejected point. *See* Pl. Br. at 4 (citing as the core problem with using “an ISP account” as the basis for the Enforcement Program that the account could have been associated with a business, a house, an apartment, *or a dormitory room*, any of which could have been occupied or visited by any number of individual persons”) (emphasis added). *See also* Compl. ¶¶ 7.5-7.6; 7.18-7.22; Pl. Br. at 4. (“[A]t its best the [Enforcement Program] was devised only to identify a computer device serviced by an [ISP] and associated with an [IP] address.”); *id.* at 14 (“Defendants could not have known...the identity of any given person who might have participated in any alleged infringing activity at any given time”); Compl. ¶ 7.3 (“Media Sentry is . . . capable of identifying an Internet Protocol (IP) address that may have been associated with or assigned to a particular computer or routing device,” but the infringement also could have been committed by a guest in the owner’s home, by someone accessing the owner’s broadband service unlawfully, or by someone “spoofing” an IP address); Pl. Br. at 9-10 (purporting to list, without any factual citation to expert or other evidence, “several critical facts that Defendants could never know or prove based solely” on the IP address).

Neither Ms. Andersen's contentions, nor the virtually identical challenge brought by the defendant in *Raleigh*, trump *Noerr-Pennington* immunity. The *Raleigh* court found that, having linked the defendant's IP address to infringement, the Record Companies had probable cause to initiate the lawsuit, and dismissed the defendant's counterclaims under *Noerr-Pennington*. See 2008 WL 3890387, at *4. Other courts have reached the same conclusion. See, e.g., *Interscope Records v. Does 1-12*, Civ. No. 08-187, 2008 WL 4939105, at *2 (N.D. Ind. Nov. 14, 2008) ("Doe's argument that the court must demand evidence that a defendant has engaged in wrongful conduct fails when compared to plaintiffs' rights [under the Copyright Act] . . . because the IP addresses have traced the users and reveal the necessary distribution of copyrighted music recordings."); *Heslep*, 2007 WL 1435395, at *6 (N.D. Texas, May 16, 2007) ("[t]he evidence uncovered from MediaSentry's investigation shows that Plaintiffs' allegations of Heslep's alleged copyright infringement have evidentiary support and will likely have more evidentiary support through further investigation and discovery"; rejecting claim of "sham").

In Ms. Andersen's case, she acknowledges (Compl. ¶ 7.12), and the record in the underlying case confirms, that Verizon identified her to the Record Companies as the owner of the address that apparently had been used for infringement. (In fact, Ms. Andersen now knows through discovery that, when the Record Companies *twice* acted on her protestations by asking Verizon to reconfirm its identification, Verizon *both* times provided that additional confirmation.) This establishes that probable cause existed.

B. The Use Of IP Addresses Provided An Objective Basis For Litigation Even Stronger Than That Found Sufficient In *Sosa*.

The Record Companies' Enforcement Program parallels that which the Ninth Circuit found protected in *Sosa*, but more closely ties the infringer to the infringing conduct. In *Sosa*, DirecTV's signal was being intercepted by individuals using improper means (in DirecTV's case, equipment used to program "smart cards" that can descramble satellite TV signals) to obtain access to DirecTV's programming without paying for it. 437 F.3d at 926. To combat that problem, DirecTV began by "initiat[ing] litigation against several companies selling smart card programming technology. In the course of this litigation, DirecTV obtained lists of the names and addresses of numerous individuals who had purchased such equipment." *Id.*

Using these lists, DirecTV sent letters to over 100,000 individual purchasers of smart card programming equipment, asserting that DirecTV had records showing that the recipient had used the equipment to steal its signal, accusing the recipient of violating a criminal statute, and threatening civil legal action unless the recipient forfeited the equipment to DirecTV and paid DirecTV an unspecified sum to settle its claim. When a number of recipients contacted DirecTV by telephone to protest their innocence of the alleged conduct, DirecTV repeated its accusations and threats to sue. Rather than incur the expense of engaging an attorney to respond, some allegedly innocent recipients, including the three named plaintiffs, paid DirecTV thousands of dollars to settle the claims.

Id. at 926-27.⁴

The Ninth Circuit found that DirecTV's sending PNL letters to more than 100,000 purchasers of smart card programming equipment, or more than three times the number contacted in the Record Companies' enforcement program, was entitled to *Noerr-Pennington*

⁴ A copy of the pre-suit notification letter at issue in *Sosa*, obtained from the appellate record in that case, is attached as Jacobson Decl. Ex. B.

immunity. It thus affirmed the district court's dismissal, on a Rule 12(b)(6) motion, of the plaintiff's class action claims against DirecTV. It held that even though, when DirecTV sent those letters, it did not possess any direct proof of "the uses to which these individuals were putting this [smart card] equipment," and did not know "whether any particular individual" used the equipment to receive a DirecTV signal, immunity still applied. *Sosa*, 437 F.3d at 926. The Ninth Circuit concluded that, even though the claims asserted in its pre-suit letters might have been "weak," *id.* at 939, and even if the letters misrepresented the law and oversold the nature of DirecTV's alleged proof, DirecTV's litigation program nonetheless had an objective basis and thus was protected under *Noerr-Pennington*. *See id.* at 942.⁵

DirecTV's enforcement program, which began by alleging liability based on the reported purchase of a device that only *potentially* may have been used to pirate DirecTV's content, stands in sharp contrast to that undertaken by the Record Companies. The Enforcement Program Ms. Andersen challenges initiated claims against suspected infringers only after particular IP addresses *actually were documented in the act* of infringement. Compl. ¶¶ 7.18. This much more direct and focused Enforcement Program is, *a fortiori*, entitled to *Noerr-Pennington* protection. Ms. Andersen's objections to letters sent on behalf of the Record Companies, Pl. Br. at 6-7, and to any subsequent litigation efforts, Pl. Br. at 3-4, do not satisfy the high threshold for establishing that the Enforcement Program was a sham.

⁵ Multiple courts assessing the same enforcement program also dismissed claims arising from DirecTV's enforcement program after finding those claims to be barred by *Noerr-Pennington*. *See, e.g., Ellebracht v. DirecTV, Inc.*, No. 4:05CV02180 ERW, 2006 WL 1698329 (E.D. Mo. June 7, 2006); *DirecTV, Inc. v. Weikel*, No. Civ. 03-5300(JBS), 2005 WL 1243378 (D.N.J. May 25, 2005); *DirecTV, Inc. v. Lewis*, No. 03-CV-6241-CJS-JWF, 2005 WL 1006030 (W.D.N.Y. Apr. 29, 2005).

C. Internet Protocol Addresses Repeatedly Have Been Upheld, In Other Criminal And Civil Contexts, As Providing Probable Cause.

As noted, Ms. Andersen's objection to IP addresses as the basis for the Enforcement Program is substantively identical to the argument the Ninth Circuit specifically rejected in *Sosa*: That owning smart card programming equipment was insufficient proof of whether, how (or by whom) the equipment was used to trigger *Noerr-Pennington* protection. *See* 437 F.3d at 942 (noting that even though "the dispositive issue would not be what . . . records showed about Sosa's activities, but what those activities actually were," a fact obviously not knowable before discovery was completed, probable cause existed to commence enforcement proceedings against Sosa).

The flaws with Ms Andersen's arguments, however, go further than *Sosa*. It is well-settled that, even if a screen capture of unlawful activity at a specific IP address may not be conclusive of ultimate liability, it plainly suffices as probable cause. Virtually every case pertaining to wrongful conduct online has been predicated on exactly the same type of IP address capture and subsequent ISP identification of the subscriber assigned that address. *See generally Napster*, 239 F.3d at 1012 (Napster used its knowledge of users' Internet addresses to facilitate file uploads and downloads of infringing copies); *Sony Pictures Home Entertainment Inc. v. Lott*, 471 F. Supp. 2d 716, 719 (N.D. Tex. 2007) ("The unique IP address . . . assigned to the user by SBC . . . at the date and time that the infringement . . . occurred provide[s] the information necessary to connect an IP address engaging in infringing activity with the infringer's identity"); *Sony Music Entertainment, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 559 (S.D.N.Y. 2004) ("[a]n ISP can identify the computer from which the alleged infringement occurred and the name and address of the subscriber controlling the

computer when it is provided with a user's IP address and the date and time of the allegedly infringing activity.") Indeed, were this not the case, copyright owners would have little or no ability ever to pursue direct infringers on the Internet.

Even in the rigorous criminal context, evidence of a link between an IP address and unlawful conduct consistently has been recognized as providing probable cause to obtain identifying information about the user associated with that address and to commence litigation. *See, e.g., United States v. Sloan*, 2009 WL 118080, at *1 (9th Cir. Jan. 8, 2009) (where subpoena revealed IP address registered to defendant was associated with files confirmed to contain child pornography, "district court correctly concluded that the officers had probable cause "to place defendant in custody"); *United States v. Ganoe*, 538 F.3d 1117, 1119, 1127 (9th Cir. 2008) (conviction affirmed; file sharing program commonly used to download both music and child pornography enabled investigator to "determine downloads originated from a computer with a particular IP address assigned to the defendant; resulting search did not violate defendant's expectation of privacy); *United States v. Hay*, 231 F.3d 630, 635-36 (9th Cir. 2000) (child pornography conviction affirmed; search warrant affidavit "set forth evidence which linked the 19 files to Hay's apartment by tracing the IP address . . . to the computer in Hay's apartment that Hay told government agents he used exclusively"); *United States v. Perez*, 484 F.3d 735, 740 (5th Cir. 2007) (specifically rejecting the argument that "mere association between an IP address and a physical address is insufficient to establish probable cause"; FBI agents had probable cause to search a residence where "[t]he affidavit presented to the magistrate included the information that the child pornography viewed by the

witness . . . had been transmitted over the IP address 24.27.21.6, and that this IP address was assigned to Javier Perez, residing at [that residence].”).

Ms. Andersen’s contention that no evidentiary basis existed for suing her despite the IP address, *see* Compl. ¶8.8, rests on the same reasoning rejected in *United States v. Carter*, 549 F. Supp. 2d 1257, 1268-69 (D. Nev. 2008). There, the defendant, charged with possession of child pornography, submitted an expert affidavit raising the possibilities: (a) that outside persons could have “hijacked” his wireless connection and IP address; (b) someone “spoofed” his IP address; or (c) that multiple devices may have been connected to the Internet using the same IP address he had been assigned. *Compare* Pl. Br. at 10-13 (making virtually identical arguments). The Court held that, even though these possibilities could not be excluded and theoretically could have resulted in misidentification, the link between the IP address assigned to Carter and his home address was sufficient. It therefore found probable cause existed, based on the use of an IP address to download child pornography, and denied the defendant’s motion to suppress the evidence of such images found on his home computer. *Carter*, 549 F. Supp. 2d at 1269. The Court further noted that neither certainty, nor a preponderance of the evidence, is required for probable cause and that common sense plays an important role in analyzing whether there is a “fair probability” that contraband or evidence of wrongdoing will be located. *Id.* at 1266-67.

Similarly, in civil, non-copyright litigation, courts have upheld complaints alleging a link between an IP address and tortious conduct as a reasonable basis on which to proceed with litigation against specific individuals. *See Doe I v. Individuals*, 561 F. Supp. 2d 249, 252, 255-57 (D. Conn. 2008) (in libel action, refusing to quash subpoena to ISP requiring

disclosure of “the identity of the person assigned to the IP address from which an individual using the pseudonym ‘AK47’ posted comments,” and observing that “AT&T’s subscriber data is the plaintiffs’ only source regarding the identity of AK47”); *Kimberlite Corp. v. John Does 1-20*, Civ. No. 08-2147, 2008 WL 2264485, at *2 (N.D. Cal. Jun. 2, 2008) (Computer Fraud and Abuse Act claim; “Kimberlite has adequately set forth a claim for relief against the IP address holder whose identity it seeks, and it is therefore proper for Kimberlite to subpoena the internet service provider to obtain such information.”); *see also Doe v. Cahill*, 884 A.2d 451, 455 (Del. 2005) (“if the ISP knows the time and the date that postings were made from a specific IP address, it can determine the identity of the subscriber.”).

These authorities all stand for the proposition that, having documented the existence of unauthorized copies of sound recordings linked to specific IP addresses, the Record Companies had an objective basis to pursue cases against Ms. Andersen and others who were identified by their ISPs as the owners of those addresses. Moreover, when coupled with the well-settled law that end-users directly infringe when they download or upload unauthorized copies of sound recordings, *Grokster*, 545 U.S. at 918-24; *Aimster*, 334 F.3d at 645; *Napster*, 239 F.3d at 1012, the Record Companies had ample probable cause to believe that individuals associated with the IP addresses at which unauthorized copies of sound recordings were located ultimately would be found liable for infringement.

Based on these holdings, the Record Companies were entirely justified in pursuing users of P2P systems for infringement based on IP addresses and in suing them once they were identified by their ISPs. That Ms. Andersen lists, without support, a host of possible flaws with the use of IP addresses as the first step in the Enforcement Program (Pl. Br. at 10-

13) does not change this conclusion. These same supposed shortcomings have been considered and rejected, by courts across the country, as insufficient to strip away the probable cause that exists when unlawful online conduct is linked to a specific IP address. In short, Ms. Andersen's hypothetical attacks on IP addresses do not satisfy the stringent sham litigation exception.

D. Neither The Supposed Need For "Private Investigator" Licenses, The Use Of Doe Proceedings, Nor Allegations About "Entered Computers" Establish Sham Litigation.

Ms. Andersen contends that MediaSentry operated unlawfully because it did not obtain "private investigator" licenses.⁶ For purposes of *Noerr-Pennington*, nothing flows from this dispute over licensing because it is irrelevant to the question of whether the IP address of a computer used for an improper purpose provides probable cause to commence an action against the registered owner of that address. In purely civil matters, not involving any government action that would trigger the Fourth Amendment, the absence of a license is no basis for excluding evidence. *See, e.g., Mejia v. City of News York*, 119 F. Supp. 2d 232, 254 (S.D.N.Y. 2000) ("the Fourth Amendment's exclusionary rule does not apply in civil actions other than civil forfeiture proceedings."), *citing Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363 (1998); *Nutrasweet Co. v. X-L Eng'g Corp.*, 926 F. Supp. 767, 769 (N.D. Ill. 1996) ("[T]he Fourth and Fourteenth Amendments do not require in civil cases that

⁶ Although officials in a handful of states have raised the question of whether MediaSentry should have obtained a license, no state authority, after a determination on the merits, has *concluded* such a license was needed. In fact, in the only contested proceeding to date, the relevant authorities in North Carolina dismissed the lawsuit brought by another Enforcement Program defendant who had argued that MediaSentry needed a license. *See Virgin Records America, Inc. v. Doe*, 2009 WL 700207 (E.D.N.C. Mar. 16, 2009) (summarizing North Carolina decision).

the exclusionary rule be extended to situations where private parties seek to introduce evidence obtained through unauthorized searches made by state officials.”). *See also TNT Road Co. v. Sterling Truck Corp.*, 2004 WL 1626248, at *2 (D. Me. July 19, 2004) (even “[a]ssuming that [the expert] was required by Maine law to have a license to conduct his investigation of the vehicle fire in this case, I am not persuaded that his failure to do so justifies the exclusion of his testimony. Nor do I think that his failure to obtain a license prevents the court from considering his expert qualifications or the reliability of his investigatory methods.”).

Ms. Andersen’s complaint that the Record Companies engaged in sham litigation because they used *ex parte* subpoena applications in *Doe* actions is equally unavailing. The *Doe* procedure repeatedly has been upheld as proper and, therefore, cannot be the basis for sham litigation. In *Interscope Records v. Does 1-12*, 2008 WL 4939105 at *1, after the ISP received a subpoena, it notified the affected subscribers (as the Record Companies specifically encouraged all ISPs to do). One of the “Doe” defendants appeared through counsel and sought to quash the subpoena, arguing that the Record Companies’ complaint “d[id] not allege a *prima facie* case of copyright infringement.” *Id.* at *1. Finding that “caselaw supports the proposition that making a digital file available to others on a P2P platform is the equivalent of copying and/or distributing for copyright purposes,” and that “there is no question that the identity of the Doe defendant is relevant to the claims,” the court denied the motion to quash and ordered the Doe defendant’s identity disclosed. *Id.* at *2, citing, *inter alia*, *Arista Records LLC v. Does 1-19*, 551 F. Supp. 2d 1, 8 (D.D.C. 2008); *Fonovisa, Inc. v. Does 1-9*, 2008 WL 919701 (W.D. Pa. Apr. 3, 2008); *Arista Records LLC v.*

Does 1-43, 2007 WL 4538697, at *1 (S.D. Cal. Dec. 20, 2007); *Arista Records LLC v. Does 1-11*, Civ. A. No. 07-568 (W.D. Okla. Nov. 14, 2007). See also *Sony Music Entertainment Inc. v. Does 1-40*, 326 F. Supp. 2d at 559 (refusing motion of Doe defendants to quash subpoena); *Virgin Records America, Inc. v. Doe*, 2009 WL 700207 at *3 (in context of denying motion to quash, rejecting claims that the MediaSentry's lack of a license should affect whether subpoena should issue.).

Moreover, as is evident from these numerous opinions, it is not as if the *ex parte* process precludes a Doe, or a Doe's ISP, from challenging a subpoena request. Multiple *Doe* actions have involved contested applications for discovery. Ms. Andersen's unsupported statement that because of *ex parte* maneuvers, subpoenas "were almost invariably unopposed," Pl. Br. at 6, is completely undercut by facts of which this Court may take judicial notice.

Finally, Ms. Andersen alleges, again without a single factual citation, that MediaSentry "entered[ed] private individual computers to search in "shared" file folders." Pl. Br. at 4-5; Compl. ¶ 7.8 (alleging, in addition, that files were "manipulated"). The suggestion that there is anything actionable, or even untoward, in documenting the sound recordings that users on a P2P network have placed in a shared folder connected to the Internet has been repeatedly rejected. It is well-settled that there is no invasion of privacy or other impropriety when "an individual subscriber opens his computer to permit others" to see what is stored there because he has "essentially open[ed] the computer to the world." *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 267 (D.D.C. 57); *Fonovisa, Inc.*, 2008 WL 919701 at *8-*9

(same). It is the use of shared folders, not any improper entry, that allowed MediaSentry to collect proof of unauthorized sharing.

III. The Record Companies' Post-Filing Conduct Against Ms. Andersen Also Enjoys *Noerr-Pennington* Immunity.

Ms. Andersen also pleads claims, relating to herself but not the putative class, objecting to the continued pursuit of the litigation against her even after, in her view, discovery had exonerated her. The “real ‘Gotenkito,’” Ms. Andersen contends, was “a young man in Everett, Washington,” whose “MySpace webpage . . . described his interest in computers and music and even admitted downloading copyrighted materials.” Compl. ¶ 7.20. The Record Companies knew of this individual as early as “September 2006,” Ms. Andersen says (Compl. ¶ 7.22), and therefore should not have continued to litigate against her and should not, in particular, have subsequently sought the deposition of her minor daughter.

These claims also cannot withstand *Noerr-Pennington* scrutiny. The hurdle these claims must clear, set forth in *Professional Real Estate*, is the same: Ms. Andersen must plead facts sufficient to show that the Record Companies continued to press their case against her despite the suit having become so “objectively baseless” that “no reasonable litigant could realistically expect success on the merits.” Although the Record Companies discovered some conflicting evidence concerning the identity of “Gotenkito,” they certainly had the right to investigate these facts through discovery before ultimately electing to dismiss their claims against Ms. Andersen. Even at that point, they still had (and have) unrefuted evidence that she had been properly identified, including her admission at deposition that a friend had installed the KaZaA “Lite” file-sharing program on her computer. In addition, Ms. Andersen’s daughter, whom Ms. Andersen’s Rule 26(a)(1) disclosures identified as a

knowledgeable witness, was shown to be a fan of the television show “Dragonball Z,” which features a character called “Goten,” like the “Gotenkito” username.

Under these circumstances, that another individual may have used the name “Gotenkito” on an unrelated Internet site did not make it objectively unreasonable for the Record Companies to continue to litigate against Ms. Andersen, at least for the period before voluntarily dismissing their action in June 2007, or to have sought a brief telephonic deposition from her daughter, whom Ms. Andersen specifically identified as a knowledgeable witness, as part of this process. *See* Compl. ¶ 7.30.⁷

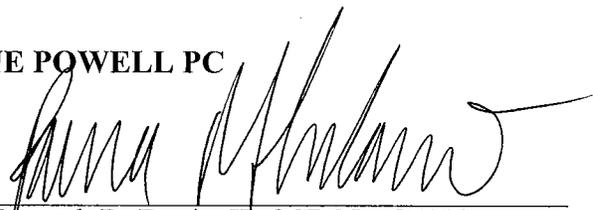
⁷ Ms. Andersen sought a protective order barring her daughter’s deposition, but the court ordered that it go forward by telephone or videoconference. *See* Docket entry # 109. That this deposition occurred pursuant to court order should preclude Ms. Andersen from using it as a basis for an “abuse of process” claim.

CONCLUSION

For the foregoing reasons, the Record Companies respectfully request the Court to dismiss the Fourth Amended Complaint with prejudice.

DATED: April 15, 2009

LANE POWELL PC

By 

Kenneth R. Davis, II, OSB No. 97113
William T. Patton, OSB No. 97364
Parna A. Mehrbani, OSB No. 05323
(503) 778-2100

Timothy Reynolds, *Admitted Pro Hac Vice*
timothy.reynolds@hro.com
HOLME ROBERTS & OWEN LLP

Jeffrey S. Jacobson, *Admitted Pro Hac Vice*
jsjacobson@debevoise.com
DEBEVOISE & PLIMPTON LLP

Attorneys for Defendants Atlantic Recording Corporation, Priority Records LLC, Capitol Records, Inc., UMG Recordings, Inc., BMG Music, Recording Industry Association of America, and Settlement Support Center, LLC