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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

**TANYA ANDERSEN**,

No. 3:07-CV 07-934 BR

Plaintiff,

v.

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

Defendants.

**RECORD COMPANIES’  
MEMORANDUM  
IN OPPOSITION TO  
PLAINTIFF’S MOTION FOR  
CLASS CERTIFICATION**

**ORAL ARGUMENT REQUESTED**

RECORD CO. DEFENDANTS’ MEMO IN OPPOSITION TO CLASS CERTIFICATION

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## INTRODUCTION

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 the “Record Companies”), and Safenet, Inc. (“MediaSentry”) oppose Ms. Andersen’s motion for class certification because she has not satisfied and cannot satisfy the rigorous requirements of Federal Rule of Civil Procedure 23.

Ms. Andersen’s claims rest on her contention that she herself was not one of the people who infringed the Record Companies copyrighted sound recordings “on a gigantic scale,” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940 (2005). She argues that, at the time the Record Companies initiated claims against her and others who were the registered owners of particular Internet Protocol (“IP”) addresses from which acts of infringement were seen to have occurred, the Record Companies could not completely exclude the possibility that someone besides the registered owner of the address had infringed from that address.<sup>1</sup> Ms. Andersen claims she was improperly targeted (Compl. ¶ 1.5), hypothesizes that at least some others were, too, and seeks to certify a class comprising “[t]hose who were sued . . . or were threatened with suit by Defendants, for copyright infringement . . . *who have not engaged in violation of copyright laws.*” Plaintiff’s Class Certification Brief (“Pl. Class Br.”) at 2 (emphasis added).

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<sup>1</sup> Ms. Andersen’s claims are precluded by the *Noerr-Pennington* doctrine as interpreted by the Ninth Circuit in *Sosa v. DirecTV, Inc.*, 437 F.3d 923 (9th Cir. 2006). As explained in Defendants’ Memorandum In Support of Summary Judgment (“*Noerr-Pennington* Brief”), the documentation of IP addresses of computers being used to upload and download copyrighted music files, and the subsequent identification of the owners of those addresses by their Internet Service Providers (“ISPs”), provided ample probable cause to commence proceedings against those owners.

As a matter of controlling Ninth Circuit law, this class cannot be certified. Putting aside that the Record Companies' nationwide enforcement program (the "Enforcement Program") was cautious, thorough and well-grounded in existing law, the certification theory Ms. Andersen advances has been repeatedly rejected. For a proposed class to be certified, its membership must be capable of determination — right now, at this stage of the litigation — on an *objective* basis. Examples of an objective basis include one's employment status or purchase of a particular product or service at a given time. Ms. Andersen's proposed class definition, by contrast, turns on the conditional, merits-based criterion of whether one did or did not "engage in violation of copyright laws." For that reason, no one against whom the Record Companies asserted a claim could become part of the class without a mini-trial on whether he or she did or did not upload or download copyrighted songs without permission. Under black-letter law, if one's class membership depends on the determination of a merits issue, such as whether he or she committed an unlawful act of copyright infringement, common questions of fact cannot predominate, as Rule 23(b)(3) requires. *See pp. 14-17, infra.*

Ms. Andersen cannot fix this problem. Whether she expressly includes the merits-based qualifier ("those who did not infringe") in her proposed definition or not, people who uploaded or downloaded the Record Companies' copyrighted sound recordings without permission have no possible claim for "abuse of process" or "wrongful initiation of civil proceedings." Thus, there is no circumstance in which a jury could find an "abuse" in any particular case without examining the facts of the Record Companies' infringement claim against that specific person.

Ms. Andersen's claims are particularly ill-suited to class treatment because her class definition not only is merits-based, but also effectively asks this Court to sit in judgment of previously decided federal cases. Each of the individual matters Ms. Andersen seeks to sweep



into this Court, using Rule 23, has proceeded on its own unique track under the supervision of another federal judge. Each *ex parte* subpoena to an Internet Service Provider (“ISP”), seeking to identify the owner of an IP address from which infringement occurred, was approved by a federal judge. Once the Record Companies brought a case against a person, if that person opposed a discovery request, the step was taken only if and as authorized by a federal judge.

As explained in the Record Companies’ *Noerr-Pennington* motion, numerous judges have issued decisions in individual cases blocking the very claims that Ms. Andersen now seeks to pursue on those litigants’ behalf. On June 15, still another federal judge dismissed abuse of process claims against the Record Companies, finding that “the objectives sought by [an Enforcement Program] suit are well within those contemplated by Congress and the Copyright Act, 17 U.S.C. § 101, et seq.”<sup>2</sup> Then, on June 18, a federal jury returned a \$1.92 million verdict in the Record Companies’ favor against another person they sued as part of the Enforcement Program. *See Capitol Records, Inc. v. Thomas-Rasset*, No. 06-1497 (MJD/RLE) (D. Minn. June 19, 2009) (attached as Oppenheim Decl. Ex. H). Respectfully, when civil proceedings have been overseen and approved by one federal district court judge, it is for that judge alone, supervised by his or her appellate court, to decide a claim that those proceedings were “wrongfully initiated” or “abusive.”

Even were there a way to pursue state law “abuse of process”-type claims on a class basis under Rule 23(b)(3) — which, apparently, never has been attempted by any court at any

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<sup>2</sup> *Capitol Records, Inc. v. Alaujan*, No. 1:03-cv-11661 (D. Mass. electronic order entered June 15, 2009), attached as Exhibit A to the Declaration of Matthew J. Oppenheim, dated June 24, 2009 (“Oppenheim Decl.”), filed concurrently herewith. *See also Atlantic Recording Corp. v. Raleigh*, No. 4:06-CV-1708 (CEJ) (E.D. Mo. June 2, 2009) (dismissing defendant’s civil conspiracy counterclaim) (attached as Oppenheim Decl. Ex. B).

time — it certainly could not be done on a *nationwide* basis. All of Ms. Andersen’s claims arise under state rather than federal law. In deciding whether the conduct of any particular case in the Enforcement Program constituted an “abuse of process,” a jury would have to apply the unique laws of that Enforcement Program defendant’s home state. The laws of the 50 states, however, are too widely-varied for a single jury to decide cases under all of them at once. Ms. Andersen’s cursory analysis of those laws falls well short of meeting her burden to demonstrate how her claims could manageably be tried on a class basis. Given the differences among the relevant laws, explained below, she cannot possibly carry this burden. *See pp. 19-36, infra.*

*Every* federal court that recently has been asked to certify a nationwide state-law class has refused certification, even when the claims involved legal theories much more well-developed than Ms. Andersen’s. Because Ms. Andersen’s causes of action remain relatively, and in some respects totally, unexplored by the supreme courts of many states, this Court would face not only the already-insurmountable challenge of crafting jury instructions faithful to each state’s already-expressed legal nuances, but also would, in addition, first have to *predict* how each state’s supreme court would rule on key elements of the alleged torts. Federal judges uniformly have recognized that this task would not be manageable. *See pp. 20-23, infra.*

Even had Ms. Andersen limited her proposed class to the 112 residents of Oregon whom the Record Companies contacted during the Enforcement Program, that class could not be certified, either.<sup>3</sup> An Oregon-only class would suffer from the same need for infringement

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<sup>3</sup> In addition to producing documents pertaining to all lawsuits brought against Enforcement Program targets nationwide, the Record Companies searched for and produced all records of correspondence with Oregon residents and provided a declaration summarizing the status of each of the 112 Oregon cases. A revised version of the original Declaration of Katheryn Coggon, dated February 23, 2009, is being filed concurrently with this motion. So that it need not be filed under seal, it has been revised to replace names with numerical

mini-trials and review by this Court of decisions of other District of Oregon judges. In addition, both Oregonians and the broader, nationwide group contain numerous subgroups whose interactions with the Record Companies are not typified by Ms. Andersen, as required by Rule 23(a)(3). As one example, Ms. Andersen's class definition includes people who were "threatened with suit," but not actually sued. Pl. Class Br. at 2. That is not what happened to Ms. Andersen. This group includes people whom the Record Companies tried to contact but failed to reach; and some who simply ignored the Presuit Notification Letter ("PNL"), or did not settle, but whom the Record Companies decided not to pursue further.<sup>4</sup> Ms. Andersen cannot represent these people, nor are there any viable claims she could litigate on their behalf.

Ms. Andersen's certification motion also fails for the separate reason that she has an incurable conflict with those who, unlike herself, settled the Record Companies' claims against them. Because those who settled at the PNL stage did not receive releases, but only promises that the Record Companies would not pursue litigation, they have no interest in reopening questions of the scope of their infringement. If Ms. Andersen succeeds in abrogating these settling parties' promises not to contest the validity of their individual settlements, and if the mini-trials Ms. Andersen contemplates prove that these settling parties infringed, they could become subject to potential liability beyond what they already have paid. Many people opted to settle to avoid just such an outcome. Moreover, a large number of people chose to settle anonymously, before the Record Companies learned their names from their ISPs.

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substitutes (*i.e.* "Oregon Resident No. 1," etc.). Paragraphs 33 and 53 have also been revised to reflect that these two people settled with the Record Companies after the declaration was first given to Ms. Andersen.

<sup>4</sup> For the purposes of this motion, a "PNL" is defined as any correspondence with a target prior to naming that person individually in a lawsuit.

Ms. Andersen's motion seeks to expose their identities. For these reasons and others, those who settled have interests that totally diverge from Ms. Andersen's. *See* pp. 18-19, *infra*.

Finally, a class action is not a superior method of adjudicating Ms. Andersen's dispute, as Rule 23(b)(3) requires. Her request for this Court to revisit decisions made by coordinate courts in thousands of concluded cases is an affront to comity. There are, moreover, several dozen cases still actively pending, with defendants who presumably prefer to continue with the cases as they have unfolded, in their home jurisdictions and represented by the counsel of their choice, rather than starting from scratch in this Court and being represented derivatively by Ms. Andersen and *her* chosen counsel. Even if individual litigants want this Court to hear their cases, the judges before whom the cases now are pending have rendered interim decisions that would affect the ability of each defendant to pursue the claims Ms. Andersen has asserted. As explained in the *Noerr-Pennington* brief (at 13-15), for example, many of these courts already have dismissed counterclaims against the Record Companies similar or identical to those Ms. Andersen has pled. *Res judicata* prevents Ms. Andersen from relitigating these same claims on their behalf. Others settled cases and stipulated to judgments, thus also barring, as a matter of *res judicata*, the claims she seeks to pursue for them. *See* pp. 42-44, *infra*.

In short, Ms. Andersen's class is neither definite nor manageable. She is not typical or representative of those she proposes to represent. Neither common questions of law, nor questions of fact, predominate. For these and other reasons explained below, Ms. Andersen's motion for class certification should be denied.

## **RULE 23 STANDARD OF REVIEW**

Ms. Andersen “bears the burden of demonstrating that [s]he has met each of the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b).” *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 724 (9th Cir. 2007). Rule 23(a) requires Ms. Andersen to show that:

(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Because Ms. Andersen seeks class certification under Rule 23(b)(3), she also must demonstrate “that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Rule 23(b)(3) provides that:

The matters pertinent to these findings include: (A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

In considering these issues, the Court must conduct a “rigorous analysis.” *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982). Ms. Andersen relies on an older, pre-*Falcon* Ninth Circuit case, *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975), for the premise that this Court must accept her complaint’s allegations as true and not weigh any merits issues. *See* Pl. Class Br. at 17. That, however, is not the correct standard.

As the Ninth Circuit held in *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992), courts are “at liberty” to consider any evidence that “goes to the requirements of Rule 23, even though the evidence may also relate to the underlying merits of the case.” Since then, a national consensus has emerged, following the Seventh Circuit’s decision in *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001), that “the proposition that a district judge must accept all of the complaint’s allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it.”

Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23 . . . . And if some of the consideration under Rule 23(b)(3), such as “the difficulties likely to be encountered in the management of a class action,” overlap the merits[,]. . . then the judge must make a preliminary inquiry into the merits. *Id.* at 676.

In *In re IPO Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006), the Second Circuit noted that the other Circuits uniformly had issued decisions agreeing with *Szabo*, and it then “align[ed] itself] with . . . all of the other decisions . . . that have required definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues.” *See also id.* at 38-39, citing *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 6 (1st Cir. 2005); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Unger v. Amedisys, Inc.*, 401 F.3d 316, 319 (5th Cir. 2005); *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005).<sup>5</sup> The Record Companies submit that this now-universal standard, and not *Blackie*, governs Ms. Andersen’s motion.

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<sup>5</sup> *See also In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1078-79 (6th Cir. 1996); *Vallario v. Vandehey*, 554 F.3d 1259, 1266-67 (10th Cir. 2009); *Cooper v. S. Co.*, 390 F.3d 695, 712 (11th Cir. 2004); *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530 n.5 (D.C. Cir. 2006); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316-18 (3d Cir. 2008). No circuit

## **FACTUAL BACKGROUND**

### ***The Enforcement Program Generally***

The Enforcement Program had two phases. In the first, the Record Companies directed their enforcement efforts toward people who used commercial ISPs, such as Verizon Online, to unlawfully upload or download copyrighted sound recordings. Identification of these people generally, but not always, involved documenting the IP addresses used for these infringing purposes, initiating *Doe* lawsuits against the then-unknown persons to whom the IP addresses were registered, seeking leave of court to subpoena the ISP, and obtaining identifying information from the ISPs in response to the subpoenas. *See* Oppenheim Decl. ¶ 2; *see generally*, *Noerr-Pennington* Brief at 8-9; Decl. of Doug Jacobson, Ph.D. ¶¶ 27-32; Decl. of Christopher Connelly ¶¶ 2, 7-12. This was the process used, for example, in Ms. Andersen's case.<sup>6</sup>

In the second phase of the Enforcement Program, the Record Companies focused on people who used the internet connections of colleges and universities to infringe. (Many colleges and universities are themselves ISPs; they assign IP addresses to their individual

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currently stakes out a contrary position, although the issue is again before the Ninth Circuit in *Dukes v. Wal-Mart Inc.*, 556 F.3d 919 (9th Cir. 2009) (granting *en banc* review).

<sup>6</sup> Ms. Andersen argues that MediaSentry's downloading of sound recordings from public peer-to-peer ("P2P") networks and documenting the IP addresses from which it downloaded each recording constituted a "private investigation" for which MediaSentry was not licensed. *See, e.g.*, Pl. Class Br. at 8. Her motion includes no analysis of state licensing laws, and she does not (and cannot) contend that these laws are uniform. Moreover, claims that MediaSentry's activities amounted to "private investigation" repeatedly have been rejected as being without merit. *See Capitol Records, Inc. v. Thomas-Rasset*, No. 06-1497 (MJD/RLE) (D. Minn. June 11, 2009) (attached as Oppenheim Decl. Ex. C); *Virgin Records Am., Inc. v. Doe*, No. 5:08-CV-389-D, 2009 WL 700207, at \*3 (E.D.N.C. Mar. 16, 2009).

students and faculty members just as commercial ISPs do.) In this second phase, the Record Companies sent letters to the ISP-provider schools, assigning unique ID numbers to each IP address that had been used for infringement, and asked the schools to forward the letters to the students or employees to whom each address had been assigned. Most colleges and universities forwarded these letters, and a significant number of claims were settled through this process. If the claim was not settled, *Doe* suits were often initiated. In still others, the Record Companies took no further action, and students did not learn of the Record Companies' pursuit of a claim against them. *See* Oppenheim Decl. ¶¶ 3-5.

The number of people personally contacted during both phases of the Enforcement Program totaled over 18,000.<sup>7</sup> Approximately 12,500 of these people were identified by means of *Doe* suits and subpoenas to ISPs. Another 5,100 received PNLs forwarded by their ISPs. Approximately 600 people were sent PNLs after they had been identified by other means, such as affidavits from the registered owners of IP addresses naming these others as the people who used the affiants' computers for unlawful copying. *See* Oppenheim Decl. ¶ 7.

In about 4,000 of the 18,000 cases, the people responsible for the IP addresses settled the claims either before their ISP had identified them in response to a subpoena (the Record Companies encouraged ISPs to notify the individuals responsible for the IP addresses, so that these individuals could, if they so chose, contact the Record Companies and begin a dialogue),

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<sup>7</sup> In addition to those who were personally contacted, Ms. Andersen also purports to represent people who "were sued . . . as 'John or Jane Does'" (*i.e.*, as an IP address only), but who were not thereafter personally sued or even threatened with suit. Pl. Class Br. at 2. Leaving aside the obvious differences between such people and Ms. Andersen, most of these nominal *Doe* defendants never learned they had been sued in a *Doe* capacity, nor, in most cases, do Defendants even know who they are. Ms. Andersen's motion does not explain how she would locate these people, what possible claims she would litigate on their behalf, or how her claims are typical of theirs.



or in response to a PNL that their ISP had forwarded to them. *See* Oppenheim Decl. ¶¶ 2, 8. Slightly more than half of these 4,000 cases were college and university students or faculty members who were never named in a *Doe* suit or any other complaint. *See id.* ¶ 8. In over 1,300 cases, the persons settled their cases anonymously, communicating only by using the ID numbers that the Record Companies had assigned to their cases. The Record Companies never learned their names. *See id.* ¶ 4.

Of the 18,000 Enforcement Program communications, approximately 7,000 resulted in a lawsuit against a person by name. The rest ended without litigation, either by settlement, or because the Record Companies, for any number of reasons, chose not to file a complaint. *See* Oppenheim Decl. ¶ 9.

#### ***Tanya Andersen's Individual Case***

The Record Companies commenced enforcement efforts against Ms. Andersen based on her IP address. The process by which IP addresses were obtained is well-known, having been explained by other federal courts reviewing the Enforcement Program. *See, e.g., Capitol Records, Inc. v. Thomas-Rasset*, No. 06-1497 (MJD/RLE), at 2-4 (D. Minn. June 11, 2009) (attached as Oppenheim Decl. Ex. C).

Briefly stated, MediaSentry communicated over the KaZaA P2P network with the IP address later identified as Ms. Andersen's. MediaSentry downloaded numerous copyrighted sound recordings from a computer connected to that address. *See Noerr-Pennington* Brief at 8-9. MediaSentry confirmed the IP address from which it downloaded these copyrighted files in two ways: It used a publicly available tool called "WinPCap" (*see* [www.winpcap.org](http://www.winpcap.org)), which, when one computer is in the process of downloading files from another, displays the IP address of the transmitting computer. Also, information transmitted by the KaZaA program itself

included the IP address of the computer from which the downloaded sound recording was sent. *See* Connelly Dep. 170:19-172:14, 179:18-181:15 (attached as Oppenheim Decl. Ex. I). Both sources showed the address from which MediaSentry downloaded sound recordings to be 4.41.209.23. Later, on three separate occasions, Verizon Online confirmed that, at the time in question, this address was registered to Ms. Andersen. *See Noerr-Pennington* Brief at 3-4.

When Ms. Andersen received the Record Companies' PNL, she contacted their counsel to discuss their infringement complaint. During those initial contacts, she admitted having the "KaZaA Lite" P2P software on her computer. She contended, however, that she did not use that software. She asserted that someone must have stolen her Internet access, even though she did not use a wireless router. *See Noerr-Pennington* Brief at 26.

Ms. Andersen's current contention, unique to herself, is that her IP address was somehow commandeered by "a young man in Everett, Washington" (Compl. ¶ 7.20) and that it was he, not she, who was logged onto KaZaA and from whom MediaSentry downloaded copyrighted sound recordings from her IP address. In claims that also are unique to herself, she contends that the Record Companies "publicly humiliated her with demeaning and repulsive accusations" (by which she means the filing of their complaint, which identified the titles of songs downloaded from the IP address), *id.* ¶ 7.23, and exacerbated her pre-existing mental health problems, *id.* ¶¶ 7.25-7.26.

#### ***Other Enforcement Program Communications In Oregon.***

Ms. Andersen's story shares little, if anything, in common with the 111 other Oregon residents who were contacted during the Enforcement Program, to say nothing of the thousands of other persons contacted nationwide. For example, fewer than half of the Enforcement Program contacts in Oregon matured into lawsuits. Of those, 14 ended in default judgments.

See Declaration of Katheryn Coggon, dated June 12, 2009 (“Coggon Decl.”) ¶¶ 2, 22, 28, 39, 40, 60, 74, 91, 92, 93, 94, 96, and 101; *see also* note 9.

Of the majority of Oregon contacts that ended short of litigation, 46 resulted in pre-litigation settlements. These settlements ranged from \$1,000 to \$5,600.<sup>8</sup> Other cases ended when, for example, the Record Companies could not contact the suspected infringers (there were four such cases in Oregon, *see* Coggon Decl. ¶¶ 25, 56, 63, and 75); because the people whose IP addresses had been identified credibly explained that others were the primary infringers on their computers (three, *see id.* ¶¶ 1, 5 and 62); or because the ISP acknowledged having misidentified them (two, a married couple, *see id.* ¶ 68). Five cases are unresolved.<sup>9</sup> *See id.* ¶¶ 8, 15, 16, 17, and 55; *see also* note 9.

Of the Oregon residents individually named in a complaint, two subsequently sought bankruptcy protection. *See* Coggon Decl. ¶¶ 29, 61. Four could not be located or served with process. *See id.* ¶¶ 36, 58, 76, and 81. Four others signed an affidavit attributing the infringing acts to another person, after which the Record Companies either voluntarily dismissed their

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<sup>8</sup> *See* Coggon Decl. ¶¶ 6, 10, 11, 14, 19, 21, 26, 27, 30, 31, 32, 33, 34, 35, 37, 38, 45, 46, 47, 48, 50, 52, 53, 57, 59, 64, 65, 66, 67, 70, 73, 77, 78, 85, 86, 88, 95, 98, 99, 100, and 102; *see also* note 3.

<sup>9</sup> After the Coggon Declaration was prepared on February 23, 2009, two more lawsuits were initiated in Oregon against people whose cases the declaration then described as “unresolved.” *See id.* ¶¶ 20 and 22. One of those cases is now pending as *Sony Music Entm’t v. Reese*, No. 6:09-cv-06113-TC (D. Or.), and in the other case, the Record Companies obtained a default judgment against the defendant for \$7,170 on June 10, 2009. The only other case, besides Ms. Andersen’s, that remains pending in Oregon is one that this Court stayed when the defendant filed for bankruptcy protection. *See id.* ¶ 29. The Record Companies filed two other lawsuits in California against Oregon residents who previously were students at the University of Oregon. *See id.* ¶¶ 12 and 23. One of those two cases subsequently settled.

cases (if the cases had matured into a formal complaints) or did not file complaints against them. *See id.* ¶¶ 51, 84, 85, and 90.

Twenty-three other Oregon residents who were named in a complaint subsequently settled. *See Coggon Decl.* ¶¶ 3, 4, 9, 13, 23, 24, 41, 42, 43, 44, 49, 54, 69, 72, 79, 80, 82, 83, 84, 87, 89, and 97; *see also* note 9. One paid no money; the others settled for payments ranging from \$1,000 to \$6,500. Importantly for the purpose of determining whether Ms. Andersen can litigate “abuse of process”-type claims on behalf of these people, those who stipulated to judgments memorializing their settlements “irrevocably and fully waive[d] any and all right to appeal th[e] Judgment and Permanent Injunction, to have it vacated or set aside, to seek or obtain a new trial thereon, *or otherwise to attack in any way, directly or collaterally, its validity or enforceability.*” *See Oppenheim Decl. Ex. D* (emphasis added).

## **ARGUMENT**

### **I. People “Who Have Not Engaged In Violation of Copyright Laws,” Is Not A Precise, Objective, or Ascertainable Class Definition.**

A class may not be certified unless the class definition is “precise, objective, and presently ascertainable.” *Mazur v. eBay Inc.*, \_\_\_ F.R.D. \_\_\_, 2009 WL 1203937, at \*4 (N.D. Cal. May 5, 2009) (citation omitted); *Xiufang Situ v. Leavitt*, 240 F.R.D. 551, 558 (N.D. Cal. 2007) (citation omitted). “The identity of class members must be ascertainable by reference to objective criteria.” *Rodriguez v. Gates*, No. CV99-13190GAF (AJWX), 2002 WL 1162675, at \*8 (C.D. Cal. May 20, 2002), *citing Manual for Complex Litigation Third* § 30.14 (1995) (“Definitions should avoid criteria that are subjective . . . or that depend on the merits (*e.g.*, persons who were discriminated against).”). “The problem of ascertainability is the inability of

future courts to ascertain who was and was not bound by the judgment.” *Deitz v. Comcast Corp.*, No. C 06-06352 WHA, 2007 WL 2015440, at \*8 (N.D. Cal. July 11, 2007).

Ms. Andersen’s class definition, which purports to encompass those people whom the Record Companies sued but who allegedly could prove that they “have not engaged in violation of copyright laws” (Pl. Class Br. at 2), is the antithesis of a proper class. No person could have his or her membership in the class determined without an individualized factual determination as to whether he or she did or did not use a P2P network to upload or download copyrighted sound recordings. In a motion for class certification under Rule 23(b)(3), which requires common questions of law and fact to predominate, conditioning class membership on such individual merits issues is impermissible.

In *Pierce v. County of Orange*, 526 F.3d 1190, 1198 (9th Cir. 2008), for example, a district court decertified a class of pretrial detainees whose rights allegedly had been violated. Because class membership would have turned on individualized issues respecting the treatment of each inmate, the district court found, and the Ninth Circuit agreed, that “[c]lass membership here would be highly fluid and indefinite.” *Id.* at 1200.

The law is the same in other circuits. For example, in *Romberio v. UnumProvident Corp.*, No. 07-6404, 2009 WL 87510, at \*7 (6th Cir. Jan. 12, 2009), the plaintiff sought to define a class as those who were “subjected to any of the practices alleged in the Complaint.” The Sixth Circuit found this definition “unsatisfactory” because of the individualized fact-finding that would have been necessary to determine to what extent the alleged practices actually had been applied to class members. *See also Davoll v. Webb*, 194 F.3d 1116, 1146 (10th Cir. 1999) (rejecting proposed class of “officers who were disabled,” because “the individualized consideration required to determine whether each class member was disabled

under the ADA rendered the proposed definition ‘untenable’”); *Crosby v. Soc. Sec. Admin.*, 796 F.2d 576, 578, 579-80 (1st Cir. 1986) (rejecting proposed class of “all claimants who have not had a hearing or a decision on their disability claim ‘within a reasonable time,’” because what was “reasonable” in each case required individual inquiry); *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 403 (E.D. Pa. 1995) (rejecting as “untenable” a class definition comprising all those who received “unsolicited” faxes, because this would have required “addressing the central issue of liability . . . [and] a mini-hearing into the merits of each case”).

Among district courts in the Ninth Circuit, whenever membership in a class would have first required a factual determination, certification has been refused. In *Mazur*, for example, the plaintiff contended that “shill bidding” inflated the prices paid for auctioned items. The plaintiff sought to certify a class of “all persons ‘who would have won but for the shill bidder.’” *Mazur*, 2009 WL 1203937, at \*4. The court found this class to be neither objective nor ascertainable because it necessitated case-by-case determination of who “would have” won. *Id.*

In *Brazil v. Dell Inc.*, 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008), plaintiffs pled false advertising claims, defining the proposed class as “California persons or entities who purchased Dell computer products that ‘Dell falsely advertised.’” The “advertisements” in question, however, differed from product to product and from consumer to consumer. Because class membership could not be known until after the fact-finder decided that Dell had, in fact, advertised falsely in that class member’s case, the district court denied certification. *See also Xiufang Situ*, 240 F.R.D. at 558 (class definition was “improper because it would be impossible to determine whether [any person] was a member of the class without reaching the merits of Plaintiffs’ claims”); *Rodriguez*, 2002 WL 1162675, at \*9 (rejecting class described as “[a]ll persons whose rights under the . . . Constitution were violated”); *Hagen v. City of Winnemucca*,

108 F.R.D. 61, 63 (D. Nev. 1985) (class of “all persons whose constitutional rights have been violated by [specified] City policies” could not be certified because case “would require the court to determine whether a person’s constitutional rights had actually been violated in order to determine whether that person was a class member”).

That Ms. Andersen’s proposed class definition includes the same sort of individualized fact-finding component is fatal to her motion. Nor is the problem curable. People who unlawfully uploaded or downloaded the Record Companies’ copyrighted sound recordings have no possible claim for abuse of process or wrongful initiation of civil proceedings. Thus, even had Ms. Andersen proposed a class comprising all those who were sued or threatened with suit, without having expressly included the fatal individualized component limiting the class to an alleged group who *did not* infringe, each person’s right of recovery still would turn on (among other things) the same inherently individualized inquiry into the merits of the Record Companies’ claims.

Other permutations would be equally flawed. For example, had Ms. Andersen pled the class as including “everyone against whom the Record Companies initiated a claim but then voluntarily dropped it,” then (putting aside the numerosity problem of this small group) the “class” would include people against whom claims were dropped due to financial hardship or other reasons unrelated to their liability. They similarly would not be able to recover without individual inquiries both into the merits of the Record Companies’ claims against them and the reasons why the Record Companies discontinued those claims. For these reasons, Ms. Andersen’s contention that “the proof required to establish illegality/legality of the litigation enterprise would be the same for every Class member,” Pl. Class Br. at 19, is simply wrong.

## **II. Ms. Andersen's Interests Conflict With Those Who Settled Their Cases.**

Even were the Court amenable to conducting thousands of infringement mini-trials — a process that, even if each mini-trial took much less time than the week-long *Thomas-Rasset* proceedings, still would require decades to conclude — Ms. Andersen's proposal suffers from the additional problem that she is in conflict with many of the people she proposes to represent. Those who settled with the Record Companies, either before or after receiving a PNL, paid substantially less than the amount for which they would have been liable if the Record Companies had succeeded at a trial on their infringement claims. Settling persons did not receive releases of claims in exchange for their payments, but only promises to discontinue the threatened or pending actions, which the Record Companies kept. *See* Oppenheim Decl. ¶ 12. Furthermore, many settling persons settled anonymously; the Record Companies never learned their names. Those who settled, anonymously or by name, may not want Ms. Andersen to reopen their cases, pursue abuse of process-type claims on their behalf, and thus abrogate the Record Companies' promises not to seek additional damages in the event that their infringement of the Record Companies' copyrighted sound recordings is conclusively proved.

Although Ms. Andersen argues that some of these settlements resulted from “pressure,” it is unarguable that many people affirmatively contacted the Record Companies to settle because they had, in fact, illegally infringed. That Ms. Andersen seeks to pry open matters these people specifically desired to be closed puts her in conflict with them and renders her an inadequate class representative under Rule 23(a)(4). *See, e.g., Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009) (“[U]ncovering conflicts of interest between the named parties and the class they seek to represent is a critical purpose of the adequacy inquiry.”);



*Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (“Examination of potential conflicts of interest has long been an important prerequisite to class certification.”); *Andrews Farms v. Calcot, Ltd.*, No. CV-F-07-0464, 2009 WL 1211374, at \*10 (E.D. Cal. May 1, 2009) (class members are “entitled to a class representative who is free from a desire to prove a claim that will impair their interests”), quoting *Payne v. Travenol Labs*, 673 F.2d 798, 810-11 (5th Cir. 1982). Any way one looks at it, the claims Ms. Andersen pleads are inherently individualized, would require merits assessments to determine class membership, and put her in an irreconcilable conflict with many of the members of her alleged class.

### **III. Ms. Andersen’s Proposed Nationwide Class Fails the Predominance and Manageability Tests Because the Relevant State Laws Vary Widely.**

Ms. Andersen does not contend, nor could she, that the claims of members of her class who reside outside Oregon can be judged by Oregon law. Instead, each member of any class must prove claims under the standards applicable in his or her home state.<sup>10</sup> As court after court has recognized, however, state laws vary too much to allow a single jury to sort out the claims of a nationwide class. That certainly is true with respect to Ms. Andersen’s claims, as will be explained in detail below. Although Ms. Andersen’s motion contends that the specific torts she alleges do not have wide interstate variations, the analysis she provided is

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<sup>10</sup> See *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187 (9th Cir. 2001) (“A federal court sitting in diversity must look to the forum state’s choice of law rules to determine the controlling substantive law.”), amended by 273 F.3d 1266 (9th Cir. 2001); *Tower v. Schwabe*, 585 P.2d 662, 663 (Or. 1978) (Oregon follows the “most significant relationship” test). This test will be particularly troublesome to apply in the sizable number of cases involving university students. The infringement occurred at the students’ schools, but many of these students maintained a permanent address elsewhere and/or now reside elsewhere following their graduation.

demonstrably superficial, inaccurate and insufficient to show that her claims could be manageably tried on a nationwide class basis. *See Lozano*, 504 F.3d at 724 (“[T]he law on predominance requires the district court to consider variations in state law when a class action involves multiple jurisdictions.”); *Zinser*, 253 F.3d at 1189 (plaintiff seeking certification of a class “for which the law of forty-eight states potentially applies . . . bears the burden of demonstrating a ‘suitable and realistic plan for trial of the class claims’”) (citation omitted).

**A. Courts Uniformly Have Rejected Class Certification When Material Variations Exist in the Applicable State Laws.**

Since the 1998 adoption of Rule 23(f), which permitted interlocutory appeals from class certification decisions, not a single district court certification of a nationwide state-law tort class has been upheld on appeal. Indeed, the Seventh Circuit, in *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1015 (7th Cir. 2002), has gone so far as to impose a categorical ban on nationwide state-law class actions. *See also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) (“In a multi-state class action, variations in state law may swamp any common issues and defeat predominance.”).

**1. Neither the Ninth Circuit, nor any district court within this Circuit, has approved a nationwide state-law class action.** Although the Ninth Circuit has stopped short of a categorical ban, it never has approved a nationwide class such as the one Ms. Andersen proposes. Instead, it repeatedly has found that when the laws of multiple jurisdictions apply, the plaintiff cannot satisfy Rule 23(b)(3)’s requirement that common questions of law predominate. *See Lozano*, 504 F.3d at 728 (“predominance was defeated because [the analysis] would necessitate a state-by-state review of contract unconscionability jurisprudence”); *Zinser*, 253 F.3d at 1189-90 (in a medical products liability case, attempt to certify a nationwide class

“compound[ed] exponentially” the “proliferation of disparate factual and legal issues”); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1230, 1234 (9th Cir. 1996) (decertifying products liability class because district court failed to consider state law variations). It is not surprising, therefore, that every district court within this Circuit to have been presented with a motion like Ms. Andersen’s has denied it.<sup>11</sup>

**2. Ms. Andersen has not carried her burden of demonstrating sufficient uniformity of state laws to permit a manageable nationwide trial.** Ms. Andersen cannot carry her burden of presenting a “suitable and realistic plan for trial of the class claims,” *Zinser*, 253 F.3d at 1189, without “credibly demonstrat[ing], through an ‘extensive analysis’ of state law variances, that class certification does not present insuperable obstacles.”<sup>12</sup> *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986) (citation omitted). *See also Lozano*, 504 F.3d at 728; *Castano*, 84 F.3d at 742 (quoting *Walsh*); *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 724

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<sup>11</sup> The following represent a small fraction of recent cases, just from within the Ninth Circuit, rejecting proposed multistate or nationwide state-law classes: *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651 (D. Nev. 2009) (granting defendants’ preemptive motion to deny certification); *Rivera v. Bio Engineered Supplements & Nutrition, Inc.*, No. SACV 07-1306 JVS (RNBx), 2008 WL 4906433, at \*3 (C.D. Cal. Nov. 13, 2008) (plaintiff provided inadequate trial plan for handling differences in state laws); *Stearns v. Select Comfort Retail Corp.*, No. 08-2746 JF, 2008 WL 4542967, at \*7-8 (N.D. Cal. Oct. 1, 2008); *In re HP Inkjet Printer Litig.*, No. C 05-3580 JF, 2008 WL 2949265, at \*7 (N.D. Cal. July 25, 2008); *Estate of Felts v. Genworth Life Ins. Co.*, 250 F.R.D. 512, 526 (W.D. Wash. 2008); *Sweet v. Pfizer*, 232 F.R.D. 360, 372 (C.D. Cal. 2005) (all same). *Cf. Stearns v. Select Comfort Retail Corp.*, No. 08-2746 JF, 2009 WL 1635931, at \*19 (N.D. Cal. June 5, 2009) (striking class allegations from complaint due to, *inter alia*, variations in state laws).

<sup>12</sup> *See, e.g., Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1279 n.20 (11th Cir. 2009) (citing *Zinser*, stating that “there is a direct correlation between the importance of a realistic, clear, detailed, and specific trial plan and the magnitude of the manageability problems a putative class action presents,” and “recommend[ing] that district courts make it a usual practice to direct plaintiffs to present feasible trial plans, which should include proposed jury instructions, as early as practicable when seeking class certification”).

(5th Cir. 2007) (same); *Duncan v. Northwest Airlines, Inc.*, 203 F.R.D. 601, 613 (W.D. Wash. 2001) (same).

These requirements cannot be met simply by reciting the elements of each cause of action and claiming that they are “almost” or “virtually” identical in all jurisdictions. That, however, is exactly what Ms. Andersen has done. *See* Declaration of Benjamin Justus (“Justus Decl.”), Exhibits B-D (*e.g.*, “The elements of abuse of process are *almost identical* in each state.”) (emphasis added). In *Cole*, for example, the Fifth Circuit found that such an approach “oversimplified the required analysis and glossed over the glaring substantive legal conflicts among the applicable laws of each jurisdiction.” 484 F.3d at 725-26. *See also, e.g., Spence v. Glock Ges.m.b.H.*, 227 F.3d 308, 316 (5th Cir. 2000) (district court abused its discretion in certifying nationwide class where plaintiffs had failed to carry their burden of providing an extensive analysis of applicable law); *In re Conagra Peanut Butter Prods. Liab.*, 251 F.R.D. 689, 698-99 (N.D. Ga. 2008) (certification denied where plaintiffs’ fifty-state survey “downplay[ed] the significance of state law variations” and “fail[ed] to account for important variances” such that plaintiffs “failed to carry their burden that there are no material variations in state law”); *Agostino v. Quest Diagnostics, Inc.*, 256 F.R.D. 437, 452 (D.N.J. 2009) (certification denied where plaintiff’s analysis “appear[ed] to be nothing more than a copy-and-paste compilation of the relevant provisions of state law” that overstated the similarities among the laws of 47 jurisdictions).

Instead, meeting this burden requires a careful, substantive discussion of the state laws, acknowledging and addressing the relevant differences. Properly done, such an analysis makes immediately apparent that Ms. Andersen’s attempt to certify a nationwide class must fail. *See, e.g., In re Paxil Litig.*, 212 F.R.D. 539, 546 (C.D. Cal. 2003) (Plaintiffs did “not even begin to

lay out the specific elements required to prove certain causes of actions. The completed picture will no doubt be too vast and too complicated for even the most diligent jury to grasp.”).

**3. Because Ms. Andersen’s claims have not been defined by the supreme courts of most states, this Court would have to *predict* state law.** To begin, neither of Ms. Andersen’s two core claims (abuse of process and wrongful initiation of civil proceedings) has been well-developed by the highest courts in most states. Without binding, or even persuasive, guidance from the states on issues critical to purported class members’ claims, this Court would have no choice but to *predict*, extrapolating as best it can from other decisions of each state’s courts, how the 50 state supreme courts would rule on these issues. *See Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 872 (9th Cir. 2007) (“Where the state’s highest court has not decided an issue, the task of the federal courts is to predict how the state high court would resolve it.”); *Zehel-Miller v. AstraZeneca Pharm., LP*, 223 F.R.D. 659, 663 (M.D. Fla. 2004) (Absence of state court guidance “would force this Court into the undesirable position of attempting to predict how their courts of last resort would resolve [the] issue. . . . There simply is no justification for embarking on so complex a path.”), *quoting In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 74 (S.D.N.Y. 2002).

It is well-recognized that when dealing with relatively ill-defined torts, courts cannot conclude that certification will result in a savings of judicial resources. *See, e.g., Castano*, 84 F.3d at 750 (finding that individual adjudication of novel claims is preferable to a class action because it allows state courts to apply and develop their own law); *Emig v. Am. Tobacco Co., Inc.*, 184 F.R.D. 379, 394 (D. Kan. 1998) (refusing to bind class to “decisions of one court and one jury when such novel issues have never been presented to a court in any individual litigation within the state”); *Arch v. Am. Tobacco Co., Inc.*, 175 F.R.D. 469, 495 (E.D. Pa.

1997) (concluding that “in the absence of a prior track record of individual trials,” any attempt to show the superiority of a class action is “necessarily based on speculation”).

**B. State-By-State Standards for Proving Abuse of Process Claims Make Class Adjudication of These Claims Unmanageable.**

Ms. Andersen’s contention that “the elements of abuse of process are almost identical in each state,” Justus Decl. Ex. B, at 1, is incorrect. Leaving aside the states that have rejected the approach of the Restatement (Second) of Torts § 682 — such as Georgia, for example, which has statutorily merged the torts of abuse of process and wrongful initiation of civil proceedings into a single cause of action for “abusive litigation,” and created its own framework for these claims, *see* Ga. Code Ann. § 51-7-80 (2009) — even those states following the Restatement have deep and material interpretive differences.<sup>13</sup> Discussing each material difference would consume hundreds of pages, and is not necessary here, because highlighting just a few examples illustrates succinctly why Ms. Andersen’s attempt to certify a nationwide class cannot succeed. It is worth emphasizing, however, that the exercise of exploring all of the differences among the states would be required in order to craft accurate jury instructions.

**1. States do not agree on what constitutes “process.”** One key difference among states is their definition of “process,” and, specifically, whether *pre-litigation* conduct may form the basis of a claim for abuse of process. These differences are relevant to

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<sup>13</sup> Section 682 defines the elements of abuse of process as “(1) the existence of an ulterior purpose to accomplish an object not within the proper scope of the process and (2) an act in the use of legal process not proper in the regular prosecution of the proceedings.” *See, e.g., Neurosurgery & Spine Surgery v. Goldman, S.C.*, 790 N.E.2d 925, 929-30 (Ill. App. Ct. 2003). Some states then impose a third element of damages. *See, e.g., Thomson McKinnon Sec., Inc. v. Light*, 534 So. 2d 757, 760 (Fla. Dist. Ct. App. 1988).

Ms. Andersen's motion because she seeks to include in her class people who were "threatened with suit," but not actually sued. Pl. Class Br. at 2.

Only a minority of state supreme courts have defined process; 36 state supreme courts have not.<sup>14</sup> Of the states that have considered, in any of their courts, whether a threat of a lawsuit will suffice, every court has ruled that an actual suit is required.<sup>15</sup> No state has addressed whether a *Doe* suit constitutes requisite "process."<sup>16</sup> Thus, people whom the Record

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<sup>14</sup> Oregon has not defined "process," and neither have Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin.

<sup>15</sup> It is a widely-accepted principle that there can be no *abuse* of process without *use* of process. *See, e.g., Fish v. Watkins*, 298 F. App'x 594, 596 (9th Cir. 2008); *Pruitt v. Chow*, 742 F.2d 1104, 1109 (7th Cir. 1984); *DeNardo v. Maassen*, 200 P.3d 305, 312 (Alaska 2009); *Forrest City Mach. Works, Inc. v. Mosbacher*, 851 S.W.2d 443, 446 (Ark. 1993); *State v. Rendelman*, 947 A.2d 546, 556 n.9 (Md. 2008); *Gugliotta v. Morano*, 829 N.E.2d 757, 768 (Ohio Ct. App. 2005); *Lafferty v. Rhudy*, 878 S.W.2d 833, 836 (Mo. Ct. App. 1994). Although the issue has not been addressed directly in many states, it seems fair to assume that those states that require more than filing a complaint also would not recognize a claim based on a threat of a lawsuit. *See infra* note 17.

Even where a state permits abuse of process suits based on pre-litigation conduct, Ms. Andersen contends that some people were subjected to "coercive telephone conversations." Pl. Class Br. at 7. This claim has a different predominance problem: As numerous courts have recognized, oral communications which differ from person to person cannot validly be the subject of a class action. *See, e.g., Moore v. PaineWebber, Inc.*, 306 F.3d 1247 (2d Cir. 2002) (agreeing with five other circuits that fraud claims based on "oral misrepresentations are presumptively individualized"); *Clark v. Watchie*, 513 F.2d 994, 1000 (9th Cir. 1975) (same); *Lanzarone v. Guardsmark Holdings, Inc.*, No. CV06-1136 RPLAX, 2006 WL 4393465, at \*7 (C.D. Cal. Sept. 7, 2006) (same).

<sup>16</sup> Arizona is the only state to even come close to addressing a situation in which a *Doe* suit was filed. In that case, the individual was subsequently named in a personal suit and the court found that he could not assert a claim for abuse of process based on the filing of a complaint, *Doe* or personal, because "abuse of process requires some act *beyond the initiation of a lawsuit*["]."*Best W. Int'l, Inc. v. Furber*, No. CV-06-1537-PHX-DGC, 2008 WL 2045701, at \*2 (D. Ariz. May 12, 2008) (citation omitted).



Companies never reached, those who received PNLs but were not actually sued by name, those who settled before being sued by name, and other large subgroups within Ms. Andersen's proposed class definition, but of which her own story is not typical, and who reside in states requiring an actual complaint to have been brought, have no possible claim.

At least 17 state Supreme Courts have held that even the filing of a complaint is not enough.<sup>17</sup> In these states, people who settled their cases after being served with a complaint, or whose cases otherwise ended with no further litigation, also are not typified by Ms. Andersen and, again, would have no claim. Moreover, each of the few states that permits claims based on the filing of a lawsuit alone has its own unique standards for deciding when the process has been "abused." For example, Colorado requires a plaintiff to show (as Ms. Andersen could not) that the underlying claim was "devoid of factual support or if supportable in fact, [had] no cognizable basis in law." *Yadon v. Lowry*, 126 P.3d 332, 337 (Colo. Ct. App. 2005).<sup>18</sup>

This means that only those few Enforcement Program targets whose cases proceeded into active litigation have even the potential to plead a claim for abuse of process. Those claims then would be judged according to widely varying state-by-state standards. As just one example of how these standards vary, some states allow abuse of process claims to be maintained for alleged abuses of the discovery process, while others do not. *Compare, e.g.,*

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<sup>17</sup> These states are Alabama, Alaska, Arkansas, D.C., Illinois, Iowa, Maine, Michigan, Mississippi, New Hampshire, New York, North Carolina, South Carolina, Tennessee, Utah, Vermont, and Washington.

<sup>18</sup> The Oregon Supreme Court has not addressed whether the filing of a lawsuit alone is sufficient, and neither have the supreme courts of Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, Virginia, West Virginia, Wisconsin, and Wyoming.



*DeNardo v. Maassen*, 200 P.3d 305, 311-312 (Alaska 2009) (“actions taken in the regular course of litigation, such as threatening suit or requesting discovery, are not a proper basis for an abuse of process claim even if done with an ulterior motive”); *Alphas Co., Inc. v. Kilduff*, 888 N.E.2d 1003, 1013 (Mass. Ct. App. Ct. 2008) (“discovery activities have not provided grounds for abuse of process actions”) with *Advanced Constr. Corp. v. Pilecki*, 901 A.2d 189, 197 (Me. 2006) (allowing abuse of process recovery for discovery violations).

**2. States do not agree on what constitutes “abuse.”** The concept of “abuse” also varies considerably. Many courts go beyond the *Noerr-Pennington* doctrine and recognize an even broader “litigation privilege” in order to guarantee free access to courts “without fear of being harassed subsequently by derivative tort actions,” to encourage judgment finality, or to encourage the initiation of meritorious suits. *Rusheen v. Cohen*, 128 P.3d 713, 722 (Cal. 2006) (“To effectuate these purposes, the litigation privilege is absolute and applies regardless of malice.”); *see also Schmit v. Klumpyan*, 663 N.W.2d 331, 336 (Wis. Ct. App. 2003) (noting that “the tort of abuse of process is disfavored and must be narrowly construed” because of its chilling effect on the right of access to the courts). Each state that has such a “litigation privilege” articulates it differently. *Compare, e.g., Rusheen*, 128 P.3d at 719 (stating very broad privilege); *Am. Nat’l Title & Escrow of Fla., Inc. v. Guarantee Title & Trust Co.*, 748 So. 2d 1054 (Fla. Dist. Ct. App. 1999) (also stating broad privilege) with *Netterville v. Lear Siegler, Inc.*, 397 So. 2d 1109 (Miss. 1981) (privilege extends to statements made in attorneys’ disciplinary proceedings; unclear to what else it applies); *Baglini v. Lauletta*, 768 A.2d 825 (N.J. Super. Ct. App. Div. 2001) (privilege applies to *attorneys* involved in litigation; unclear whether it applies to *litigants*). Many state supreme courts have not yet addressed these issues at all.

In another recent test of the Enforcement Program, a federal district court just rejected a virtually identical abuse of process claim, noting that because online copyright infringement is unlawful, it cannot be abuse of process, as a matter of law, “to enforce precisely the rights created by Congress.” *Capitol Records, Inc. v. Alaujan*, No. 1:03-cv-11661 (D. Mass. electronic order entered June 15, 2009) (attached as Oppenheim Decl. Ex. A). As that court stated, “Congress has handed the [Record Companies] a massive hammer to combat copyright infringement and they have chosen to use it. That choice . . . does not amount to an abuse of process.” *Id.*

Ms. Andersen also claims that the Record Companies’ use of discovery techniques was abusive because it was “unreasonable.” Pl. Class Br. at 7-8. Whether any particular discovery request truly was “unreasonable,” however, depends upon the circumstances of the specific case and state-by-state standards of reasonableness. In this regard, it would appear that any discovery specifically approved by a court, over the adverse party’s objection, would not be a candidate for a *post hoc* finding of “abuse” by a coordinate court. Numerous cases in the Enforcement Program featured contested discovery motions. *See, e.g., Sony BMG Music Entm’t v. Arellanes*, No. 4:05-CV-328 (E.D. Tex. Oct. 27, 2006) (attached as Oppenheim Decl. Ex. E); *Arista Records, LLC v. Tschirhart*, No. SA05CA0372OG (W.D. Tex. Jan. 25, 2006) (attached as Oppenheim Decl. Ex. F); *UMG Recordings, Inc. v. Lindor*, No. 1:05-cv-1095 (E.D.N.Y. Jan. 16, 2008) (attached as Oppenheim Decl. Ex. G). Indeed, even in *this* case, the telephonic deposition of Ms. Andersen’s minor daughter, which she contends in this action constituted an “abuse,” was ordered by the magistrate judge in this case over Ms. Andersen’s objection. *See* Compl. ¶ 7.30; *see also Noerr-Pennington* Brief at 27.

As yet another variation, many states require arrest or seizure of property as damages. Neither Ms. Andersen nor most (indeed, perhaps none) of the proposed class members can satisfy this requirement. For example, New York requires unlawful interference with one's person or property. *Williams v. Williams*, 246 N.E.2d 333, 335 (N.Y. 1969). *See also One Thousand Fleet Ltd. P'ship v. Guerriero*, 694 A.2d 952, 960 (Md. 1997) (same); *RRR Farms Ltd. v. Am. Horse Prot. Ass'n*, 957 S.W.2d 121, 134 (Tex. App. 1997) (same). Some states further have ruled that arrest or seizure is required because injury to good name or reputation is insufficient. *See, e.g., Raines v. Drasin*, 621 S.W.2d 895, 902 (Ky. 1981); *Kittler & Hedelson v. Sheehan Props., Inc.*, 203 N.W.2d 835, 840 (Minn. 1973). Although a small number of states have ruled that arrest or seizure is not necessary, *see, e.g., Nienstedt v. Wetzel*, 651 P.2d 876, 881 (Ariz. Ct. App. 1982); *Kumar v. Bornstein*, 820 N.E.2d 1167, 1173 (Ill. App. Ct. 2004), 40 states have not addressed the issue in their supreme courts.<sup>19</sup>

**3. Ms. Andersen's personal allegations demonstrate that these differences are material and preclude class certification.** At the heart of Ms. Andersen's claim is her allegation that once the Record Companies "determined that they could not prove infringement claims against the targets, they often abused the litigation process to investigate claims against third parties while incongruously maintaining active sham lawsuits against the exonerated targets." Pl. Class Br. at 8. This assertion is based on Ms. Andersen's unique contention that the Record Companies continued to pursue *her* despite allegedly having learned that she was

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<sup>19</sup> The states that have not addressed the arrest or seizure requirement include Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, D.C., Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

not “the real ‘Gotenkito.’” After receiving extensive discovery into all of the other Enforcement Program cases, Ms. Andersen’s motion does not identify any other person whose case resembles hers and who would be able to assert similar claims in similar terms. Moreover, the question of when a target had been sufficiently “exonerated” so that further proceedings might be declared abusive would be highly fact-specific, in addition to being subject to different state legal standards.

**C. State Variations on “Wrongful Initiation of Civil Proceedings” Are Equally Extensive.**

Ms. Andersen also eschewed any analysis of the tort of “wrongful initiation of civil proceedings” in favor of the assertion that “[t]he elements of wrongful initiation of civil proceedings/malicious prosecution are almost identical for each state nationwide.” Justus Decl. Ex. C, at 1. This, too, is incorrect. Not only does a sharp split in authority exist on the ways courts have interpreted (in particular) the elements of favorable termination and damages, but a number of state supreme courts also have yet to address the meaning of one or both. The only two commonalities in the 50 states’ laws governing this tort are, first, that a finding of probable cause to sue (*i.e.*, the standard governing application of the *Noerr-Pennington* doctrine) constitutes a complete defense; and, second, that this tort has never, in any state, been the subject of a Rule 23(b)(3) class action.<sup>20</sup>

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<sup>20</sup> See, e.g., *Sheldon Appel Co. v. Albert & Olier*, 765 P.2d 498, 504 (Cal. 1989) (“If the court determines that there was probable cause to institute the prior action, the malicious prosecution action fails, whether or not there is evidence that the prior suit was maliciously motivated.”); *Howard v. Firmand*, 880 N.E.2d 1139, 1142 (Ill. App. Ct. 2007) (“Probable cause is a complete defense to an action for malicious prosecution.”); *Zahorsky v. Griffin, Dysart, Taylor, Penner & Lay, P.C.*, 690 S.W.2d 144, 151 (Mo. Ct. App. 1985) (“When probable cause exists, the issue of malice becomes irrelevant because even if malice is clearly shown, the action for malicious prosecution must fail.”).

It is worth emphasizing that the Record Companies' claims against Ms. Andersen were not litigated to a verdict because the Record Companies voluntarily discontinued their lawsuit against her. Although Oregon may allow persons to sue for wrongful initiation of civil proceedings following a voluntary dismissal, other states' courts do not. Nine states have not addressed the voluntary dismissal issue in *any* of their courts, and 18 state Supreme Courts have not considered it.<sup>21</sup> Most have taken a fact-specific approach, holding that a voluntary dismissal may constitute a favorable termination only if the dismissal "reflects upon the merits" of the prior action, and the result of that fact-based analysis may vary based on the case law in each jurisdiction.<sup>22</sup>

This means, before the fact-finder even could consider the claim of any absent class member, it first would need to determine whether the Record Companies' affirmative claim against that person had terminated in the person's favor. The vast majority of Enforcement Program cases ended through settlement, and it is not clear that *any* state court would permit a claim for wrongful initiation of civil proceedings after the defendant voluntarily settled.

Although the Record Companies discontinued their suits against Ms. Andersen and a few others without a settlement, the reasons behind these decisions varied in ways that directly

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<sup>21</sup> The states that have never considered this issue in any court include Alaska, Arkansas, Idaho, Michigan, Minnesota, Nebraska, Nevada, North Dakota, and South Dakota. The state supreme courts of the following states have also not addressed this issue: Florida, Hawaii, Indiana, Maine, Maryland, Missouri, Pennsylvania, Texas, and Wyoming.

<sup>22</sup> *See, e.g., Cohen v. Corwin*, 980 So. 2d 1153, 1156 (Fla. Dist. Ct. App. 2008) ("Whether a voluntary dismissal qualifies as a 'bona fide termination' of the proceedings in the defendant's favor depends upon the reasons and circumstances underlying the dismissal."); *Parrish v. Marquis*, 172 S.W.3d 526, 531-33 (Tenn. 2005) (same); *Frey v. Stoneman*, 722 P.2d 274, 279 (Ariz. 1986) ("[W]here there has been no adjudication on the merits the existence of a 'favorable termination' of the prior proceeding generally must be found in the substance rather than the form of prior events and often involves questions of fact.").

affect the “favorable termination” element. Some were discontinued, for example, because of the person’s financial hardship, bankruptcy filing, or active-duty military service. Still others ceased because the person could not be located, could not be served with process, or moved out of the country. Yet another group of people acknowledged that their computers had been used to upload or download copyrighted music, but provided evidence that the primary acts of infringement had been committed by others with access to the computers. In this last group of cases, the Record Companies subsequently ceased proceedings against the initial defendants and proceeded against the personally-identified primary infringers. *See, e.g., Coggon Decl.* ¶¶ 1, 5, 51, 84, 85, 90. It is doubtful that any of these voluntary dismissals would be considered “reflective of the merits” but, in any event, the need to determine this on a case-by-case basis is fatal to nationwide class certification.

States also differ on the damages a wrongful initiation plaintiff must have suffered. Although some permit claims when the plaintiff’s only damages are defense costs, this avenue would not be available to Ms. Andersen, because she already has received her defense costs from the Record Companies. Other states require plaintiffs to demonstrate that they have suffered some additional damages beyond defense costs.<sup>23</sup> As illustrated by Ms. Andersen’s complaint, however, any such additional damages (*i.e.*, claims for emotional distress) are inherently too individualized to permit class treatment.

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<sup>23</sup> *See, e.g., Kauffman v. Shefman*, 426 N.W.2d 819, 822 (Mich. Ct. App. 1988); *Stanback v. Stanback*, 254 S.E.2d 611, 625 (N.C. 1979); *Ely v. Whitlock*, 385 S.E.2d 893, 895 (Va. 1989).

**D. Multiple Cases Hold That Negligence Claims Are Not Capable of Nationwide Class Treatment.**

A long line of cases holds that, because each state has made its own policy choices about the allocation of responsibility for negligence-induced harm, these differences preclude certification of multi-state negligence classes. In a landmark decision in 1995, the Seventh Circuit decertified such a class, finding that “[t]he law of negligence, including subsidiary concepts such as duty of care, foreseeability, and proximate cause,” differs too widely from state to state. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995). District courts within the Ninth Circuit and elsewhere uniformly have agreed with *Rhone-Poulenc*. See, e.g., *Gartin v. S&M NuTec LLC*, 245 F.R.D. 429, 439 (C.D. Cal. 2007) (“[C]ourts generally consider negligence claims ill-suited for class action litigation.”); *In re Paxil Litig.*, 212 F.R.D. 539, 544-45 (C.D. Cal. 2003); *Duncan v. Nw. Airlines, Inc.*, 203 F.R.D. 601, 613-14 (W.D. Wash. 2001); *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 653 (C.D. Cal. 1996).<sup>24</sup>

In addition, nearly all states (although not Oregon, which uniquely has eliminated the concept of duty), require a negligence plaintiff to show that the defendant owed him or her a duty to exercise reasonable care. In those states, the existence or nonexistence of a duty is a threshold question of law for the court, and if no duty exists, the negligence claim must be

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<sup>24</sup> Among the many decisions agreeing that negligence cases are unsuited to class treatment because of, *inter alia*, differences in state laws, are *Thompson v. Jiffy Lube Int’l, Inc.*, 250 F.R.D. 607, 629-30 (D. Kan. 2008); *In re Conagra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 698-99 (N.D. Ga. 2008); *Sanders v. Johnson & Johnson, Inc.*, Civ. No. 03-2663(GEB), 2006 WL 1541033, at \*5 (D.N.J. June 2, 2006); *Drooger v. Carlisle Tire & Wheel Co.*, No. 1:05-CV-73, 2006 WL 1008719, at \*8-9 (W.D. Mich. Apr. 18, 2006); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 564-65 (E.D. Ark. 2005); *Foster v. St. Jude Med., Inc.*, 229 F.R.D. 599, 605-06 (D. Minn. 2005) and *Benner v. Becton Dickinson & Co.*, 214 F.R.D. 157, 174 (S.D.N.Y. 2003).



dismissed.<sup>25</sup> Whether a duty exists is a policy-laden question, and the policies to be considered, as well as the weight they are accorded, vary from state to state.<sup>26</sup>

Ms. Andersen's untenable theory of "duty" — that the holder of an infringed copyright owes a duty to the person it suspects infringed — has not been accepted by any state. Her theory, moreover, cannot be reconciled with the Supreme Court's holdings, under the *Noerr-Pennington* doctrine, that a plaintiff's responsibility is only to ensure that a suit is brought on probable cause. The imposition of any pre-suit "duty" that is greater than the probable cause standard would contravene the First Amendment's guarantee of an aggrieved party's right to petition the federal courts for redress.

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<sup>25</sup> See, e.g., *Taylor v. Smith*, 892 So. 2d 887, 891-92 (Ala. 2004) ("[T]he existence of a duty is a strictly legal question to be determined by the court."); *Molloy v. Meier*, 679 N.W.2d 711, 716 (Minn. 2004) (same); *Doe ex rel. Doe v. Batson*, 548 S.E.2d 854, 857 (S.C. 2001) (same); *Carson v. Headrick*, 900 S.W.2d 685, 690 (Tenn. 1995) (same).

<sup>26</sup> See, e.g., *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas*, 740 N.W.2d 206, 210-11 (Mich. 2007) ("The most important factor to be considered is the relationship of the parties."); *Erickson v. U-Haul Int'l, Inc.*, 738 N.W.2d 453, 460 (Neb. 2007) ("When determining whether a legal duty exists for actionable negligence, a court considers (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution."); *Lowery v. Echostar Satellite Corp.*, 160 P.3d 959, 964 (Okla. 2007) ("The most important consideration in determining the existence of a duty of care is foreseeability of harm to the plaintiff."); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1125 (Ill. 2004) (existence of a duty "turns largely on public policy considerations, informed by consideration of four traditional factors: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing that burden on the defendant"); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1060 (N.Y. 2001) ("Courts traditionally 'fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.'").



Even were Ms. Andersen’s “duty” theory credible, she would further compound the court’s inability to wrestle with her claims on a nationwide basis by alleging that the Record Companies owed her and the other class members a *heightened* duty of care because of their “specialized knowledge.” See Compl. ¶¶ 8.37-8.39. Generally, courts impose a heightened duty only in a very narrow category of cases. See, e.g., *Shin v. Sunriver Preparatory Sch., Inc.*, 111 P.3d 762, 771 (Or. Ct. App. 2005) (“The common thread among special relationships . . . warranting a heightened duty of care . . . is that the party who owes the duty has a *special responsibility* toward the other party.”); *Burrows v. Union Pacific R.R. Co.*, 218 S.W.3d 527, 537 (Mo. App. Ct. 2007) (“There are few situations in which a statute or the courts impose a duty to use ‘the highest degree of care,’ or ‘that degree of care that a very careful person would use.’ Courts have most commonly imposed this heightened duty on the operators of motor vehicles . . . electric companies, those who use firearms, or those who handle explosives.”). None of the *Burrows* examples, of course, remotely describes the relationship between a copyright owner and an alleged infringer.

Furthermore, most states impose negligence liability only when the defendant’s conduct was the proximate or legal cause of the plaintiff’s injury. This, too, is an inherently individual question. As with duty, the standard for proximate cause varies significantly from state to state. Some states define proximate cause solely in terms of foreseeability.<sup>27</sup> Others define it much more narrowly, requiring that the harm be a “probable” consequence of the defendant’s

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<sup>27</sup> See, e.g., *Spann v. Shuqualak Lumber Co., Inc.*, 990 So. 2d 186, 190 (Miss. 2008) (proximate causation exists if “the damage is the type, or within the classification, of damage the negligent actor should reasonably expect (or foresee) to result from the negligent act”); *Abrams v. City of Chicago*, 811 N.E.2d 670, 675 (Ill. 2004) (“‘Legal cause’ . . . is largely a question of foreseeability. The relevant inquiry is whether ‘the injury is of a type that a reasonable person would see as a likely result of his or her conduct.’”).

conduct.<sup>28</sup> Some require that the defendant's conduct be a "substantial factor" in causing the plaintiff's harm,<sup>29</sup> and some states' standards do not fit neatly within any of these categories.<sup>30</sup>

In each case, the state's definition of proximate causation reflects a deliberate policy choice. A broad standard, such as a foreseeability approach, is fundamentally incompatible with a more narrow standard, such as a rule requiring a probability of harm. Additionally, the affirmative defenses available to defendants vary from state to state. As *Rhone-Poulenc* and all subsequent cases have recognized, no single jury could be expected to apply the varying causation standards of fifty-one jurisdictions to each putative class member's peculiar facts.

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<sup>28</sup> E.g., *Hale v. Brown*, 197 P.3d 438, 440 (Kan. 2008) ("The injury must be the natural and probable consequence of the wrongful act. Individuals are not responsible for all possible consequences of their negligence, but only those consequences that are probable according to ordinary and usual experience."); *Interim Personnel of Cent. Virginia, Inc. v. Messer*, 559 S.E.2d 704, 708 (Va. 2002) (proximate cause exists if "an ordinary, prudent person ought, under the circumstances, to have foreseen that an injury might probably (not possibly) result from the negligent act"); *Regions Bank & Trust v. Stone County Skilled Nursing Facility, Inc.*, 49 S.W.3d 107, 116 (Ark. 2001) (proximate cause exists "if the injury is the natural and probable consequence of the negligent act and ought to have been foreseen in the light of attending circumstances"); *Mussivand v. David*, 544 N.E.2d 265, 272 (Ohio 1989) ("If an injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in the light of all the attending circumstances, the injury is then the proximate result of the negligence.").

<sup>29</sup> E.g., *Schweiger v. Amica Mut. Ins. Co.*, 955 A.2d 1241, 1244 (Conn. App. Ct. 2008) ("[T]he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries."); *IHS Cedars Treatment Ctr. of DeSoto v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004) ("The two elements of proximate cause are cause in fact (or substantial factor) and foreseeability.").

<sup>30</sup> See, e.g., *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP*, 69 P.3d 965, 969 (Cal. 2003) (proximate cause exists if the court, considering public policy, determines that the defendant should be held liable for harm that he/she actually caused); *Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666, 670 (N.Y. 1980) (proximate cause is an "elusive" concept, "incapable of being precisely defined to cover all situations"; it is for the finder of fact to determine whether proximate cause exists based on the facts of the case).

**IV. The Individual Nature of Ms. Andersen's Claims Makes Them Unsuitable to Class Treatment Even Were The Class Limited to Oregon.**

Several of the foregoing problems flow from Ms. Andersen's attempt to have a nationwide class certified. Limiting the class to her fellow Oregonians, however, still would not render it certifiable. Even an Oregon-only class would continue to suffer from Ms. Andersen's inability to sort infringers from any non-infringers without individual inquiry. Indeed, an examination of the other 111 Enforcement Program subjects who reside or resided in Oregon illustrates why this is so. This group of people, like the much larger group nationwide, includes people who settled their cases, some of whom stipulated to judgments prohibiting their ability to bring claims like Ms. Andersen's; people whom the Record Companies ceased to pursue for a variety of individualized reasons; people whom the Record Companies never actually located; people against whom the Record Companies obtained default judgments, and a variety of other unique scenarios. Oregon's tort laws foretell different possible outcomes in each of these situations.

**A. Oregon Abuse of Process Law, Though Undeveloped, Suggests That No Oregon Resident Could State a Claim.**

The "abuse of process" tort has not been much explored in Oregon, and the Oregon Supreme Court has provided no guidance on its nuances since the 1970s. Of the few cases decided by Oregon courts, none resemble Ms. Andersen's. The sparse precedents that exist on these claims all suggest that Ms. Andersen's claim is untenable and that, in any event, the issues presented by her claim are too individualized to be litigated on a class basis.

Generally, under Oregon law, "[a]buse of process is the perversion of legal procedure to accomplish an ulterior purpose when the procedure is commenced in proper form and with

probable cause.” *Kelly v. McBarron*, 482 P.2d 187, 190 (Or. 1971). It “involves the use of the process as a club by which to extort something unrelated to the process from the other party.” *Clausen v. Carstens*, 730 P.2d 604, 608 (Or. Ct. App. 1986). In addition to alleging some improper, ulterior purpose, a plaintiff also must allege both “a willful act in the use of the process that is not proper in the regular conduct of the proceeding,” *Pfaendler v. Bruce*, 98 P.3d 1146, 1152 (Or. Ct. App. 2004); and an arrest or seizure of person or property. *See Acro-Tech, Inc. v. Robert Jackson Family Trust*, No. 01-447-KI, 2001 WL 1471753, at \*8 (D. Or. Sept. 6, 2001); *Roberts v. Jefferson County*, No. 98-524-AS, 1999 WL 1442334, at \*8 (D. Or. Oct. 5, 1999); *Lee v. Mitchell*, 953 P.2d 414, 427 (Or. Ct. App. 1998); *Reynolds v. Givens*, 695 P.2d 946, 950 (Or. Ct. App. 1985).

These principles raise a key issue with the claim of any Oregon resident in this matter whom the Record Companies did not sue personally. No Oregon court has addressed the question of whether the threat of a lawsuit, by itself, ever can constitute an abuse of “process.” This Court, therefore, would be bound by the Ninth Circuit’s determination in *Ross v. Union Oil Co. of Cal.*, No. 87-3819, 1988 WL 84093, at \*1 (9th Cir. Aug. 9, 1988) (unpublished opinion), that “no action for abuse of process may be maintained [in Oregon] where there has been no actual use of process by a court or by some official enforcement agency.”

Even as to persons whom the Record Companies sued, but then did not pursue past the complaint stage, Oregon’s sparse law on abuse of process suggests that the filing of a lawsuit alone also cannot form the basis of an abuse of process claim. *See Pfaendler*, 98 P.3d at 1153 (dismissing defendant’s counterclaim for abuse of process which was based solely on the filing of a lawsuit). As to the few Oregon residents whose cases have advanced beyond a complaint, none, including Ms. Andersen, can assert an arrest or seizure of property.

**B. Wrongful Initiation Of Civil Proceedings Is Inherently Individualized.**

The elements of a claim for wrongful initiation of civil proceedings in Oregon are “(1) [t]he commencement and prosecution by the defendant of a judicial proceeding against the plaintiff; (2) [t]he termination of the proceeding in the plaintiff’s favor; (3) [t]he absence of probable cause to prosecute the action; (4) [t]he existence of malice . . . [*i.e.*,] a primary purpose other than that of securing an adjudication of the claim; and (5) [d]amages.” *See Alvarez v. Retail Credit Ass’n of Portland, Or., Inc.*, 381 P.2d 499, 501 (Or. 1963). This tort, too, has been little-explored by Oregon courts, and such guidance as exists points to the presence of individualized issues that would preclude class treatment in this case.

The first element, “commencement and prosecution,” cannot be met by anyone whose case never matured, as Ms. Andersen’s did, to the point of a personalized (non-*Doe*) lawsuit. As for the third element, probable cause, even should the Court disagree with the Record Companies that collection of an IP address constitutes probable cause under Ninth Circuit *Noerr-Pennington* precedent, the jury in this case still could not find probable cause lacking as a matter of Oregon law without examining the *totality* of evidence that the Record Companies had at the point they commenced a personalized lawsuit. With respect to the cases in Oregon that were premised not on IP addresses, but on attestations by people claiming to know who used their computers to upload or download copyrighted sound recordings, to the extent there is any doubt that this constituted probable cause, the jury would need to resolve that doubt in the specific context presented by each individual case.

The second factor, “favorable termination,” also has implications for Ms. Andersen’s attempt to pursue this claim on a class basis. Oregon residents who settled their cases cannot satisfy this element. *See Gowin v. Heider*, 386 P.2d 1, 7 (Or. 1963). An exception may apply

if a settling party can show that the settlement was “not [a] free and voluntary act,” *id.*, but that inquiry would be highly individualized and, in this case, no Oregon resident could satisfy it.

Oregon appellate courts also have stated that “the voluntary dismissal of an underlying action before a trial on the merits is favorable to the defendant,” but *only* “if it reflects adversely on the merits of the underlying action.” *Portland Trailer & Equip., Inc. v. A-1 Freeman Moving & Storage, Inc.*, 49 P.3d 803, 808 (Or. Ct. App. 2002) (emphasis added). This affects both Ms. Andersen and other Oregon residents whose cases the Record Companies voluntarily dismissed. Deciding whether a dismissal reflects on the merits of the underlying claim “requires an examination of the circumstances resulting in the termination,” *id.* — another inherently individualized inquiry.

In fact, it is not at all clear which Oregon residents Ms. Andersen could represent in a claim for wrongful initiation of civil proceedings. Those whose cases were ceased due to financial hardship could not do so, because the Record Companies’ voluntary termination did not reflect on the merits. Other cases were discontinued after the IP address owner acknowledged that his or her computer had been used to upload or download copyrighted music, but provided evidence that the acts of infringement had been committed by others with access to the computer. Once the IP address owner affirmatively identified the person who had used his or her computer and internet connection to upload and download copyrighted sound recordings, the Record Companies discontinued proceedings against the IP address owner.

**C. Ms. Andersen Is Not Even A Member of an Oregon Negligence Class.**

Ms. Andersen also pleads a negligence claim against the Record Companies. This claim is premised only on emotional injuries, not financial ones. Oregon, however, is one of the minority of states that continues to adhere to the common law “impact rule,” which bars

negligence actions for emotional injuries unless the plaintiff also sustained a physical impact or injury due to the defendant's conduct. *See Hammond v. Cent. Lane Commc'n Ctr.*, 816 P.2d 593, 597 (Or. 1991) (en banc) (“[P]laintiff points to no legal source of liability for her emotional injury other than its foreseeability. . . . [W]e conclude that plaintiff may not recover because she sustained no physical injury.”). Ms. Andersen has not alleged, and cannot allege, any facts suggesting that the defendants physically touched her person or property. Nor has she alleged facts that might create an exception to the impact rule. Lacking a valid negligence claim under Oregon law, she cannot represent a class. *Falcon*, 457 U.S. at 156 (stating that the Court has “repeatedly held” that a representative must be a member of the class).

Ms. Andersen's putative class also includes people who, unlike herself, settled their cases and paid some amount of money to the Record Companies. Ms. Andersen's attempt to represent such people fails the typicality requirement of Rule 23(a)(3). Even if persons who sustained an economic injury could be included in a class, Oregon law also holds that claims for purely economic harm are unsustainable absent a special duty. *Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP*, 83 P.3d 322, 328 (Or. 2004). Ms. Andersen cannot credibly allege any special duty between the Record Companies and people the Record Companies sued or threatened with suit for copyright infringement.

**V. Class Treatment Is Not Superior to Other Available Methods for Fairly And Efficiently Adjudicating the Controversy.**

Separate from Rule 23(b)(3)'s requirement that common questions of law and fact must predominate, the rule also requires plaintiffs to demonstrate that a class action is “superior” to other methods of adjudicating the underlying disputes. *See p. 7, supra*, citing four-factor test of Rule 23(b)(3). The unmanageability of Ms. Andersen's claims, and the reason she thus fails

the test of Rule 23(b)(3)(D), is demonstrated by the predominance of individual issues of fact and law. Ms. Andersen's proposed class, however, also fails the other three superiority tests.

**A. Individual Control Is Preferable Here.**

Rule 23(b)(3)(A) requires consideration of class members' interests in individually controlling the prosecution or defense of separate actions. In each Enforcement Program case, the person sued or threatened with suit faces potential responsibility for quite large statutory penalties if he or she is found to have uploaded or downloaded copyrighted sound recordings without permission. Rather than letting these cases proceed in each person's home jurisdiction, where they can appear and mount their own, individualized defenses through counsel of their choice, or letting settlements or voluntary dismissals lie, Ms. Andersen's proposal is that she and her counsel should take over litigation of pending claims and reopen all matters that have been closed. Should this case go to trial on a class basis, and should Ms. Andersen lose, depending upon the nature and extent of the verdict, each pending Enforcement Program defendant would lose some or all ability to mount an individual defense, and those who previously settled or had their cases dismissed could become subject to additional liability.

**B. There Are Many Pending Cases.**

In addressing "the extent and nature of any litigation concerning the controversy already begun by or against class members," as required by Rule 23(b)(3)(B), Ms. Andersen's counsel claim not to be aware of "any pending litigation in which the claims at issue . . . are being separately pursued by any other class members." Pl. Class Br. at 26. In fact, however, more than 100 Enforcement Program targets asserted counterclaims against the Record Companies. *See* Oppenheim Decl. ¶ 10. As the Record Companies have explained in their summary judgment motion, counterclaims that have implicated *Noerr-Pennington* concerns, as



Ms. Andersen's do, routinely have been dismissed on that basis. It may be that the emphasis in Ms. Andersen's denial of knowledge of these cases is meant to be placed on the words "pending" or "are," because other counterclaims repeatedly have been pursued but dismissed on *Noerr-Pennington* grounds or for other reasons. Even on those terms, however, the assertion is false, because several of these matters remain pending.

Even were Ms. Andersen the only person with *active* (i.e., non-dismissed) counterclaims against the Record Companies, that is not the point. Because all of the claims Ms. Andersen is alleging depend upon her, or any absent class member's, ability to show that he or she did not "engage in violation of the copyright laws," Ms. Andersen's proposal is that this Court take over all of the Record Companies' affirmative infringement cases across the country, regardless of how advanced those cases may be in the jurisdictions in which they were brought, and to relitigate matters decided in closed cases. Such an approach would be an inefficient duplication of judicial efforts. *See In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1088 (6th Cir. 1996) (stating that certification of nationwide class was a "cause for concern" when there were "previously-filed cases at more advanced stages of litigation").

**C. One Court Cannot Decide Whether Proceedings Litigated Before Other Courts Around the Country Were "Abusive" or "Wrongfully Initiated."**

Rule 23(b)(3)(C) requires consideration of "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." Here, Ms. Andersen's proposal is that this Court sit in judgment of the conduct of proceedings litigated around the country before coordinate jurists. There is no precedent for this, nor could there be. The concept that one federal district court judge has the authority to conclude that a litigation step,

supervised and authorized by another federal district court judge, amounted to a state-law tort, is completely inconsistent with notions of comity.

### **CONCLUSION**

For the foregoing reasons, the Record Companies respectfully request the Court to deny Ms. Andersen's motion for class certification.

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