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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

TANYA ANDERSEN,

No. 3:07-CV 07-934 BR

Plaintiff,

v.

Defendants'
**MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

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

ORAL ARGUMENT REQUESTED

Defendants.

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Defendants Atlantic Recording Corporation, Priority Records, LLC, Capitol Records, Inc., UMG Recordings, Inc., BMG Music, Recording Industry Association of America and Settlement Support Center, LLC (collectively “Record Companies”) and MediaSentry, Inc., f/k/a SafeNet, Inc., respectfully move, in conjunction with their opposition to Ms. Andersen’s motion for class certification, for summary judgment dismissing each of her claims. Controlling Supreme Court and Ninth Circuit authority applying *Noerr-Pennington* First Amendment immunity bar Ms. Andersen’s claims as a matter of law. In fact, since the Court last considered the *Noerr-Pennington* issue, several other courts have dismissed, on *Noerr-Pennington* grounds, strikingly similar (if not identical) claims against the Record Companies brought by other individuals Ms. Andersen claims are within her class.

The Ninth Circuit case that controls most directly, *Sosa v. DirecTV, Inc.*, 437 F.3d 923 (9th Cir. 2006), along with other *Noerr-Pennington* decisions rejecting the claims of other members of Ms. Andersen’s purported class, were decided on the pleadings under Rule 12. Given that Ms. Andersen already has received all her requested discovery, and because that discovery shows there are no material facts in dispute as to whether the Record Companies had probable cause to initiate proceedings against her, the Record Companies, with the Court’s permission, have withdrawn their previously-filed motion for judgment on the pleadings and are replacing it with this motion for summary judgment pursuant to Rule 56.

Because the undisputed record shows that the Record Companies had probable cause to initiate proceedings against Ms. Andersen, and because that record negates her conclusory claims about “sham litigation,” the *Noerr-Pennington* doctrine bars her claims.

PRELIMINARY STATEMENT

Ms. Andersen's five causes of action allege that the Record Companies' copyright enforcement program (the "Enforcement Program"), undertaken to combat the unlawful infringement of music copyrights occurring on peer-to-peer ("P2P") networks, was tortious.¹ None of her claims can survive summary judgment because, as was the case in *Sosa*, the Record Companies had an objectively reasonable belief that those sued as part of the Enforcement Program, including Ms. Andersen, ultimately would be found to have infringed.

Sosa controls this case. It is one in a line of Supreme Court and Ninth Circuit decisions holding that the First Amendment right to petition the courts protects most litigation-related activities from claims like Ms. Andersen's. *Sosa*, 437 F.3d at 929, citing *Eastern R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

The Supreme Court has set perhaps the highest bar known to the law for claims like Ms. Andersen's. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) ("*PRE*"), the Court held that it is only when the underlying litigation-related activities are "**objectively baseless** in . . . that **no reasonable litigant could realistically expect success on the merits**" that claims like Ms. Andersen's can proceed. *Id.* (emphasis

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

added). The controlling standard is probable cause. If there is a *“reasonable belief that there is a chance . . . that [a] claim may be held valid upon adjudication,”* that reasonable belief is an absolute bar. *Id.* (emphasis added). As the Supreme Court put it, *“an objectively reasonable effort to litigate cannot be sham”* for *Noerr-Pennington* immunity purposes, “regardless of subjective intent.” *Id.* at 57 (emphasis added). For that reason, the Ninth Circuit has emphasized that courts must proceed with “great reluctance” before “conclud[ing] in any *Noerr-Pennington* case that the litigation in question is objectively baseless, as doing so would leave that action without the ordinary protections afforded by the First Amendment.” *White v. Lee*, 227 F.3d 1214, 1232 (9th Cir. 2000).

That standard, as applied to this record, compels summary judgment. The few facts necessary to demonstrate that the Record Companies had an objectively reasonable basis for suing Ms. Andersen cannot be disputed. On the morning of May 20, 2004, a person using an internet account assigned the Internet Protocol (“IP”) address 4.41.209.23 accessed the KaZaA P2P network.² That person used KaZaA to share numerous copyrighted music files. *See* Declaration of Chris Connelly, dated May 8, 2009 (“MediaSentry Decl.”) ¶¶ 7-11 & Exs. 1-4. The Record Companies sued that person on a “Doe” basis. Through a subpoena, they learned from Verizon Online, the Internet Service Provider (“ISP”) responsible for IP address 4.41.209.23, that, at the time in question, it had been assigned to Ms. Andersen’s account. On two subsequent occasions, when Ms. Andersen contended that Verizon had misidentified her,

² The manner in which IP addresses are assigned is described in the Declaration of Doug Jacobson, Ph.D., dated May 8, 2009, (“D. Jacobson Decl.”) at ¶¶ 8-10. *See also id.* ¶¶ 11-20 (discussing the functions of P2P networks generally and the KaZaA network specifically). Professor Doug Jacobson is not related to Jeffrey S. Jacobson, counsel for defendant Recording Industry Association of America.

Verizon reconfirmed that the IP address was registered to her. *See* Declaration of Jeffrey S. Jacobson, Esq., dated May 7, 2009 (“J.S. Jacobson Decl.”) ¶¶ 3-6 & Exs. A-B.

Ms. Andersen does not, and truthfully could not, dispute any of these facts. She nevertheless characterizes the Record Companies’ litigation against her as a “sham.” This characterization, however, is based on five theories of liability, recited in her motion for class certification, that courts repeatedly and consistently have rejected.

First, Ms. Andersen puts most of her effort into arguing that an IP address is too circumstantial a basis on which to claim that any specific individual engaged in infringement. According to Ms. Andersen, knowledge that an IP address is linked to acts of infringement does not exclude the possibilities that those acts actually may have been committed (1) by someone “spoofing” the IP address, (2) by someone purloining another person’s broadband Internet access (wired or wireless), (3) by a third party visitor to an accountholder’s home, or (4) as a result of some other possible explanation of innocence. *See* Pl. Class Br. at 4.³ In both civil and criminal cases, however, *including in cases that are part of this Enforcement Program*, numerous courts have held that even if an IP address can be “spoofed,” and even if someone other than the registered owner of an IP address ultimately may be proved to have been the person actually using the computer to commit the act of infringement, the accurate identification of an IP address nevertheless constitutes probable cause to initiate proceedings against the registered owner. *See infra* pp. 17-21.

Second, Ms. Andersen argues that Media Sentry, which used KaZaA and other P2P networks to locate suspected infringers and memorialize proof that acts of infringement had

³ “Pl. Class Br.” refers to the Brief in Support of Plaintiff’s Motion for Class Certification (doc. no. 121).

occurred, did not hold state “private investigator” licenses. This allegation is irrelevant to the application of *Noerr-Pennington* immunity. The IP address of a computer attached to a P2P network, and, of course, the actual downloaded song itself, are readily and publicly available to any user of a P2P network. The only relevant question is whether this evidence, regardless of how collected or by whom, meets the probable cause standard. Every court that has examined this issue has held that it does. *See infra* pp. 21-23.

Third, Ms. Andersen asserts, without any factual support or citation, that the Record Companies acted improperly by “enter[ing]” publicly-available shared file folders. Pl. Br. at 4-5. It is well settled, however, that one has no basis for objecting when, after affirmatively offering his or her shared file folder to the online world (as users of P2P networks do, by definition), someone else views the contents of that folder. Moreover, Ms. Andersen’s conclusory statement is inadequate to create a disputed issue of a material fact because the use of P2P networks, such as that undertaken by MediaSentry, involves no such “entry.” *See* D. Jacobson Decl. ¶ 21; MediaSentry Decl. ¶ 8 (discussed further *infra* p. 24).

Fourth, Ms. Andersen’s objections to the Record Companies’ use of *Doe* proceedings against the registered owners of IP addresses observed in the act of infringement, and *ex parte* subpoenas to ISPs seeking to identify those registered owners, fail as a matter of law. This same procedure has been reviewed and approved by dozens of courts as part of the Enforcement Program. These courts repeatedly and consistently have rejected challenges like Ms. Andersen’s to this utterly common use of the discovery process. *See infra* pp. 23-24.

Fifth, and finally, in a set of allegations that relate solely to her, but not to any other member of the class she purports to represent, Ms. Andersen contends the Record Companies

continued to litigate against her even after they knew, or should have known, that she was not “Gotenkito@kazaa” and that she had been misidentified as such by her ISP. Fourth Amended Complaint (doc. no. 58) (“Compl.”) ¶ 7.12. These allegations, however, also fall well short of demonstrating that the case against her had become “objectively baseless,” and are similarly barred by *Noerr-Pennington*. See *infra* pp. 25-26.

Because the existence of probable cause absolutely precludes a finding of sham litigation, *PRE*, 508 U.S. at 60, and because Ms. Andersen’s challenge to probable cause (1) is based only on conclusory statements, not any genuinely disputed issues of material fact, and (2) rests on theories courts have uniformly rejected, her claims fail and should be dismissed.⁴

FACTUAL BACKGROUND

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

⁴ Because undisputed material facts show probable cause existed for the Enforcement Program and the suit against Ms. Andersen, her repeated characterizations of the Record Companies’ motives are legally irrelevant. See, e.g., Compl. ¶¶ 1.3, 6.2 (motive was to spread fear and intimidation; not to protect copyrights); Pl. Class Br. at 3 (motive was to preserve a monopoly over the distribution of recorded music). Moreover, even accepting her pejorative characterizations at face value, there is nothing improper about the Record Companies’ motives: They simply wanted to ensure that consumers did not obtain pirated copies of copyrighted music. Accusations like “monopoly” and “intimidation” do not change the reality that the Record Companies have the right to protect their valuable intellectual property against the problem of piracy.

In 2004, the Department of Justice concluded that online media distribution systems are “one of the greatest emerging threats to intellectual property ownership.” See Report of the Department of Justice’s Task Force on Intellectual Property, at 39 (Oct. 2004), <http://www.cybercrime.gov/IPTaskForceReport.pdf> (“Task Force Report”). It estimated that “millions of users access P2P networks” and “the vast majority” of those users “illegally distribute copyrighted materials through the networks.” *Id.* See also *Grokster*, 545 U.S. at 923 (users employed P2P software “primarily to download copyrighted files.”) As the Seventh Circuit found in *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005), “[m]usic downloaded for free from the Internet is a close substitute for purchased music; many people are bound to keep the downloaded files without buying the originals.”

Recording companies, motion picture producers, software developers and others similarly affected by the massive scope of the online infringement problem plainly have the right to petition the federal government, including the federal courts, to stop this piracy. The Record Companies exercised that right judiciously. They did not begin their P2P enforcement efforts by suing individual infringers, but first brought a number of high profile cases to clearly establish and make public that unauthorized online “sharing” of copyrighted works on P2P networks was illegal, that individuals could be held liable for such conduct, and that the proprietors of those systems can be secondarily liable for copyright infringement. See *Grokster*, 545 U.S. at 940; *In re Aimster Copyright Litigation*, 334 F.3d 643, 654-55 (7th Cir. 2003). See also *Gonzalez*, 430 F.3d at 889 (those who post or download music files are “primary infringers”); *A&M Records, Inc. v. Napster*, 239 F.3d 1004, 1022-24 (9th Cir. 2001).

The successful secondary liability litigation against the proprietors of certain P2P networks did not stop those or other networks from being used by persons to copy sound recordings without authorization. As the *Aimster* court noted, people remained “disdainful of copyright and in any event *discount the likelihood of being sued or prosecuted for copyright infringement.*” 334 F.3d at 645 (emphasis added). This “discount” was attributable, in large part, to the mistaken belief by end-users that they could not be located online, or, if located, could not be personally identified. *See* Task Force Report at 39-40. Accordingly, in 2002, the Record Companies decided, reluctantly, to commence the Enforcement Program, designed to identify and pursue the direct infringers pirating their works. *See* Compl. ¶ 7.1.

The relevant elements of the Enforcement Program are undisputed. The Record Companies engaged a firm, MediaSentry, to observe and document instances of infringement using P2P networks. All that was required for this task was to (1) log on to a P2P network; (2) query it for the availability of copyrighted songs; (3) observe the results of these queries, which showed the users offering to share these songs unlawfully; (4) use KaZaA’s inherent functionality to view all other songs that individual was offering; and (5) download the songs, noting the IP address of the computer from which the songs were transferred. All of this could be done by any user of the KaZaA network; no extraordinary steps were required. *See* D. Jacobson Decl. ¶¶ 28-31. In particular, neither KaZaA nor the other P2P networks in question permit one user to alter or manipulate the contents of another user’s shared folder. *See id.* ¶ 21; *see generally id.* ¶¶ 15-22; MediaSentry Decl. ¶¶ 3-11. Indeed, the ability to see what files other users have made available for “sharing” is the principal attraction of P2P networks.

Once MediaSentry recorded the IP addresses of persons who had unlawfully shared copyrighted songs and gathered the necessary evidence, the Record Companies chose cases they wished to pursue and commenced “Doe” actions against the (as-yet-unidentified) individuals responsible for the IP addresses. The Record Companies then subpoenaed the ISP records identifying these individuals. *See Atlantic Recording Corp. v. Heslep*, No. 4:06-CV-132-Y, 2007 WL 1435395 at *1-3 (N.D. Tex. May 16, 2007) (explaining MediaSentry’s actions and the subsequent *Doe* proceedings, emphasizing “that MediaSentry uses the very program employed by the alleged infringing user.”). *See also* D. Jacobson Decl. ¶ 32.

In the specific case of Ms. Andersen, MediaSentry discovered that a person with the screen name “Gotenkito” was logged on to the KaZaA P2P network to share music, early in the morning of May 20, 2004. Compl. ¶ 7.18; MediaSentry Decl. ¶ 7. MediaSentry’s involvement with Gotenkito ended there. After determining that the files Gotenkito distributed were, in fact, copies of the Record Companies’ copyrighted material, the Record Companies filed a *Doe* case against the alleged infringer assigned this IP address. Nowhere in Ms. Andersen’s complaint or class certification motion does she contest that the IP address used by Gotenkito was 4.41.209.23, nor does she dispute that Verizon identified this address as having been assigned to her Verizon account. In fact, Verizon confirmed the accuracy of its identification on two subsequent occasions. *See* J.S. Jacobson Decl. ¶ 6 & Ex. B.

Once Verizon Online connected Gotenkito’s address to Ms. Andersen, the Record Companies sent her a Pre-suit Naming Letter (“PNL”) (attached as J.S. Jacobson Decl. Ex C). The PNL invited her to contact the Record Companies’ settlement agent to discuss a

resolution. When a mutually satisfactory resolution was not reached, the Record Companies filed a complaint against Ms. Andersen for copyright infringement.

ARGUMENT

I. The Record Companies Easily Meet The Summary Judgment Standard.

The record of what evidence the Record Companies had at the time they initiated proceedings against Ms. Andersen is undisputed. Accordingly, the Record Companies bring this motion pursuant to Rule 56(c), which “authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Hummasti v. Ali*, No. 06-CV-1710-BR, 2009 WL 789679, at *2 (D. Or. Mar. 23, 2009). “A non-movant’s bald assertions or a mere scintilla of evidence in his favor are both insufficient to withstand summary judgment.” *FTC v. Stefanichik*, 559 F.3d 924, 929 (9th Cir. 2009). Significantly, “the substantive law governing a claim or defense determines whether a fact is material,” and “[i]f the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment.” *Hummasti*, 2009 WL 789679, at *2, citing *Miller v. Glen Miller Prod., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006). Here, the Ninth Circuit has held that the purported issues Ms. Andersen raises are immaterial to the application of *Noerr-Pennington* immunity.

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

The *Noerr-Pennington* doctrine is based on the First Amendment right “to petition the government for a redress of grievances” — a right the Supreme Court held “extend[s] to situations where groups use courts to advocate their causes and points of view respecting resolution of their business and economic interests.” *BE&K Constr. Co. v. NLRB*, 536 U.S.

516, 525 (2002) (internal quotation omitted), *citing Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972). In *PRE*, 508 U.S. at 60, the Supreme Court carved out an extremely narrow exception to *Noerr-Pennington*, holding that so-called “sham” petitions are not entitled to protection. In order to establish that the Record Companies’ lawsuit against her was a sham, however, Ms. Andersen must demonstrate that, at the time the Record Companies began that lawsuit, they had absolutely no “*reasonable belief* that there [was] *a chance* that [their] claim [would] be held valid upon adjudication.” *Id.* (emphasis added).

In *PRE*, 508 U.S. at 62, the Supreme Court held that “[t]he existence of probable cause . . . precludes a finding . . . [of] sham litigation.”⁵ It held that sham litigation exists only if “a lawsuit is . . . ‘objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.’” *Id.* The Ninth Circuit, elaborating on this test, wrote that “an objectively reasonable effort to litigate cannot be sham regardless of subjective intent,” and “proof of a lawsuit’s objective baselessness is the ‘threshold prerequisite: A court may not even consider the defendant’s allegedly illegal objective unless it first determines that his lawsuit was objectively baseless.’” *White*, 227 F.3d at 1232, *quoting PRE*, 508 U.S. at 55-57. Because liberal application of “the sham exception to the *Noerr-Pennington* rule may have a chilling effect on those who seek redress in the courts . . . the exception should be applied with caution.” *Columbia Pictures Indus., Inc. v. Prof’l Real Estate Investors*, 944 F.2d

⁵ Probable cause “does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required.” *Texas v. Brown*, 460 U.S. 730, 742 (1983) (internal quotation and citations omitted). “The substance of all the definitions of probable cause is a reasonable ground for belief of guilt.” *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). The definition of probable cause is the same in both the civil and criminal contexts. *See Haupt v. Dillard*, 17 F.3d 285, 288 (9th Cir. 1994) (defendant that litigated probable cause issue in criminal case estopped from relitigating same issue in subsequent civil trial).

1525, 1531 (9th Cir. 1991). *See also CBS Interactive, Inc. v. NFL Players Ass'n, Inc.*, Civ. No. 08-5097, 2009 WL 1151982, at *13-15 (D. Minn. Apr. 29, 2009) (dismissing claims under *Noerr-Pennington*; rejecting allegations of “sham” litigation even when the underlying suit had been brought in the face of adverse and controlling appellate authority).

Ms. Andersen contends that the Record Companies’ lawsuits against her and others were a “sham” principally because, as she views it, the method the Record Companies used to initially identify suspected infringers (IP addresses, which she contends do not definitively prove that the owner of the address was the actual infringer), lacked precision and led to lawsuits against people who should not have been sued. Compl. ¶ 8.74; Pl. Class Br. at 4, 10-13. According to Ms. Andersen, observing an IP address being used for infringement, and learning, through court-supervised discovery, the identity of the person responsible for that address, was not sufficient probable cause, because the Record Companies could not, at the outset of the case, prove that the owner of the IP address was the specific person directly responsible for the acts of infringement committed from the address. *See, e.g.*, Pl. Class Br. at 14 (Record Companies “could not have known, regardless of the information gained from [MediaSentry] . . . the identity of any given person who might have participated in any alleged infringing activity at any given time.”). A long, clear and unbroken line of authority, however, holds that the link between IP addresses and unlawful conduct *does*, on its own, constitute probable cause to proceed against the identified owners of those addresses.

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

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

Numerous courts previously have considered and rejected the contention, raised now by Ms. Andersen, that the Enforcement Program was a “sham” because IP addresses are not enough. As one court recently stated when dismissing, on *Noerr-Pennington* grounds, similar counterclaims in another Enforcement Program case:

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

Motown Record Co., L.P. v. Kovalcik, No. 07-CV-4702, 2009 WL 455137, at *4 (E.D. Pa. Feb. 23, 2009) (emphasis added).

Just last month, in *UMG Recordings, Inc. v. Martino*, No. 4:08-CV-1756, 2009 WL 1069160, at *3 (M.D. Pa. Apr. 21, 2009), the court considered claims, identical to Ms. Andersen’s, that the Record Companies “caused [Martino] to suffer emotional distress and incur legal fees by maliciously filing suit and intimidating the defendant, via the legal process, in an effort to unjustly obtain compensation or induce settlement.” Even assuming such allegations sufficed to state a claim for abuse of process, the court found the claim to be barred by *Noerr-Pennington* immunity:

There can be no question that the present plaintiffs have a right to protect their copyright interests via the litigation process. Consequently, even if the defendant could properly allege that the plaintiffs filed this suit for improper reasons, the *Noerr-Pennington* Doctrine bars the defendant's counterclaim because the plaintiffs are entitled to seek redress in this fashion under federal law. ***The defendant simply cannot demonstrate that plaintiffs' claims are "completely baseless" because plaintiffs had probable cause to institute these civil proceedings and reasonably expect success on the merits.*** . . . Because we find that the Defendant cannot establish the initial factor of "sham exception," we need not analyze the second prong of the test.

Id. at *3-4 (emphasis added) (citations omitted).

One of Ms. Andersen's specific criticisms of IP addresses — that they "could have been associated with a business, a house, an apartment, or a dormitory room, any of which could have been occupied or visited by any number of individual persons" (Pl. Class Br. at 4), also has been held insufficient to overcome *Noerr-Pennington* immunity.⁶ In *Atlantic Recording Corp. v. Raleigh*, No. 4:06-CV-1708, 2008 WL 3890387 (E.D. Mo. Aug. 18, 2008), the defendant, like Ms. Andersen, could not "deny that plaintiffs linked the allegedly infringing activity to the IP address of a computer to which she had access[,] . . . but state[d] that she ***resided in a sorority house*** and owned a computer that was not password-protected,

⁶ Ms. Andersen has urged this point repeatedly. *See, e.g.*, Compl. ¶¶ 7.5-7.6; 7.18-7.22; Pl. Class Br. at 4. ("[A]t its best the [Enforcement Program] was devised only to identify a computer device serviced by an [ISP] and associated with an [IP] address."); *id.* at 14 ("Defendants could not have known . . . the identity of any given person who might have participated in any alleged infringing activity at any given time"); Compl. ¶ 7.3 ("Media Sentry is . . . capable of identifying an Internet Protocol (IP) address that may have been associated with or assigned to a particular computer or routing device," but the infringement also could have been committed by a guest in the owner's home, by someone accessing the owner's broadband service unlawfully, or by someone "spoofing" an IP address); Pl. Class Br. at 9-10 (purporting to list, without any factual citation to expert or other evidence, "several critical facts that Defendants could never know or prove based solely" on the IP address).

and *thus any one of the house's residents could have used her computer* to engage in unlawful infringement.” *Id.* at *3 (emphasis added). The court dismissed the defendant’s counter-claims pursuant to *Noerr-Pennington* immunity because “the defendant’s denial that she personally engaged in wrongdoing is not sufficient to bar this action . . . within the ‘sham’ litigation exception to the *Noerr-Pennington* doctrine.” *Id.* at *4.

Other courts have reached similar conclusions. *See, e.g., Interscope Records v. Does 1-12*, No. 08-187, 2008 WL 4939105, at *2 (N.D. Ind. Nov. 14, 2008) (“Doe’s argument that the court must demand evidence that a defendant has engaged in wrongful conduct fails when compared to plaintiffs’ rights [under the Copyright Act] . . . because the IP addresses have traced the users and reveal the necessary distribution of copyrighted music recordings.”); *Heslep*, 2007 WL 1435395, at *6 (“[t]he evidence uncovered from MediaSentry’s investigation shows that Plaintiffs’ allegations of Heslep’s alleged copyright infringement have evidentiary support and will likely have more evidentiary support through further investigation and discovery”; rejecting claim of “sham”).

In Ms. Andersen’s case, it is undisputed (Compl. ¶ 7.12), that Verizon identified her as the owner of the address that had been used for infringement. Verizon then confirmed this identification on two subsequent occasions when Ms. Andersen protested that Verizon had erred. *See* J.S. Jacobson Decl. ¶¶ 3-6 & Exs. A-B. This establishes probable cause.

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

Ms. Andersen’s claims are similar to, but much weaker than, those that the Ninth Circuit held were properly dismissed in *Sosa*. Although both this case and *Sosa* concern large-scale intellectual property protection programs, the Record Companies’ Enforcement Program

ties the alleged infringer to the infringing conduct in a way the program at issue in *Sosa* did not. In *Sosa*, DirecTV's satellite television signal, for which DirecTV subscribers pay a fee, was accessed without payment by individuals using devices to program the "smart cards" that descramble satellite TV signals. 437 F.3d at 926. To combat that problem, DirecTV began by "initiat[ing] litigation against several companies selling smart card programming technology. In the course of this litigation, DirecTV obtained lists of the names and addresses of numerous individuals who had purchased such equipment." *Id.*

Using these lists, DirecTV sent letters to over 100,000 individual purchasers of smart card programming equipment, asserting that DirecTV had records showing that the recipient had used the equipment to steal its signal, accusing the recipient of violating a criminal statute, and threatening civil legal action unless the recipient forfeited the equipment to DirecTV and paid DirecTV an unspecified sum to settle its claim. When a number of recipients contacted DirecTV by telephone to protest their innocence of the alleged conduct, DirecTV repeated its accusations and threats to sue. Rather than incur the expense of engaging an attorney to respond, some allegedly innocent recipients, including the three named plaintiffs, paid DirecTV thousands of dollars to settle the claims. [*Id.* at 926-27.⁷]

The Ninth Circuit found that DirecTV's sending PNL letters to more than 100,000 purchasers of smart card programming equipment, more than three times the number contacted in the Record Companies' enforcement program, was entitled to *Noerr-Pennington* immunity. DirecTV did not have any direct proof of "the uses to which these individuals were putting this [smart card] equipment," and did not even know "whether any particular individual" had used the equipment to receive a DirecTV signal. *Id.* at 926. Nonetheless, although the claims asserted in its pre-suit letters might have been "weak," *id.* at 939, and the letters may have

⁷ A copy of the pre-suit notification letter at issue in *Sosa*, obtained from the appellate record in that case, is attached as J.S. Jacobson Decl. Ex. D.

misrepresented the law and oversold the nature of DirecTV's alleged proof, the Ninth Circuit concluded DirecTV had an objective basis for its enforcement program activities and thus was protected under *Noerr-Pennington*. *See id.* at 942.

It is worth emphasizing that DirecTV pursued people based solely on their reported purchase of a device that *potentially* might have been used to pirate DirecTV's content. The Enforcement Program, by contrast, pursued people only after their IP addresses *actually were documented in the act* of infringement. Compl. ¶¶ 7.18. This much more direct and focused Enforcement Program is, *a fortiori*, entitled to *Noerr-Pennington* protection.

C. IP Addresses Repeatedly Have Been Upheld, In Other Criminal And Civil Contexts, As Sufficient To Establish Probable Cause.

Ms. Andersen's objection to IP addresses as the basis for the Enforcement Program is substantively identical to the argument made and rejected in *Sosa*: That a person's purchase of smart card programming equipment was insufficient probable cause to believe he or she had stolen DirecTV's signal. The Ninth Circuit found that although it was "not knowable before discovery was completed" whether DirecTV ultimately could prove infringement, DirecTV had ample probable cause to initiate proceedings and move to the discovery phase against those who had merely purchased smart card programming equipment. *See* 437 F.3d at 942. Pre-suit proof that the defendants themselves actually had infringed was not necessary.

Ms Andersen's arguments, moreover, have flaws beyond their conflict with *Sosa*. It is now beyond any possible dispute, in the sphere of online law and copyright enforcement, that even if documentation of unlawful activity at a specific IP address may not be conclusive of ultimate liability, it plainly suffices as probable cause. Virtually every case pertaining to wrongful conduct online has been predicated on exactly the same type of IP address

documentation and subsequent ISP identification of the subscriber assigned that address. *See generally Napster*, 239 F.3d at 1012 (Napster used its knowledge of users' Internet addresses to facilitate file uploads and downloads of infringing copies); *Sony Pictures Home Entm't Inc. v. Lott*, 471 F. Supp. 2d 716, 719 (N.D. Tex. 2007) ("The unique IP address . . . assigned to the user by SBC . . . at the date and time that the infringement . . . occurred provide[s] the information necessary to connect an IP address engaging in infringing activity with the infringer's identity"); *Sony Music Entm't, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 559 (S.D.N.Y. 2004) ("[a]n ISP can identify the computer from which the alleged infringement occurred and the name and address of the subscriber controlling the computer when it is provided with a user's IP address and the date and time of the allegedly infringing activity.") Indeed, were this not the case, copyright owners would have little or no ability ever to pursue direct infringers on the Internet.

Even in criminal cases, evidence of a link between an IP address and unlawful conduct consistently has been recognized as sufficient to establish probable cause to obtain identifying information about the user associated with that address and to commence prosecution. *See, e.g., United States v. Sloan*, 307 F. App'x 88, 90 (9th Cir. 2009) (where subpoena revealed IP address registered to defendant was associated with files confirmed to contain child pornography, "district court correctly concluded that the officers had probable cause "to place defendant in custody"); *United States v. Ganoë*, 538 F.3d 1117, 1119, 1127 (9th Cir. 2008) (file sharing program used to download both music and child pornography enabled investigator to "determine downloads originated from a computer with a particular IP address assigned to the defendant; resulting search did not violate defendant's expectation of privacy);

United States v. Hay, 231 F.3d 630, 635-36 (9th Cir. 2000) (child pornography conviction affirmed; search warrant affidavit “set forth evidence which linked the 19 files to Hay’s apartment by tracing the IP address . . . to the computer in Hay’s apartment that Hay told government agents he used exclusively”); *United States v. Perez*, 484 F.3d 735, 740 (5th Cir. 2007) (specifically rejecting the argument that “mere association between an IP address and a physical address is insufficient to establish probable cause”; FBI agents had probable cause to search a residence where “[t]he affidavit presented to the magistrate included the information that the child pornography viewed by the witness . . . had been transmitted over the IP address 24.27.21.6, and that this IP address was assigned to Javier Perez”).

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

analyzing whether there is a “fair probability” that contraband or evidence of wrongdoing will be located. *Id.* at 1266-67. *See also United States v. Merz*, No. 07-199, 2009 WL 1183771, at *5 (E.D. Pa. May 4, 2009) (upholding search based on ISP’s identification of the registered owner of an IP address; summarizing case law requiring this result).

Similarly, in other civil, non-copyright litigation, courts have upheld complaints alleging a link between an IP address and tortious conduct as a reasonable basis on which to proceed with litigation against specific individuals. *See Doe I v. Individuals*, 561 F. Supp. 2d 249, 252, 255-57 (D. Conn. 2008) (in libel action, refusing to quash subpoena to ISP requiring disclosure of “the identity of the person assigned to the IP address from which an individual using the pseudonym ‘AK47’ posted comments,” and observing that “AT&T’s subscriber data is the plaintiffs’ only source regarding the identity of AK47”); *Kimberlite Corp. v. John Does I-20*, No. 08-2147, 2008 WL 2264485, at *2 (N.D. Cal. Jun. 2, 2008) (Computer Fraud and Abuse Act claim; “Kimberlite has adequately set forth a claim for relief against the IP address holder whose identity it seeks, and it is therefore proper for Kimberlite to subpoena the internet service provider to obtain such information.”); *see also Doe v. Cahill*, 884 A.2d 451, 455 (Del. 2005) (“if the ISP knows the time and the date that postings were made from a specific IP address, it can determine the identity of the subscriber”).

These cases all stand for the proposition that after documenting unauthorized copying of sound recordings linked to specific IP addresses, the Record Companies had an objective basis to pursue cases against Ms. Andersen and others who were identified by their ISPs as the owners of those addresses. When coupled with the well-settled law that end-users directly infringe when they download or upload unauthorized copies of sound recordings, *Grokster*,

545 U.S. at 918-24; *Napster*, 239 F.3d at 1012; *Aimster*, 334 F.3d at 645, the Record Companies had probable cause to believe that the people associated with the IP addresses used to share these sound recordings ultimately would be found liable for infringement.

That Ms. Andersen lists, without support, a host of possible flaws with IP addresses (Pl. Class Br. at 10-13) does not change this. These same hypothetical shortcomings have been considered and rejected, by courts across the country, as insufficient to strip away the probable cause that exists when unlawful online conduct is linked to a specific IP address. In short, Ms. Andersen's speculation about the theoretical weaknesses of IP addresses as evidence do not warrant her inclusion within the stringent sham litigation exception.

D. Neither The Supposed Need For "Private Investigator" Licenses, Nor The Use Of Doe Proceedings, Nor Allegations About "Entered Computers," Nor Any Combination of Those Elements Establishes Sham Litigation.

There can be no dispute that MediaSentry documented the IP address used by Gotenkito to share music or that Verizon Online identified Ms. Andersen as responsible for that address. Those are the only facts relevant to the determination of probable cause and the application of *Noerr-Pennington* immunity in this matter. Ms. Andersen's complaint and motion for class certification raise other issues about the Enforcement Program, but not only are these allegations irrelevant, they also are flatly and demonstrably wrong.

Ms. Andersen contends, for example, that MediaSentry operated unlawfully because it did not obtain "private investigator" licenses. This issue is irrelevant for *Noerr-Pennington* purposes, because even were a state to find that a license was needed (and none has so far), this would not alter the conclusion that the IP address of a computer used for an improper purpose provides probable cause to commence an action against the registered owner. In fact,

the absence of a license is no basis to exclude evidence in purely civil matters not involving any government action. *See, e.g., Mejia v. City of New York*, 119 F. Supp. 2d 232, 254 (S.D.N.Y. 2000) (“the Fourth Amendment’s exclusionary rule does not apply in civil actions other than civil forfeiture proceedings”), *citing Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998); *Nutrasweet Co. v. X-L Eng’g Corp.*, 926 F. Supp. 767, 769 (N.D. Ill. 1996) (“[T]he Fourth and Fourteenth Amendments do not require in civil cases that the exclusionary rule be extended to situations where private parties seek to introduce evidence obtained through unauthorized searches made by state officials.”). *See also TNT Road Co. v. Sterling Truck Corp.*, No. Civ. 03-37-B-K, 2004 WL 1626248, at *2 (D. Me. July 19, 2004) (even “[a]ssuming that [the expert] was required by Maine law to have a license to conduct his investigation of the vehicle fire in this case, I am not persuaded that his failure to do so justifies the exclusion of his testimony. Nor do I think that his failure to obtain a license prevents the court from considering his expert qualifications or the reliability of his investigatory methods.”); *Virgin Records Am., Inc. v. Doe*, No. 5:08-CV-389-D, 2009 WL 700207 at *3 (E.D.N.C. Mar. 16, 2009) (in context of denying motion to quash, rejecting claims that the MediaSentry’s lack of a license should affect whether subpoena should issue).

Ms. Andersen’s allegation about licensing also is simply wrong. She points to two state regulators that raised questions about the need for a license after Enforcement Program targets provided those authorities with incorrect descriptions of the MediaSentry process. *See* Compl. ¶ 7.4; Pl. Class Br. at 8. She does not and cannot, however, point to any authority that, after investigation, has determined that MediaSentry required a license, and it is by no means apparent that any state would consider MediaSentry’s activities, which were limited to logging

on to and using publicly-available P2P networks, as any member of the public could, as constituting “private investigation.” Indeed, in the one instance in which there was a hearing on the issue, the regulator, in North Carolina, dismissed the complaint against MediaSentry. *See Virgin Records*, 2009 WL 700207, at *3 (summarizing decision).

Ms. Andersen’s complaint next contends that the Record Companies engaged in sham litigation because they used *ex parte* subpoena applications in *Doe* actions. This allegation, too, is both irrelevant and wrong. The *Doe* procedure repeatedly has been upheld as proper and, therefore, cannot be the basis for a claim of sham. In *Interscope Records v. Does 1-12*, 2008 WL 4939105 at *1, for example, after the ISP received a subpoena, it notified the affected subscribers, as the Record Companies specifically encouraged all ISPs to do. (The Record Companies, of course, could not give notice themselves to individuals whose identities they did not yet know.) One of the “Doe” defendants appeared through counsel and sought to quash the subpoena, arguing that the Record Companies’ complaint “d[id] not allege a *prima facie* case of copyright infringement.” *Id.* at *1. Finding that “caselaw supports the proposition that making a digital file available to others on a P2P platform is the equivalent of copying and/or distributing for copyright purposes,” and that “there is no question that the identity of the Doe defendant is relevant to the claims,” the court denied the motion to quash and ordered the Doe defendant’s identity disclosed. *Id.* at *2, *citing, inter alia, Arista Records LLC v. Does 1-19*, 551 F. Supp. 2d 1, 8 (D.D.C. 2008); *Fonovisa, Inc. v. Does 1-9*, No. 07-1515, 2008 WL 919701 (W.D. Pa. Apr. 3, 2008); *Arista Records LLC v. Does 1-43*, No. 07cv2357-LAB (POR), 2007 WL 4538697, at *1 (S.D. Cal. Dec. 20, 2007); *Arista Records*

LLC v. Does 1-11, No. 07-568 (W.D. Okla. Nov. 14, 2007). See also *Sony Music Entm't Inc.*, 326 F. Supp. 2d at 559 (refusing motion of Doe defendants to quash subpoena).

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

Finally, Ms. Andersen alleges, but without any support, that MediaSentry "entered[ed] private individual computers to search in "shared" file folders." Pl. Br. at 4-5; Compl. ¶ 7.8 (alleging, in addition, that files were "manipulated"). As demonstrated by the declarations from MediaSentry and from a computer forensics expert familiar with MediaSentry's processes, this allegation is pure fiction. MediaSentry simply used public P2P networks to download music files from other network users who specifically made those files available for downloading. The networks MediaSentry used do not permit one user to "manipulate" another user's share folder or even to observe any files on the computer that the user did not affirmatively place in the shared folder. See D. Jacobson Decl. ¶ 21; MediaSentry Decl. ¶ 8.

Moreover, courts repeatedly have rejected the suggestion that there is anything actionable, or even untoward, in documenting the sound recordings that users on a P2P network have placed in shared folders connected to the Internet. It is well settled that there is no invasion of privacy or other impropriety when "an individual subscriber opens his computer to permit others" to see what is stored there because he has "essentially open[ed] the computer to the world." *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 267 (D.D.C.

2003); *Fonovisa, Inc.*, 2008 WL 919701 at *8-9 (same). It is the P2P user's affirmative decision to place copyrighted music in a shared folder for copying purposes, not any improper entry, that allowed MediaSentry to collect proof of this unauthorized sharing.

IV. The Record Companies' Post-Filing Conduct Against Ms. Andersen Also Is Protected By *Noerr-Pennington* Immunity.

The claims Ms. Andersen seeks to pursue on behalf of a class all concern the Record Companies' decision to initiate suits based on the collection of IP addresses. Accordingly, should the Court agree that the Record Companies' decision to sue Ms. Andersen is protected by *Noerr-Pennington* immunity, that finding would be fatal to Ms. Andersen's class claims. Separately, Ms. Andersen contends that, in her own particular case, evidence of her alleged innocence developed to the point that the Record Companies should have discontinued the litigation against her sooner than they did. The "real 'Gotenkito,'" Ms. Andersen contends, was "a young man in Everett, Washington," whose "MySpace webpage . . . described his interest in computers and music and even admitted downloading copyrighted materials." Compl. ¶ 7.20. The Record Companies knew of this individual as early as "September 2006," she says (Compl. ¶ 7.22), and therefore should not have continued to litigate against her and should not, in particular, have subsequently sought the deposition of her minor daughter.

Ms. Andersen raised these arguments when moving to recover attorneys' fees as a prevailing party under Section 505 of the Copyright Act when the Record Companies dismissed her case. After reviewing the outcome of the case, but without expressing any doubt that the Record Companies had probable cause to have initiated it, Magistrate Judge Ashmanskas awarded Ms. Andersen \$107,834.00. The Record Companies objected to that award, but paid it.

Now, in the very different context of an “abuse of process” challenge, Ms. Andersen’s claims do not withstand *Noerr-Pennington* scrutiny. The hurdle these claims must clear, set forth by the Supreme Court in *PRE*, is the same: She must plead facts sufficient to show that the Record Companies continued to press their case against her despite the suit having become so “objectively baseless” that “no reasonable litigant could realistically expect success on the merits.” Although the Record Companies discovered some conflicting evidence concerning Gotenkito’s identity, they certainly had the right to investigate these facts through discovery before ultimately electing to dismiss their claims. Even at the point of dismissal, they still had (and have) evidence that she had been properly identified, including her admission at deposition that a friend had installed the KaZaA “Lite” file-sharing program on her computer. *See* J.S. Jacobson Decl. Ex. E at pp. 83-85. As for the possibility that someone else gained access to the IP address registered to Ms. Andersen, she stated at deposition that she did not use a wireless internet connection and did not, at the relevant time, give anyone access to her internet connection. *See id* at pp. 64, 147; *see also* Compl. ¶ 7.22 (Ms. Andersen did not know the person she claims was Gotenkito.).

Under these circumstances, that another individual may have used the name “Gotenkito” on an unrelated Internet site did not make it objectively unreasonable for the Record Companies to continue to litigate against Ms. Andersen, at least for the period before voluntarily dismissing their action in June 2007, or to have sought a brief telephonic

deposition from her daughter, whom Ms. Andersen specifically identified as a knowledgeable witness, as part of this process. *See* Compl. ¶ 7.30.⁸

CONCLUSION

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

DATED: May 8, 2009

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⁸ Ms. Andersen sought a protective order barring her daughter's deposition, but the court ordered that it go forward by telephone or videoconference. *See* Docket entry # 109. Not only had Ms. Andersen identified her daughter as a relevant witness in her Rule 26(a)(1) initial disclosures, but, in other testimony, her daughter was said to be a fan of the television show "Dragonball Z," which features a hero character called "Goten." *See, e.g.*, <http://anime.about.com/od/dragonball2/ig/Dragon-Ball-Z-Good-Guys/Goten.htm>.

That this deposition occurred pursuant to court order should preclude Ms. Andersen from using it as a basis for an "abuse of process" claim.

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