

Dated: June 25, 2008

By: s/ Geoffrey L. Beauchamp
Geoffrey L. Beauchamp, Esq. (No. 40380)
Geoffrey L. Beauchamp, P.C.
1015 York Road
Willow Grove, PA 19090
Telephone: (267) 781-0615
Facsimile: (215) 706-0895
E-mail: GLBLaw@comcast.net

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 25, 2008 a copy of the foregoing **PLAINTIFFS' MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS** was served upon the Defendant via United States Mail as follows:

Richard J. Bove
Hausch & Bove, LLP
1828 Spruce Street, Suite 400
Philadelphia, PA 19103
Attorney for Defendant

s/ Geoffrey L. Beauchamp
Geoffrey L. Beauchamp, Esq. (No. 40380)
Geoffrey L. Beauchamp, P.C.
1015 York Road
Willow Grove, PA 19090
Telephone: (267) 781-0615
Facsimile: (215) 706-0895
E-mail: GLBLaw@comcast.net

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTOWN RECORD COMPANY, L.P., a	:	
California limited partnership; UMG	:	
RECORDINGS, INC., a Delaware	:	
corporation; SONY BMG MUSIC	:	CIVIL ACTION NO. 2:07-cv-04702-AB
ENTERTAINMENT, a Delaware general	:	
partnership; ZOMBA RECORDING LLC, a	:	
Delaware limited liability company; and	:	
ELEKTRA ENTERTAINMENT GROUP	:	
INC., a Delaware corporation,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
John C. Kovalcik,	:	
	:	
Defendant.	:	

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’ MOTION TO DISMISS
DEFENDANT’S COUNTERCLAIMS**

Pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiffs respectfully move to dismiss Defendant’s six counterclaims.

INTRODUCTION

Defendant’s Counterclaims¹ are little more than an unambiguous attempt by the Defendant to hold Plaintiffs liable for their legitimate efforts to enforce their copyrights. That, of course, is not only improper, but is contrary to the public policy desire to have copyright owners enforcing their rights. *See Kebodeaux v. Schwegmann Giant Super Markets, Inc.*, 33 U.S.P.Q.2d 1223, 1224 (E.D. La. 1994) (holding that it would be inconsistent with the purposes of the Copyright Act to “deter plaintiffs . . . from bringing suits when they have a reason to

¹ Defendant has asserted Counterclaims for Trespass to Chattels, violations of the Computer Fraud and Abuse Act (18 U.S.C. § 1030), Abuse of Process, Defamation, Declaratory Judgment, and Civil Conspiracy.

believe, in good faith, that their copyrights have been infringed”). In a recent case in Texas involving a similar effort by record company plaintiffs to enforce their rights against another peer-to-peer infringer, the Court considered a similar attack on Plaintiffs’ motives and concluded:

The Court rejects [defendant]’s characterization of this lawsuit, and many others like it, as “predatory.” Plaintiffs’ attorneys brought this lawsuit not for purposes of harassment or to extort [defendant] as she contends, but rather, to protect their clients’ copyrights from infringement and to help their clients deter future infringement For now, our government has chosen to leave the enforcement of copyrights, for the most part, in the hands of the copyright holder. *See* 17 U.S.C. § 101, *et seq.* Plaintiffs face a formidable task in trying to police the internet in an effort to reduce or put a stop to the online piracy of their copyrights. . . . The right to come to court to protect one’s property rights has been recognized in this country since its birth.

Atlantic Recording Corp., et al. v. Heslep, No. 4:06-cv-132-Y, 2007 U.S. Dist. LEXIS 35824, at *4-5 (N.D. Texas May 16, 2007) (attached as Exhibit A).

In addition, Defendant’s six counterclaims fail, because while they are heavy on hyperbole, they fall short of alleging sufficient facts to support the essential elements of each of his counterclaims. However, Plaintiffs anticipate that Defendant will attempt to defeat Plaintiffs’ Motion to Dismiss by relying primarily on two decisions by Judge Richard A. Lazzara, in the Middle District of Florida, *UMG Recordings, Inc. v. Del Cid*, No. 8:07-CV-368-T-26 (TGW) (M.D. Fla. Sept. 19, 2007) (hereinafter “Del Cid”) and *Atlantic Recording Corp., et al. v. Boyer*, No. 8:08-cv-00147-RAL-EAJ (M.D. Fla. May 6, 2008) (hereinafter “Boyer”) . In *Del Cid*, the defendant in that case was permitted to bring claims for trespass to chattels, violation of the CFAA, deceptive and unfair trade practices and civil conspiracy. *Del Cid.*, at 7 (attached as Exhibit B). Then in *Boyer*, based solely on the court’s prior decision in *Del Cid*, the defendant was permitted to bring claims for trespass to chattels, violation of the CFAA, deceptive and

unfair trade practices, abuse of process and civil conspiracy.² See *Boyer*, at 1-2 (attached as Exhibit C). Plaintiffs, however, believe that not only are Judge Lazarra's decisions in *Del Cid* and *Boyer* not binding on this court, but they were also incorrectly decided. Moreover, as set forth herein, there is extensive case law from around the country in which similar counterclaims have been regularly dismissed as improper.

For these reasons, and as more fully set forth below, each of Defendant's six counterclaims should be dismissed.

BACKGROUND

This action seeks redress for the infringement of Plaintiffs' copyrighted sound recordings pursuant to the Copyright Act, 17 U.S.C. § 101, *et seq.* Plaintiffs are recording companies that own or control exclusive rights to copyrights in sound recordings. Since the early 1990s, Plaintiffs and other copyright holders have faced a massive and exponentially expanding problem of digital piracy over the Internet. Today, copyright infringers use a variety of peer-to-peer networks to download (reproduce) and unlawfully disseminate (distribute) to others billions of perfect digital copies of Plaintiffs' copyrighted sound recordings each month. Indeed, the Supreme Court of the United States has characterized the magnitude of online piracy as "infringement on a gigantic scale." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2782 (2005).

Peer-to-peer networks are designed so that users can easily and anonymously connect with like-minded infringers. A new user first downloads the necessary software for one of the many peer-to-peer networks. Once the software is installed and launched, the user is connected

² Defendant's Counterclaims in this case are nearly identical to the Counterclaim filed in *Boyer*. The only difference in the two Counterclaims is Defendant has asserted a claim of defamation, which the defendant in *Boyer* did not do, and has not asserted a claim of deceptive and unfair trade practices as did the defendant in *Boyer*.

to other users of the network – typically millions of people at a time – to search for, copy and distribute copyrighted works stored on other users’ computers. The software creates a “share” folder on each user’s computer in which to store the files that the user downloaded from the service, which are then further distributed to other users.³

The Department of Justice has concluded that online media distribution systems are “one of the greatest emerging threats to intellectual property ownership,” estimated that “millions of users access P2P networks,” and that “the vast majority” of those users “illegally distribute copyrighted materials through the networks.” Report of the Department of Justice’s Task Force on Intellectual Property (October 2004), available at <http://www.cybercrime.gov/IPTaskForceReport.pdf>, at 39. Unfortunately, infringing users of peer-to-peer systems are often “disdainful of copyright and in any event discount the likelihood of being sued or prosecuted for copyright infringement,” rendering this serious problem even more difficult for copyright owners to combat. *In re Aimster Copyright Litigation*, 334 F.3d at 645.

On June 21, 2007, Plaintiffs’ investigators detected an individual using the Limewire online media distribution system over a peer-to-peer file-sharing network. This individual had over 286 audio files on his computer and was distributing them to the millions of people who use peer-to-peer networks. Plaintiffs’ agent, MediaSentry, Inc., determined that the individual used Internet Protocol (“IP”) address 165.123.196.206 to connect to the Internet. In observing the infringement, MediaSentry uses the same functionalities that are built into P2P programs that any

³ For further information about how peer-to-peer networks are utilized to commit copyright infringement, see *In re Aimster Copyright Litigation*, 334 F.3d 643, 646-47 (7th Cir. 2003) and *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1032-33 (C.D. Cal. 2003), *aff’d*, 380 F.3d 1154 (9th Cir. 2004), *rev’d*, 125 S. Ct. 2764, 2005 WL 1499402 (June 27, 2005).

user of the software can utilize on the network.⁴ In fact, MediaSentry does not do anything that other users of a P2P network cannot do; the only information it obtains is the information that is available to anyone who logs onto a P2P network.

In this case, after filing a “Doe” lawsuit against the individual using the IP address detected by MediaSentry, Plaintiffs served a court-ordered third-party subpoena on the Internet Service Provider (“ISP”) to determine the identity of the individual responsible for the IP address. The ISP, University of Pennsylvania, identified John C. Kovalcik as the individual in question. The Parties were unable to resolve the matter and on February 20, 2008, Plaintiffs initiated this action against Defendant John C. Kovalcik for damages and injunctive relief against the Defendant.

LEGAL STANDARD

In considering a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept “as true all factual allegations in the complaint and draw all inferences from the facts alleged in the light most favorable to [the claimant].” *Phillips v. County of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). While all facts must be construed in favor of the nonmoving party, “conclusory allegations or legal conclusions masquerading as factual allegations will not suffice to prevent a motion to dismiss.” *Bailey v. Reed*, No. 99-3363, 2002 U.S. App. LEXIS 3075, *3 (3d Cir. Feb. 27, 2002)(citing *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997)). The U.S. Supreme Court recently held that “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ ***requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.*** . . . Factual allegations must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65

⁴ See *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1106 n.4 (D. Kan. 2000) (explaining detection through file-sharing program); *Heslep*, 2007 U.S. Dist. LEXIS 35824 (Exhibit A).

(2007) (emphasis added).

Further, courts in the Third Circuit routinely dismiss complaints for failure to state a claim upon which relief can be granted where an affirmative defense, such as the *Noerr-Pennington* doctrine and the Pennsylvania judicial immunity doctrine, bars recovery on the claim. See e.g., *A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.*, 263 F.3d 239, 250-52 (3d Cir. 2001)(dismissing Plaintiffs’ antitrust claims because “defendants engaged in petitioning activity with sovereign states and are immune under the Noerr-Pennington doctrine); *Wallace v. Federal Employees of U.S. Dist. Court*, No. 07-1132(NLH), 2008 U.S. Dist. LEXIS 34426, *15-16 (E.D. Pa. April 28, 2008).

ARGUMENT AND AUTHORITY

I. DEFENDANT’S COUNTERCLAIMS FOR ABUSE OF PROCESS, DEFAMATION AND CIVIL CONSPIRACY ARE BARRED BY THE *NOERR-PENNINGTON* DOCTRINE.

Defendant’s abuse of process, defamation, and civil conspiracy claims (Counts III, IV and VI) are barred by the *Noerr-Pennington* doctrine. Defendant attempts to avoid dismissal of these counterclaims under *Noerr-Pennington* by alleging that Plaintiffs’ efforts to protect their copyrights in both this action and the “John Doe” action, as well as Plaintiffs’ efforts to settle their claims of copyright infringement against the Defendant, are actually “a concerted pattern of sham litigation.” (Counterclaims at ¶ 11). However, Defendant’s allegations of “sham litigation”⁵ are little more than “a formulaic recitation of the elements” and conclusory self-serving allegations of the type the U.S. Supreme Court in *Twombly* considered to be insufficient to survive a motion to dismiss. See *Twombly*, 127 S. Ct. at 1965.

⁵ Defendant uses the term “sham litigation” throughout his Counterclaim.

A. Plaintiffs Are Entitled to Noerr-Pennington Immunity.

The First Amendment guarantees “the right of the people . . . to petition the Government for redress of grievances.” U.S. CONST. amend. I. This right to petition—often referred to as *Noerr-Pennington* immunity—has been extended to afford a party the right to access the courts. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). Consistent with this right to petition the courts, numerous courts have shielded litigants from claims relating to the filing of litigation. See, e.g., *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 122 (3d Cir. 1999)(“Probable cause to institute civil proceedings requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication . . . the existence of probable cause is an absolute defense.” (citations omitted)); *Video Int’l Prod., Inc. v. Warner-Amex Cable Comm.*, 858 F.2d 1075, 1082-83 (5th Cir. 1988); *Havoco Am., Ltd. v. Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983). “While the *Noerr-Pennington* doctrine originally arose in the antitrust context, it is based on and implements the First Amendment right to petition and therefore . . . applies equally in all contexts.” *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000); *California Motor Transp.*, 404 U.S. at 510; *Cheminor Drugs*, 168 F.3d at 128 (“We are persuaded that the same First Amendment principles on which Noerr-Pennington immunity is based apply to the New Jersey tort claims.”); *Taliaferro, v. Darby Township Zoning Bd.*, No. 03-3554, 2008 U.S. Dist. LEXIS 39478, *23-24 (E.D. Pa. May 15, 2008)(recognizing that both the Supreme Court, this Circuit, and other circuits have expanded the Noerr-Pennington doctrine and applied it in other contexts besides antitrust cases); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 160 (E.D. Pa. Feb. 9, 1988)(“The rule that liability cannot be imposed for damage caused by inducing legislative, administrative, or judicial action is applicable here.”).

The filing of a lawsuit is not the only conduct protected by the *Noerr-Pennington* doctrine. An offer to settle a lawsuit also constitutes “conduct incidental to the prosecution of

the suit” that is protected under the *Noerr-Pennington* doctrine. *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1528 (9th Cir. 1991), *aff’d*, 508 U.S. 49 (1993); *see also A.D. Bedell*, 263 F.3d at 254 (holding that “we see no reason to distinguish between settlement agreements and other aspects of litigation . . . [f]reedom from the threat of antitrust liability should apply to settlement agreements as it does to other more traditional petitioning activities.”) Courts have also extended *Noerr-Pennington* “to encompass concerted efforts incident to litigation, such as prelitigation ‘threat letters.’” *Primetime 24 Joint Venture v. NBC*, 219 F.3d 92, 100 (2d Cir. 2000) (citing *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1560 (11th Cir. 1992) (holding that concerted threats of litigation are protected under *Noerr-Pennington*); *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1367-68 (5th Cir. 1983) (same)).⁶

Defendant’s allegations of abuse of process (Count III) are based entirely on the fact that Plaintiffs filed a John Doe action against Kovalcik and used that action “to harass and threaten Kovalcik to surrender money in the form of a settlement,” and for the illegitimate purpose” of abusing the court system as a surrogate investigative agency.” (Counterclaims ¶¶ 38-39.) However, Plaintiffs’ “John Doe” action, through which Plaintiffs learned Defendant’s identity from his ISP, was initiated for the sole purpose of protecting Plaintiffs’ copyright. Plaintiffs’ “John Doe” action is the very type of conduct the *Noerr-Pennington* doctrine is intended to protect, as is Plaintiffs’ efforts to settle their claims of copyright infringement against the

⁶ *See also Oneida Tribe of Indians of Wis. v. Harms*, 2005 U.S. Dist. Lexis 27558, 8-9 (E.D. Wis. Oct. 24, 2005) (holding that the mere threat by the Plaintiff to protect its rights cannot give rise to a claim by the defendant); *DIRECTV, Inc. v. Personette*, 2003 U.S. Dist. LEXIS 19695, at *19-20 (W.D. Mich. 2003) (holding that actions such as sending out pre-suit letters and making threats of litigation are the type of litigation activities covered by the *Noerr-Pennington* doctrine, and thus dismissing counterclaims); *DirectTV, Inc. v. Milliman*, 2003 U.S. Dist. LEXIS 20938, at *23-24 (E.D. Mich. 2003) (dismissing deceptive trade practice counterclaim under *Noerr-Pennington*).

defendant; therefore, Defendant's abuse of process counterclaim is barred.

Defendant's allegations of defamation (Count IV) are based on Plaintiffs' communications with the University of Pennsylvania pursuant to a subpoena and Exhibit A to Plaintiffs' Complaint. All of Plaintiffs' alleged defamatory conduct occurred after Plaintiffs had initiated a legal proceeding. Therefore, Defendant's defamation claim is based entirely on statements made by Plaintiffs during the course of litigation. This goes to the very core of *Noerr-Pennington* immunity which is intended to protect litigants from claims arising out of their conduct during a lawsuit so as to ensure a party the right to petition the courts. Accordingly, Defendant's defamation claim is barred by *Noerr-Pennington*.

The same is true of Defendant's civil conspiracy claim (Count VI). Here again, Defendant strikes at the foundation of *Noerr-Pennington* protection which is intended to "protect citizens from liability for exercising their rights to petition state and local governments." *Chantilly Farms, Inc. v. West Pikeland Township*, No. 00-3903, 2001 U.S. Dist. LEXIS 3328, *14 (E.D. Pa. March 23, 2001)(citations omitted). The activity Defendant complains of, that Plaintiffs "through various concerted efforts and cartels, control or attempt to control the channels of creation, distribution and sale of musical works" through a "litigation campaign" in the "federal court judicial system," (Counterclaims at ¶¶ 4-5, 11), is the very activity that *Noerr-Pennington* was first established to protect: the right to collectively petition government to redress grievances. See *United Mine Workers*, 389 U.S. at 222; *A.D. Bodell*, 263 F.3d at 250. Moreover, "there is no conspiracy exception to the *Noerr-Pennington* doctrine." *Chantilly Farms*, 2001 U.S. Dist. LEXIS 3328, *17-18 (citations omitted). Thus, Defendant's civil conspiracy claim (Count VI) is barred.

B. The Sham Litigation Exception Does Not Apply.

Defendant's conclusory references to "sham litigation" which are peppered throughout

his counterclaims (*see* Counterclaims at ¶¶ 11, 12, 24, 30, 46) without factual development or support, are unavailing. Defendant's claim is based on a misunderstanding and misapplication of case law. The sham exception to *Noerr-Pennington* immunity ***applies only*** where petitioning activity, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the ***business relationships of a competitor***. *See Primetime 24 Joint Venture*, 219 F.3d 92, 101 (2d Cir. 2000) (citing *Noerr*, 365 U.S. 127, 144). As the Record Companies have an objectively reasonable basis for pursuing this lawsuit and because Defendant is not a competitor of the Record Companies and indeed cannot allege anti-competitive behavior aimed at interfering with the business relationships of a competitor, the sham litigation exception does not apply.

In *Professional Real Estate Investors, Inc., v. Columbia Pictures Indus. Inc.*, 508 U.S. 49, 60-61 (1993), the Supreme Court set forth two requirements to demonstrate "sham" litigation: (1) the claim must be "objectively baseless, in the sense that no reasonable litigant could realistically expect success on the merits," *Id.* at 60; and (2) the lawsuit must conceal "an attempt to interfere *directly* with the business relationships of a competitor." *Id.* (emphasis in original); *Erbe Electromedizin GMBH v. Canady Tech. LLC*, 529 F. Supp. 2d 577, 589 (W.D. Pa. Dec. 18, 2007)(rejecting sham litigation exception to *Noerr-Pennington* immunity where Plaintiff had probable cause for its patent infringement claims); *Cheminor Drugs*, 168 F.3d at 122-23; Melville B. Nimmer, *Nimmer on Copyright* § 13.09 (A)(1)(c). To deprive a party of *Noerr-Pennington* protection under the sham exception, the party asserting the sham exception must prove *both* of these factors. The second factor is not considered unless the challenged litigation is shown to be objectively baseless. *See Cheminor*, 168 F.3d at 122-23 (citing *Professional Real Estate Investors*, 508 U.S. at 60-61.)

1. Plaintiffs' Claims Are Not Objectively Baseless.

In order to establish the sham litigation exception applies, Defendant must establish that Plaintiffs' Complaint is "objectively baseless in the sense that [Plaintiffs] could [not] realistically expect success on the merits." *Professional Real Estate Investors*, 508 U.S. at 60. In analyzing the first prong to the sham litigation exception, the Supreme Court determined that "the existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation." *Cheminor*, 168 F.3d at 122 (citing *Professional Real Estate Investors*, 508 U.S. at 62). The Court also held that "[p]robable cause to institute civil proceedings requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication *the existence of probable cause is an absolute defense.*" *Id.*

Plaintiffs' claims against Defendant are in no way "objectively baseless" such that "no reasonable litigant could realistically expect success on the merits," as Plaintiffs had adequate probable cause for initiating both their "John Doe" suit and this action against the Defendant. In fact, by choosing to answer rather than moving to dismiss, Defendant acknowledges that Plaintiffs had probable cause to bring their lawsuit.

Plaintiffs have evidence of significant copyright infringement occurring through a specific Internet Protocol ("IP") address and Defendant's ISP has stated that the IP address in question belonged to Defendant. Indeed, every court to consider the issue has held that similar claims against online infringers based on the same or strikingly similar evidence are neither frivolous nor objectively unreasonable.⁷ This information alone gives Plaintiffs adequate

⁷ See, e.g., *Heslep*, 2007 U.S. Dist. LEXIS at *18-19 (holding that information linking the defendant's IP address with the unlawful distribution of the plaintiffs' sound recordings was sufficient evidentiary support for plaintiffs' claim of copyright infringement, despite the defendant's sworn denial of responsibility) (Exhibit A); *Virgin Records Am., Inc. v. Thompson*, No. SA-06-CA-592-OG, slip op. at 2 (W.D. Tex. Nov. 30, 2006) (holding that the plaintiffs' lawsuit was neither frivolous nor prosecuted with malevolent intent because the plaintiffs had discovered "substantial copyright infringement of their

probable cause for both actions.

Moreover, the Supreme Court in *Professional Real Estate* determined that “[a] winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham.” *Professional Real Estate*, 508 U.S. at 60 n.5. While, the outcome of this particular case is yet to be determined, it is important to note that plaintiff record companies, including some of the Plaintiffs in this action, have prevailed numerous times in cases with nearly identical allegations to the case at bar.⁸ Because Plaintiffs have considerable evidence of Defendant’s copyright infringement and because plaintiff record companies have prevailed in similar cases, Plaintiffs’ claims against Defendant are not objectively baseless as a matter of law. Accordingly, the sham exception does not apply and the Court’s inquiry should end here.

2. Plaintiffs’ Claim Against the Defendant Cannot Be Considered an Attempt to Interfere with the Business Relationship of a Competitor.

Even if the Court were to find that Plaintiffs’ claims against Defendant were objectively

songs by a file-sharing program attached to an internet account registered to [defendant]”) (attached as Exhibit D); *Capitol Records, Inc. v. O’Leary*, 2006 U.S. Dist. LEXIS 5115, at *4 (C.D. Cal. Jan. 31, 2006) (holding that “Plaintiffs were reasonable in bringing an action against [defendant] because the Internet account used to commit the alleged infringement was registered in her name only.”) (attached as Exhibit E); *see also Sony Pictures Home Entm’t, Inc. v. Lott*, 471 F. Supp. 2d 716, 721-22 (N.D. Tex. 2007) (granting summary judgment to the plaintiff motion picture companies based on evidence that their copyrighted motion pictures were being distributed from an IP address assigned to the defendant).

⁸ *See, e.g., Elektra Entm’t Group Inc., et al. v. Brimley*, No. 2:05-cv-00134-AAA, slip op. at 1 (S.D. Ga. August 15, 2006) (same)(attached as Exhibit F); *Priority Records, LLC, et al. v. Pearson*, No. 1:06-cv-01797-WSD, slip op. at 4 (N.D. Ga. May 16, 2007) (same) (attached as Exhibit G); *Arista Records, LLC v. Butler*, No. 8:07-cv-3-T-23EAJ, slip op. at 8 (M.D. Fla. December 21, 2007) (granting plaintiff record companies summary judgment on claims for copyright infringement)(attached as Exhibit H); *Virgin Records America, Inc. et al. v. Bonilla*, No. 04-61532-CIV-ZLOCH, slip op. at 11 (S.D. Fla. Oct. 4, 2006) (same) (attached as Exhibit I); *Lava Records, et al. v. Ates*, No. 3:05-cv-01314-RGJ-KLH, slip op. at 1 (W.D. La. July 11, 2006) (same) (attached as Exhibit J); *BMG Music, et al. v. Briscoe*, No. CV-05-5409(DGT), slip op. at 1 (E.D.N.Y. December 6, 2006)(same) (attached as Exhibit K); *UMG Recordings, Inc., et al. v. Cuccia*, No. 06-C-638-C, slip op. at 1 (W.D. Wis. Aug. 6, 2007) (same) (attached as Exhibit L); *UMG Recordings, Inc., et al. v. Francis*, No. 1:06-cv-004435-LTS-THK, slip op. at 5 (S.D.N.Y. Aug. 28, 2007) (same) (attached as Exhibit M); *Sony BMG Music Entm’t, et al. v. Keovongsavang*, No. CA 06-124 MIL, slip op. at 1 (D. R.I. April 11, 2007) (same) (attached as Exhibit N).

baseless, Defendant's claims still fail, as Defendant does not allege the second element to the sham exception, and indeed could not allege, that Plaintiffs brought their infringement claim against him in "an attempt to interfere directly with the business relationships of a competitor." *Professional Real Estate*, 508 U.S. at 60.

First, Defendant is not a competitor of Plaintiffs. Second, Plaintiffs brought their claim to combat the significant and ongoing problem of online piracy, which the United States Supreme Court has called "infringement on a gigantic scale." *See Metro-Goldwyn-Mayer Studios, Inc., v. Grokster Ltd.*, 125 S. Ct. 2764, 2782 (2005); *see also Heslep*, 2007 U.S. Dist. LEXIS 35824, at *15 (stating that a similar lawsuit was brought "to protect . . . copyrights from infringement and to help . . . deter future infringement")(Exhibit A). Thus, any suggestion of an improper motive is without merit. Third, Plaintiffs' lawsuit against Defendant in no way interfered directly with the business relationships of any of the Plaintiffs' competitors, and Defendant makes no such allegation. Accordingly, Defendant cannot satisfy the second prong of the sham exception to *Noerr-Pennington*.

Because Defendant cannot establish Plaintiffs' Complaint was sham litigation as a matter of law, Defendant's abuse of process, defamation, and civil conspiracy counterclaims are barred by *Noerr-Pennington* and must be dismissed.

II. DEFENDANT'S COUNTERCLAIMS SHOULD BE DISMISSED BECAUSE PLAINTIFFS' ALLEGED CONDUCT IS PROTECTED BY THE PENNSYLVANIA DOCTRINE OF JUDICIAL IMMUNITY.

Pennsylvania courts recognize the doctrine of judicial immunity which provides that "[a]ll communications pertinent to any stage of a judicial proceeding are accorded an absolute privilege which cannot be destroyed by abuse." *Taliaferro*, 2008 U.S. Dist. LEXIS, *32 n.10 (citing *Binder v. Triangle Pub., Inc.*, 275 A.2d 53, 56 (Pa. 1971)). The Pennsylvania "Supreme Court has explained the 'protected realm' is limited to 'those communication which are issued *in*

the regular course of judicial proceedings and which are pertinent and material to the redress or relief sought.” *Pawlowski v. Smorto*, 588 A.2d 36, 41 (Pa. Super. Ct. 1991)(citing *Post v. Mendel*, 507 A.2d 351, 355 (1986)). “Moreover, the privilege extends not only to communications made in open court, but also encompasses pleadings and even less formal communications such as preliminary conferences and correspondence between counsel in furtherance of the client’s interest.” *Id.* (citing *Moses v. McWilliams*, 549 A.2d 950, 956 (Pa. Super. Ct. 1989)(privilege is accorded to pre-trial communications between witnesses and counsel)).

Defendant’s rhetoric and hyperbole aside, *all* of the alleged conduct that Defendant complains of in his counterclaims is conduct that has allegedly occurred either during the course of judicial proceedings or as a necessary precursor to Plaintiffs’ efforts to legitimately enforce their copyrights in the underlying action. *See* Counterclaims at ¶¶ 4-22; *Heslep*, No. 4:06-cv-132-Y, slip op. at 11-12 (Exhibit A). Thus, all of the alleged conduct is privileged and cannot form the basis of any counterclaim.

III. DEFENDANT’S TRESPASS TO CHATTELS (COUNT I) SHOULD BE DISMISSED BECAUSE DEFENDANT HAS NOT ADEQUATELY PLEAD THE ESSENTIAL ELEMENTS OF THE CLAIM.

“A trespass to a chattel may be committed by intentionally (a) dispossessing another of the chattel; or (b) using or intermeddling with a chattel in the possession of another.” *Pestco v. Associated Products, Inc.*, 2005 PA Super 276, ¶ 17; 880 A.2d 700 (citing RESTATEMENT 2D TORTS § 217); *see also* RESTATEMENT 2D TORTS § 218 (“One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if, (a) he dispossesses the other of the chattel, or (b) the chattel is impaired as to its condition, quality, or value, or (c) the possessor is deprived of the use of the chattel for a substantial time, or (d) bodily harm is caused to the

possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.”); *Pearl, LLC v. Standard I/O, Inc.*, 257 F. Supp. 2d 326, 354 (D. Me. 2003) (granting summary judgment on trespass claim where there was no evidence that allegedly unauthorized access to computer network “impaired its condition, quality or value”).

In addition to being barred by Pennsylvania’s doctrine of judicial immunity, none of the elements of trespass to chattels appear on the face of Defendant’s counterclaim, nor can they be implied or derived from his pleading. Defendant does not and cannot claim that Plaintiffs or their agents ever dispossessed Defendant of his computer, or that Plaintiffs deprived Defendant of the right to possess or use his computer files when it detected the infringement by using the same Limewire software functionalities used by individuals engaged in file swapping. *Elektra Entm’t Group Inc. v. Santangelo*, No. 7:06-cv-11520 (SCR)(MDF), slip op. at 12 (S.D. N.Y. March 4, 2008) (denying motion to add a counterclaim of trespass to chattels in similar copyright infringement case because “possession is a necessary element of a claim” and conclusory allegations regarding “use and possession” and injury were insufficient)(attached as Exhibit O). Defendant does not even allege that the computer that Plaintiffs allegedly “accessed” belonged to him. (Counterclaims at ¶¶ 23-28.)

Defendant’s entire claim of Trespass to Chattels is based primarily on Defendant’s contention that “Plaintiffs have accessed a computer system without authorization and obtained information from that computer system in violation of Kovalcik’s rights.” (Counterclaim at ¶ 24.) However, contrary to Defendant’s allegations, Plaintiffs simply detected Defendant’s copyright infringement, as any other user of a peer-to-peer network could have done, through publicly shared files. *See, e.g., Arista Records, L.L.C., et al. v. Tschirhart*, 05-CV-372-OLG, slip op. at 7 (W.D. Tex. May 24, 2006) (holding that “there was no ‘wrongful interference’ because

plaintiffs' investigators did not enter the private portion of her computer, but only accessed all publicly shared files.") (Exhibit P); *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 267 (D.D.C. 2003) (When an ISP subscriber "opens his computer to permit others, through peer-to-peer file sharing, to download materials from that computer, it is hard to understand just what privacy expectation he or she has after essentially opening the computer to the world."); *see also Florida Publishing Co. v. Fletcher*, 340 So. 2d 914, 917 (Fla. 1976) (consent, which may be implied by custom, usage or conduct, "is an absolute defense to an action for trespass.")

Likewise, there is no suggestion that when Plaintiffs detected Defendant's copyright infringement that Plaintiffs, or their agents, "us[ed] or intermeddl[ed]" with Plaintiffs' computer or the files or information stored on her computer. As explained above, Plaintiffs' investigators did not thrust themselves into Defendant's computer at all, and did not act without invitation, permission, or welcome. On the contrary, the shared folder for Defendant's Limewire program was open for the world to see. Plaintiffs cannot have committed any trespass in looking at the contents of Defendant's Limewire share folder because Defendant invited the entire Internet-using public to see those files. *See id.*

Defendant also fails to adequately allege any legally cognizable harm "to some person or thing in which [he] has a legally protected interest." Defendant does allege that "a computer system" was accessed "in violation of Kovalcik's rights." (Counterclaims at ¶ 24.) However, this is little more than a "formulaic recitation of the elements," *Twombly*, 127 S. Ct. at 1964-65, that falls far short of adequately pleading a claim of trespass to chattels. Defendant does not allege that the computer system accessed belongs to Defendant, how the computer was accessed, what was accessed or what rights of Defendant's were actually violated.

Defendant's conclusory allegations of trespass to chattels fails to satisfy even a single

element of this cause of action and fails to raise Defendant's "right to relief above the speculative level." *Id.* Accordingly, Defendant's trespass to chattels counterclaim should be dismissed.

IV. DEFENDANT'S CLAIM THAT PLAINTIFFS HAVE VIOLATED THE COMPUTER FRAUD AND ABUSE ACT, 18 U.S.C. § 1030 (COUNT II) SHOULD BE DISMISSED BECAUSE IT WAS NOT PROPERLY PLED.

Defendant's second claim alleges violations of the Computer Fraud and Abuse Act ("CFAA") – a criminal statute that authorizes a civil cause of action in limited circumstances. *In re America Online, Inc. Version 5.0 Software Litigation*, 168 F. Supp. 2d 1359, 1368 (S.D. Fla. 2001); 18 U.S.C. § 1030(g). The CFAA prohibits a number of very specific computer activities, from hacking into government computers with classified information to accessing credit report information or the computers of financial institutions.

Although it is far from clear under which specific prongs of the CFAA Defendant's claim is brought, it appears as though Defendant's claims are brought under 18 U.S.C. § 1030(a)(5)(A)(iii) and 18 U.S.C. § 1030(a)(4). (Counterclaims at ¶¶ 31-32, respectively). Regardless of which section of the CFAA Defendant's claims are based upon, all of the activities prohibited by the CFAA require the access of or intentional damage to another's computer *without authorization*. See, e.g., *In re America Online*, 168 F. Supp. 2d at 1369-72; *Theofel v. Farey-Jones*, 359 F.3d 1066, 1078 (9th Cir. 2004). Here, as a matter of law, Defendant cannot show that Plaintiffs and/or their investigators acted without authorization, nor can Defendant show that Plaintiffs damaged Defendant's computer, let alone that Plaintiffs *intentionally* did so; therefore, Defendant fail to adequately allege facts sufficient to state a CFAA claim under *Twombly*.

Defendant's CFAA counterclaim may recite the language of the statute, but this is little more than "labels and conclusions, and a formulaic recitation of the elements." *Twombly*, 127 S. Ct. at 1964-65. In *Atlantic Recording Corp. v. Serrano*, No. 07-CV-1824 (S.D. Cal. Dec. 28,

2007), the Court explained that in order to state a claim under the CFAA and to put Plaintiffs on notice of a CFAA violation, Defendant must provide details regarding the alleged unlawful access and how Defendant's computer was harmed. In *Serrano* the Court held that:

Defendant's Counterclaim does not allege facts sufficient to put Plaintiffs on notice of a CFAA violation. *See Swierkiewicz*, 534 U.S. at 512. . . . Defendant fails to allege (1) when or how Plaintiffs allegedly broke into his computer; (2) when or how Plaintiffs allegedly spied on his private information; (3) what private information was spied on; (4) when or how Plaintiffs removed private information; (5) what private information was removed; (6) what files were inspected, copied, or removed; (7) when or how any files were inspected, copied or removed; (8) how Plaintiffs appropriated or profited from Defendant's personal property; and/or (9) how Defendant's data was harmed or compromised. Even viewing the Counterclaim's meager allegations in Defendant's favor, the Court can only speculate as to what may have transpired and how Defendant is entitled to relief.

Serrano, No. 07-CV-1824 W (JMA), slip op. at 9 (S.D. Cal. Dec. 28, 2007)(dismissing Defendant's CFAA counterclaim)(attaches as Exhibit Q). Defendant fails to assert any of these factual allegations in his Counterclaims.

As previously discussed, the Limewire file-sharing software utilized by Defendant to trade files over the Internet has a file-sharing feature that was enabled at the time the infringement was detected. As such, the digital audio files in Defendant's shared folder were being distributed to millions of other users of the P2P network. *See U.S. v. Kennedy*, 81 F. Supp. 2d 1103, 1106 n. 4 (explaining detection through file-sharing program). Indeed, it was precisely because Defendant was distributing the files from his shared folder that MediaSentry was able to detect the infringing conduct at issue. Because Defendant's shared folder was open to the public, including Media Sentry, Defendant granted exactly the type of authorization contemplated by the CFAA.

While Defendant baldly alleges that Plaintiffs intruded into his computer without authorization and that he did not "configure any computer to 'share' files," (Counterclaim at ¶¶

18-19), he does not deny that Limewire, or a similar program which gave him access to Limewire, was installed on his computer. As explained in *Tschirhart*, any alleged access by Plaintiffs to files on a public share folder, whether intentionally made public or not, cannot be said to be unauthorized.

[A]ssuming that the files in the iMesh folder plaintiffs accessed were made available by defendant to the public for copying and further distribution, plaintiffs' access of the folder containing those files was not "unauthorized." Defendant asserts that she did not make any portion of her computer available to the public. She does not, however, contend that the public iMesh folder was not installed on her computer. She merely asserts that if it was there she did not install it. If it was on the computer, access by the public – including plaintiffs' investigator – was not "unauthorized." See *International Ass'n of Machinists and Aerospace Workers v. Werner-Masuda*, 390 F.Supp.2d 479, 498 (D. Md. 2005)(dismissing CFAA claim where defendant had authorization to access computer).

Tschirhart, No. SA-05-CV-372-OG, slip op. at 9 (Exhibit Q) (rejecting similar CFAA claim)(Exhibit P); *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 267 (D.D.C. 2003).

In short, Defendant's own actions effectively provided a blanket authorization for others to detect the contents of his shared folder. As a result, no claim under the CFAA §1030(a)(4) or (5)(iii) for unauthorized access to Defendant's computer is available to him and the counterclaim, if allegedly arising under those sections, must fail.

Furthermore, Defendant has not and cannot allege that Plaintiffs damaged Defendant's computer in any way, let alone that Plaintiffs *intentionally* damaged his computer. Under the CFAA, damage is defined as "any impairment to the integrity or availability of data, a program, a system, or information," 18 U.S.C. § 1030(e)(8)(A), and that causes loss in any one year period to one or more individuals "aggregating at least \$5,000 in value." 18 U.S.C. § 1030(a)(5)(B)(i); *Miles v. America Online, Inc.*, 202 F.R.D. 297 (M.D. Fla. 2001). There is not a single factual allegation in Defendant's counterclaims to support this element of damage to Defendant's computer and his bald allegations of such are insufficient under *Twombly*. *Twombly*, 127 S. Ct.

at 1964-65. Thus, Defendant's counterclaim for violations of the Computer Fraud and Abuse Act likewise fail.

V. DEFENDANT'S ABUSE OF PROCESS COUNTERCLAIM (COUNT III) FAILS AS A MATTER OF LAW.

Abuse of process is "the use of legal process against another primarily to accomplish a purpose for which it is not designed." *Cruz v. Princeton Ins. Co.*, 2007 PA Super 152, ¶ 8; 925 A.2d 853 (citations omitted). "Thus, the gravamen of this tort is the perversion of legal process to benefit someone in achieving a purpose which is not an authorized goal of the procedure in question." *Werner v. Plater-Zyberk*, 2002 PA Super 42, ¶ 15; 799 A.2d 776 (citing *Rosen v. American Bank of Rolla*, 627 A.2d 190, 192 (Pa. Super. Ct. 1993)). "To establish a claim for abuse of process it must be shown that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the plaintiff." *Id.* at ¶ 15 (citations omitted.)

Here, Defendant alleges, in a conclusory fashion, that "Plaintiffs filed their 'John Doe' action for the sole purpose of obtaining an ex parte subpoena to force his university to disclose federally-protected educational information about him." (Counterclaim at ¶ 36). Then, in the same conclusory manner, Defendant alleges that Plaintiffs used their "John Doe" action "to try to force Kovalcik to surrender money in the form of settlement; even though Plaintiffs had no intention of seeking judgment in the "John Doe" action. (*Id.* at ¶ 38). Yet, Defendant fails to specifically allege under which federal statute or regulation the information Plaintiffs obtained from Defendant's ISP was protected, or how initiating a "John Doe" action or issuing a subpoena is a perversion of the legal process. *See Werner*, 2002 PA Super at ¶ 15. Such conclusory allegations fail to state a claim for relief under *Twombly* and are not sufficient to "raise a right to relief above the speculative level." *Twombly*, 127 S. Ct. at 1965.

Moreover, “[t]o satisfy the “perversion of process” element, the plaintiff must show ‘[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process.’ *Taliaferro*, 2008 U.S. Dist. LEXIS 39478, *31 n.10 (citations omitted). “[T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. . . . the point of liability is reached when the utilization of the procedure for the purpose for which it was designed becomes so lacking in justification as to lose its legitimate function as a reasonably justifiable litigation procedure.” *Naythons v. STradley, Ronon, Stevens & Young, LLP*, 2008 U.S. Dist. LEXIS 35301, *16 (E.D. Pa. April 30, 2008) (citing *General Refractories Co. v. Fireman’s Fund Insurance Co.*, 337 F.3d 297, 308 (3d. Cir. 2004)). Defendant simply has not alleged any act of Plaintiffs that was “not authorized by the process,” as all of Plaintiffs’ actions were done in an effort to settle or purse their claims of copyright infringement against the Defendant.

Defendant has also failed to allege how seeking to settle a legitimate claim of copyright infringement, particularly a claim that Plaintiffs are still pursuing, was a “perversion” of the process, as opposed to a legitimate effort on the part of the Plaintiffs to protect their copyrighted sound recordings. Defendant also alleges that Plaintiffs’ purpose in bringing their “John Doe” action was to “abuse the court system as a surrogate investigative agency,” as opposed to bringing the John Doe action for the purpose of “seek[ing] judgment against another party.” (Counterclaims ¶ 39.) Defendant’s allegations are without merit when Plaintiffs are in fact seeking judgment against Defendant for copyright infringement.

Further, Defendant alleges that Plaintiffs initiated their “John Doe” action “to harass and threaten Kovalcik” in an effort to settle this case. (Counterclaims ¶ 38.) However, Defendant

fails to allege what conduct Plaintiffs engaged in to harass Defendant, other than to contact him in an effort to settle, early on in the litigation, Plaintiffs' claims of copyright infringement. Furthermore, Defendant fails to specifically allege what if any threats were made against Defendant. *Cf. Interscope Records v. Duty*, No. 05-CV-3744-PHX-FJM, 2006 U.S. Dist. LEXIS 20214, *14 (D. Ariz. April 14, 2006)(In dismissing Defendant's counterclaim for abuse of process, the Court held that "[i]t is not, however, an abuse of the legal process to organize a large-scale legal assault on small-scale copyright infringers that together cause devastating financial losses. Moreover, it is not an abuse of the legal process if the Recording Companies' goal in bringing these actions is to scare would-be infringers into complying with federal law, and thereby prevent the networks that allegedly facilitate the alleged infringement from doing so")(attached as Exhibit S).

It is clear from Plaintiffs' Complaint that Plaintiffs' purpose in commencing this litigation, as well as the "John Doe" action, was to protect against the infringement of their copyrights, not to harass or annoy the Defendant. In *Heslep*, a case virtually identical to this one, the court held, "Plaintiffs' attorneys brought this lawsuit not for the purposes of harassment or to extort [the defendant] . . . , but, rather, to protect their clients' copyrights from infringement and to help their clients deter future infringement." *Heslep*, 2007 U.S. Dist. LEXIS 35824, at * 15 (Exhibit A).

For all of these reasons, Defendant's abuse of process counterclaim fails as a matter of law, and, should be dismissed.

VI. DEFENDANT'S DEFAMATION CLAIM (COUNT IV) SHOULD BE DISMISSED BECAUSE HE HAS NOT AND CANNOT PLEAD THE NECESSARY ELEMENTS OF SUCH A CLAIM.

To establish a claim of defamation against Plaintiffs, Defendant has the burden of proving the following:

(1) the defamatory character of the communication; (2) publication by the defendant; (3) its application to the plaintiff; (3) understanding by the recipient of its defamatory meaning; (5) understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm to the plaintiff; and (7) abuse of a conditionally privileged occasion.

Davis v. Resources for Human Dev., 2001 PA Super 73, ¶ 4, 770 A.2d 73; codified at 42 Pa.C.S. § 8343. Defendant's claim of defamation is based on alleged "materially false representations to the University of Pennsylvania," (Counterclaim ¶ 42), and the fact that Defendant would allegedly be subject to "embarrassment and ridicule" if the copyrighted sound recordings on Exhibit A to the Complaint were connected to him. (Counterclaim ¶ 43.) However, Defendant's defamation claim is barred both by the *Noerr-Pennington* doctrine and Pennsylvania's doctrine of judicial immunity. Furthermore, notwithstanding Defendant's claim to the contrary, Plaintiffs' representations to the University of Pennsylvania and Exhibit A to Plaintiffs' Complaint cannot be considered defamatory in nature. Finally, Defendant has failed to plead special damages.

All of Plaintiffs' alleged defamatory conduct, including their communications with the University of Pennsylvania and their attachment of Exhibit A to the Complaint is subject to Pennsylvania's doctrine of judicial immunity and is therefore privileged. As previously discussed, the judicial immunity doctrine is an "absolute privilege and cannot be destroyed by abuse." *Pawlowski*, 588 A.2d at 41 (citations omitted); *see also* Section II, *supra*. Plaintiffs only communication with the University of Pennsylvania regarding Defendant occurred pursuant to a subpoena; and Exhibit A was filed as an attachment to Plaintiffs' Complaint. There is little doubt that communications pursuant to a subpoena, as well as attachments to a Complaint, fall squarely within the judicial immunity privilege and are they very type of "communications which are issued in the regular course of judicial proceedings and which are pertinent and

material to the redress or relief sought.” *Id.* Moreover, as explained above, the *Noerr-Pennington* doctrine and its protection against defamation claims based on the filing of litigation, precludes Defendant’s Counterclaims. *See Oneida Tribe*, 2005 WL 2758038, at *3.

In addition to being barred by the doctrine of judicial immunity, Defendant fails to plead a claim of defamation because Plaintiffs’ communications with the University of Pennsylvania and Exhibit A are not capable of a defamatory meaning. “In an action for defamation, the plaintiff has the burden of proving . . . the defamatory character of the communication.” *Tucker v. Philadelphia Daily News*, 848 A.2d 113, 124 (2004)(citing 42 Pa.C.S. §8343(a)). “[T]o determine whether a statement is capable of a defamatory meaning, we consider whether the statement ‘tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third parties from associating or dealing with him.’” *Id.* (citing *Birl v. Philadelphia Elec. Co.*, 167 A.2d 472, 475 (1960)); *Volomino v. Messenger Publ’g Co.*, 189 A.2d 873, 874-75 (1963) (“A libel is a maliciously written or printed publication which tends to blacken a person’s reputation or to expose him to public hatred, contempt or ridicule.”) Defendant has not alleged, nor could he, facts which would show sufficient harm to his reputation “as to lower him in the estimation of the community,” that would deter others from associating with him, or that his reputation has been blackened simply because Plaintiffs’ requested the University of Pennsylvania to identify the individual responsible for a particular IP address, and because Plaintiffs alleged that he is responsible for having a Limewire shared folder containing the sound recordings listed on Exhibit A of the Complaint.

Furthermore, even if the Court were to find that Plaintiffs’ communications with the University of Pennsylvania and Exhibit A to the Complaint were capable of a defamatory meaning, the truth of Plaintiffs’ alleged defamatory statements “is a complete defense to an

action for defamation.” *Schnabel v. Meredith*, 107 A.2d 860, 862 (1954). In their communications with the University of Pennsylvania, Plaintiffs requested, pursuant to a subpoena, that the University of Pennsylvania, as an Internet Service Provider, identify the individual responsible for the IP address 165.123.196.206. In response to that subpoena, the University of Pennsylvania identified the individual responsible for the IP address as John C. Kovalcik. Defendant has not alleged that he was not responsible for the IP address, or that the IP address Plaintiffs provided to the University of Pennsylvania was incorrect or that the University of Pennsylvania mistakenly identified Defendant as the individual responsible for the IP address. Moreover, it is important to note that Plaintiffs did not provide the University of Pennsylvania with Defendant’s name, only an IP address. It was the University itself that connected the Defendant to the IP address responsible for the alleged copyright infringement.

Finally, Defendant has also failed to plead damages required for his defamation claim. As set forth above, to assert a claim of defamation Defendant must allege “special harm.” *See* 42 Pa.C.S. 8343(a). Moreover, Rule 9(g) of the Federal Rules of Civil Procedure “requires that special damages be pled with specificity.” *Synthes v. Globus Med., Inc.*, No. 04-CV-1235, 2005 U.S. Dist. LEXIS 19962, *12 (E.D. Pa. Sept. 14, 2005)(citing Fed. R. Civ. P. 9(g)). According to the Third Circuit, “special damages are ‘actual and concrete damages capable of being estimated in money, established by specific instances such as actual loss due to withdrawal of trade of particular customers, or actual loss due to refusal of credit by specific persons, all express in figures.’” *Id.* n. 3 (citing *Beverly Enter., Inc. v. Trump*, 182 F.3d 183, 188 (3d. Cir. 1999)). Defendant has failed to plead special harm, let alone plead such harm with specificity. In fact, Defendant merely alleges that he “has suffered damage as a result of Plaintiffs’ defamatory statements” and nothing more. (Counterclaim ¶ 44.) Thus, Defendant has not plead

special damages and his claim for defamation fails as a matter of law.

VII. DEFENDANT’S DECLARATORY JUDGMENT COUNTERCLAIM (COUNT V) SHOULD BE DISMISSED BECAUSE IT IS REDUNDANT OF PLAINTIFFS’ CLAIM AGAINST DEFENDANT AND FAILS TO COMPORT WITH THE DECLARATORY JUDGMENT ACT’S PURPOSE.

A. Defendant’s Counterclaim Is Redundant Because It Mirrors Plaintiffs’ Copyright Claim.

Courts routinely dismiss “mirror image” counterclaims where they merely restate issues already before the court as part of plaintiff’s affirmative case.⁹ Similarly, courts also will dismiss declaratory judgment counterclaims that are duplicative of defendant’s own allegations in its defenses. *See FDIC v. Bancinsure, Inc.*, 770 F. Supp. 496, 500 (D. Minn. 1991) (dismissing counterclaim that “seeks the same result as defendant’s denials and affirmative defenses” as “redundant”); *Lee v. Park Lane Togs, Inc.*, 81 F. Supp. 853, 854 (S.D.N.Y. 1948) (dismissing defendant’s counterclaim seeking declaration of invalidity of trademark as

⁹ *See, e.g., Tschirhart*, Case No. SA-05-CA-372, slip op. at 9 (Exhibit P); *Virgin Records America, et al. v. Thompson*, Case No. SA-06-CA-592, slip op. at 1 (W.D. Tex. Sept. 21, 2006) (Exhibit B); *Elektra Entm’t Group, et al. v. Garrett*, Case No. W-07-CA-037, slip op. at 1-2 (W.D. Tex. June 22, 2007) (attached as Exhibit R); *Interscope Records, et al. v. Kimmel*, Case No. 3:07-cv-0108, slip op. at 6 (N.D.N.Y. June 18, 2007) (attached as Exhibit S); *Interscope Records, et al. v. Duty*, Case No. 05-CV-3744-PHX-FJM, 2006 U.S. Dist. LEXIS 20214, *14 (D. Ariz. April 14, 2006); *Atlantic Richfield Co. v. Ramirez*, 1999 U.S. App. LEXIS 8669, at *5 (9th Cir. 1999) (affirming district court’s decision to strike counterclaims seeking declaratory relief because the counterclaims were duplicative of Plaintiffs’ action); *Aldens, Inc. v. Packel*, 524 F.2d 38, 53 (3d Cir. 1975) (dismissing Attorney General’s counterclaim for declaratory relief where counterclaim presented the “identical issues posited by the complaint”); *Veltman v. Norton Simon, Inc.*, 425 F. Supp. 774, 776 (S.D.N.Y. 1977) (dismissing counterclaim for declaratory relief as “redundant” and “moot”); *GNB Inc. v. Gould, Inc.*, 1190 WL 207429, *5 (N.D. Ill. 1990) (dismissing counterclaim as “duplicative” where it was “essentially a restatement” of plaintiff’s claim from defendant’s perspective); *Ivoclar Vivadent, Inc. v. Northeast Dental & Med. Supplies, Inc.*, 2006 U.S. Dist. LEXIS 61751, at *6 (W.D.N.Y. 2006) (dismissing counterclaim where the counterclaim sought declaratory relief for the same claims enumerated in the underlying suit and was therefore duplicative and redundant); *4-Country Elec. Power Ass’n v. Tennessee Valley Auth.*, 930 F. Supp. 1132, 1144 (S.D. Miss. 1996) (dismissing declaratory judgment counterclaim because it was “wholly repetitious of the issues already before the court and hence [was] unnecessary”); *John Evans Sons, Inc. v. Majik-Ironers, Inc.*, 95 F.R.D. 186, 190 (E.D. Pa. 1982) (holding that if a counterclaim merely restates the controversy set forth in the complaint it may be stricken as redundant); *Green Bay Packaging, Inc. v. Hoganson & Assoc., Inc.*, 362 F. Supp. 78, 82 (N.D. Ill. 1973) (holding, in a case involving a mirror-image counterclaims for declaratory relief, that “[i]t is well settled that such repetitious and unnecessary pleadings should be stricken,” and striking the counterclaims).

unnecessary where allegations of counterclaim were already before court as a defense).

Here, Defendant seeks a declaration of non-infringement (Counterclaims at ¶ 49) that is entirely duplicative of Plaintiffs' claim of infringement against Defendant (Compl., ¶ 15-16) and of Defendant's own defenses (Answer at ¶ 6; Aff. Defenses at ¶ 17). In a similar case to the one at bar, the court held, "[t]he issue of copyright infringement will be decided by this Court regardless of the declaratory judgment claim . . . Therefore, Defendant's claim for a declaratory judgment is redundant and unnecessary." *Tschirhart*, Case No. SA-05-CA-372, slip op. at 9 (Exhibit P); *Sony BMG Music Entm't, et al. v. Crain*, No. 1:06-CV-567-TH, slip op. at 3 (E.D. Tex. Sept. 26, 2007)("The issue of infringement is the very issue upon which plaintiffs seek recovery in their original complaint. Defendant's counterclaim seeking declaration of non-infringement raises no legal or factual issues outside those raised by plaintiffs' complaint, and is simply plaintiff's copyright claim recast from the perspective of the defendant.")(attached as Exhibit T). Because Defendant's counterclaim is entirely redundant of Plaintiffs' claim for copyright infringement and of Defendant's defenses to Plaintiffs' claim, it is duplicative and unnecessary, and should be dismissed.

B. Defendant's Attempted Use of the Declaratory Judgment Act Here Fails to Comport With the Act's Purpose.

Even if Defendant could establish jurisdiction over his declaratory judgment counterclaim, the Court should decline to exercise jurisdiction over Defendant's counterclaim in this case. The Declaratory Judgment Act does not automatically grant the right to have the claim heard. Rather, district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995). Here, the Court should decline to exercise jurisdiction over Defendant's declaratory judgment

counterclaim because doing so would serve no legitimate purpose and would only waste judicial resources. As demonstrated above, Defendant's counterclaim seeking a declaration of Defendant's non-infringement is entirely duplicative of Plaintiffs' claims and Defendant's defenses, which are already before the Court. It serves no purpose to address the same claims and defenses a second time under the guise of a declaratory judgment action. Doing so would only cause a waste of judicial resources.

Furthermore, the Declaratory Judgment Act was initially intended to dispel difficulties in cases where a party sought to challenge the constitutionality of a statute without having to violate the statute, and now serves to allow courts to declare the rights of adverse parties before they accrue avoidable damages. *Steffel v. Thompson*, 415 U.S. 452, 466 (1974); *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am.*, 933 F. Supp. 246, 250 (S.D.N.Y. 1996). The Declaratory Judgment Act was not intended to allow parties to bring redundant, unnecessary counterclaims like the one offered by Defendant here.

VIII. DEFENDANT'S CLAIM FOR CIVIL CONSPIRACY (COUNT VI) SHOULD BE DISMISSED BECAUSE HE HAS NOT - AND CANNOT PLEAD -ANY OF THE REQUIRED ELEMENTS AND THE ACTIONS OF WHICH DEFENDANT COMPLAINS ARE PRIVILEGED.

Under Pennsylvania law, the following elements are required to establish a claim for civil conspiracy:

It must be shown that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. Proof of malice, i.e., an intent to injure, is an essential part of a conspiracy cause of action; this unlawful intent must also be without justification. Furthermore, a conspiracy is not actionable until 'some overt act is done in pursuance of the common purpose or design ... and actual legal damage results.

Lackner v. Glosser, 2006 PA Super 14, ¶ 37, 892 A.2d 21 (citing *Grose v. Proctor & Gamble Paper Products*, 2005 PA Super 8, 866 A.2d 427, 440-41 (Pa. Super. 2005)(citations omitted)).

Acts which are privileged cannot provide the basis for the "overt act done in pursuance of the

common purpose or design.” *Id.*; see *Pelagatti v. Cohen*, 536 A.2d 1337, 1343 (Pa. Super. Ct. 1987)(doctrine of judicial immunity barred actions for intentional interference with contractual relations and defamation); *Brown v. Delaware Valley Transplant Program*, 539 A.2d 1372, 1375 (Pa. Super. Ct. 1975)(doctrine of judicial immunity barred a claim of civil conspiracy where all of defendant’s conduct was related to a judicial proceeding).

As discussed above, all of Defendant’s allegations in this suit relate to Plaintiffs’ actions in prosecuting this action. As such, Plaintiffs’ conduct is privileged under the *Noerr-Pennington* doctrine and/or Pennsylvania’s doctrine of judicial immunity and cannot form the basis of any conspiracy or any *actionable* underlying tort or wrong upon which a civil conspiracy claim must be based. See Section I and II, *supra*; *Chantilly Farms*, 2001 U.S. Dist. LEXIS, *18-19 (The Supreme Court has held that “there is no conspiracy exception to the Noerr-Pennington doctrine.)

Moreover, none of the alleged “illegal acts” committed by Plaintiffs “to further the ends of their conspiracy” provide the basis of an actionable underlying tort or wrong for Defendant’s civil conspiracy claim. (Counterclaims at ¶ 54). The “overt acts” committed by Plaintiffs on which Defendant’s civil conspiracy claim is based are Plaintiffs’ “unauthorized access to a protected computer system . . . in violation of 18 U.S.C. § 1030” and “extortion and attempted extortion in violation of the Hobbs Act, 18 U.S.C. § 1951.” (*Id.*) However, contrary to Defendant’s allegations, neither the Computer Fraud and Abuse Act or the Hobbs Act are an actionable underlying tort or wrong on which Defendant can basis his civil conspiracy claim.

As discussed above, Defendant has failed to allege a claim under 18 U.S.C. § 1030, thus that provision does not provide the basis of the underlying *actionable* tort or wrong. See *supra* § IV. Accordingly, the only remaining possibility is Defendant’s misplaced reliance on the Hobbs

Act, a federal statute prohibiting robbery or extortion. 18 U.S.C. 1951 *et seq.*; *U.S. v. Pringle*, 350 F.3d 1172, 1175 (11th 1951) (“the government must show (1) two or more persons agreed to commit a robbery or extortion encompassed within the Hobbs Act; (2) the defendant knew of the conspiratorial goal; and (3) the defendant voluntarily participated in helping to accomplish the goal.”)

Under the Hobbs Act, extortion is defined as “the obtaining of property from another, with his consent induced by wrongful use of actual or threatened force, violence or fear or under color of official right.” 1951(b)(2); *Wilkie v. Robbins*, 127 S. Ct. 2588, 2605 (June 25, 2007). Further, to commit extortion, “a person’s actions must be wrongful in some sense.” *U.S. v. Pendergraft*, 297 F.3d 1198, 1205-07 (11th Cir. 2002); *Vemco v. Camardella*, 23 F.3d 129, 134 (6th Cir. 1994) (“A threat of litigation if a party fails to fulfill even a fraudulent contract . . . does not constitute extortion.”); *DirectTV, Inc. v. Lewis*, 2005 U.S. Dist. LEXIS 8187, at *14 (W.D.N.Y. Apr. 29, 2005)(holding that “threats of litigation, even economically ruinous litigation, even unmeritorious litigation, do not constitute extortion”); *Crane Constr. v. Wal-Mart Stores, Inc.*, 1996 U.S. Dist. LEXIS 22729, *20 (W.D. Tenn. 1996) (“The threat of litigation does not amount to a predicate act of extortion.”).

Defendant cannot plead a conspiracy by relying on an alleged violation of the Hobbs Act. First, all of the alleged acts that Defendant would rely on to show a Hobbs Act violation are *privileged* and not wrongful. Numerous courts across the country have consistently held that litigation or the threat of litigation without more cannot be the basis for a Hobbs Act violation or be considered extortion. *See Prendergraft*, 297 F.3d at 1206-07; *Santangelo*, No. 7:06-cv-11520 (SCR)(MDF), slip op. 14 (denying addition of Civil Conspiracy Counterclaim)(Exhibit O).

In addition, there simply is no predicate act of robbery or extortion for there to be any

valid claim of a Hobbs Act violation. Defendant has suffered no loss. He has not settled the underlying case. Plaintiffs have not obtained any money from him. Thus, there is no extortion. Likewise, there are also no factual allegations to support any agreement among Plaintiffs to engage in a robbery or extortion as required by the Act. Thus, none of the statutes Defendant lists in his civil conspiracy counterclaim provide the underlying actionable wrong to sustain his claim.

As for the other elements of civil conspiracy, Defendant does not, and cannot, allege any conspiracy or agreement between Plaintiffs to utilize illegal means or accomplish illegal ends. Defendant's allegations to that effect are wholly conclusory and do not comply with *Twombly*. Neither the methods used by Plaintiffs to protect their copyrights, nor the goal of vindicating their copyrights are illegal. Plaintiffs' protected right to seek redress from the courts is clear. Not only are Plaintiffs' methods and goals legal, but likewise, Plaintiffs have not *agreed* or *conspired* to use unlawful means or to seek an unlawful end. And there is no factual support for Defendant's conclusory allegations. Finally, Defendant has alleged no facts to suggest that Plaintiffs acted with malice or an intent to injure the Defendant. Defendant's assertion that Plaintiffs acted "intending to cause him harm," is little more than a "formulaic recitation of the elements" which is insufficient under *Twombly* to survive a motion to dismiss.

The facts, when parsed from Defendant's hyperbolic spin, reveal that the only acts of Plaintiffs that Defendant complains of are acts taken in an effort to investigate the infringement of their copyrights and to settle or bring valid civil actions against those liable for the infringement. For all of these reasons, Defendant's civil conspiracy claim fails as a matter of law.

IX. THE COURT'S HOLDINGS IN *DEL CID* AND *BOYER* WERE WRONGLY DECIDED.

As set forth above, Plaintiffs anticipate that Defendant may attempt to support his counterclaims by relying on the decisions of one Judge in the Middle District of Florida in *Del Cid* and *Boyer*. While the court in *Del Cid* allowed the defendant in that case to bring claims for trespass to chattels, violation of the CFAA, deceptive and unfair trade practices and civil conspiracy, the Court's opinion focused almost exclusively on the fact that the *Del Cid* Counterclaimant adequately pled each of these claims, and that both the *Noerr-Pennington* doctrine and the Florida litigation privilege did not apply simply because the Defendant "alleges that Plaintiffs' copyright infringement suits amount to sham litigation." *Del Cid*, No. 8:07-cv-368-T-26TGW, slip op. 7 (Exhibit B). The court's decision in *Boyer* was based entirely on the court's previous decision in *Del Cid*. See *Boyer*, No. 8:08-cv-00147-RAL-EAJ (Exhibit C).

First, Judge Lazarre's opinions in *Boyer* and *Del Cid* are not binding and were based largely on inapplicable Florida state law. Second, Plaintiffs respectfully submit that the Court in *Del Cid* failed to properly apply the recent standard for motions to dismiss set forth by the Supreme Court in *Twombly*, 127 S. Ct. at 1965 (see also Section I, *supra*). In *Twombly*, the Supreme Court found that a party's grounds for his or her entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 127 S. Ct. at 1964-65. In both *Del Cid* and *Boyer*, however, the defendants asserted nothing more than legal conclusions without alleging any underlying facts.

This is also true of the *Del Cid* and *Boyer* defendants' allegations of "sham litigation," which the *Del Cid* and *Boyer* Court found were sufficient to defeat Plaintiffs' arguments that their Counterclaims were barred by both the *Noerr-Pennington* doctrine and the *Florida* litigation privilege. Contrary to the Court's holdings, while the *Del Cid* and *Boyer* defendants

repeatedly referred to the conduct of the plaintiffs as “sham litigation,” the defendants, like Kovalcik here, failed to allege any facts establishing that the plaintiffs’ conduct was (1) objectively baseless; or (2) an attempt to interfere with the business of a competitor. *See supra*, Section I(B).

For these reasons, Plaintiffs respectfully submit that this Court should not follow *Del Cid* or *Boyer*, but rather should follow the substantial authority set forth above and should dismiss Defendant’s purported counterclaims.

CONCLUSION

For all of the above reasons, Plaintiffs ask this Court to dismiss each of Defendant’s counterclaims, and for such other relief as the Court deems just and necessary.

Dated: 6/25/08

By: s/ Geoffrey L. Beauchamp
Geoffrey L. Beauchamp, Esq. (No. 40380)
Geoffrey L. Beauchamp, P.C.
1015 York Road
Willow Grove, PA 19090
Telephone: (267) 781-0615
Facsimile: (215) 706-0895
E-mail: GLBLaw@comcast.net

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 25, 2008 a copy of the foregoing
**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS
DEFENDANT'S COUNTERCLAIMS** was served upon the Defendant via United States Mail
as follows:

Richard J. Bove
Hausch & Bove, LLP
1828 Spruce Street, Suite 400
Philadelphia, PA 19103
Attorney for Defendant

s/ Geoffrey L. Beauchamp
Geoffrey L. Beauchamp, Esq. (No. 40380)
Geoffrey L. Beauchamp, P.C.
1015 York Road
Willow Grove, PA 19090
Telephone: (267) 781-0615
Facsimile: (215) 706-0895
E-mail: GLBLaw@comcast.net

Attorney for Plaintiffs