

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

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|------------------------|-------------------------------------|
| MOTOWN RECORD COMPANY, | : |
| L.P., <i>et al</i> | : |
| | : |
| Plaintiffs, | : CIVIL ACTION NO. 2:07-cv-04702-AB |
| | : |
| v. | : DOCUMENT FILED ELECTRONICALLY |
| | : |
| JOHN C. KOVALCIK, | : MEMORANDUM IN OPPOSITION |
| | : TO PLAINTIFF'S MOTION TO |
| Defendant. | : DISMISS COUNTERCLAIMS |

Defendant JOHN C. KOVALCIK ("Kovalcik") submits his memorandum in opposition to Plaintiffs' Motion to Dismiss Amended Counterclaims, as follows.

INTRODUCTION

Plaintiffs' Memorandum in support of its Motion to Dismiss Kovalcik's Amended Counterclaims runs over the normal page limit for briefs. Essentially Plaintiffs claim blanket immunity with respect to all their actions based upon their interpretation of the *Noerr-Pennington* doctrine and state judicial immunity. Plaintiffs' motion, filed before this Court, is essentially verbatim those filed by the recording industry in *UMG Recordings, Inc. v. Del Cid*, No. 8:07-CV-368-T-26 (TGW) (M.D. Fla. Sept. 19, 2007) and *Atlantic Recording Corp., et al. v. Boyer*, No. 8:08-cv-00147-RAL-EAJ (M.D. Fla. May 6, 2008). In both cases the court refused to dismiss defendants' counterclaims finding that the counterclaim adequately plead that the RIAA infringement suits amounted to sham litigation and were not protected by the *Noerr-Pennington* immunity. See *Del Cid*, at 3 (attached as Exhibit A). Kovalcik's case mirrors the Florida cases and Kovalcik's Answer and

Counterclaims mirrors those filed by the defendants' in Florida. While Plaintiffs' urge this Court to ignore the federal court decisions that precisely mirror this case in the Middle District of Florida, they proceed to cite other district court cases throughout their Motion and rely heavily upon *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) addressing sanctions pursuant to Federal Rule of Civil Procedures Rule 11. Plaintiffs expend numerous pages with so-called "background" and "introductory" information which is wholly irrelevant to a Motion to Dismiss, because that information improperly attempts to rebut the express and specific facts Kovalcik pleads in his counterclaims.

Plaintiffs' legal arguments like their improper factual contentions, are filled with arguments that - when one considers the facts that are actually plead in the Amended Counterclaims - have no relevance in a Motion to Dismiss.

This opposition will attempt to deal with each improper factual dispute and each legal diversion raised by Plaintiffs, showing why this Court should deny Plaintiffs' Motion in its entirety.

JUDICIAL NOTICE
Judicial Notice In Connection With Defendant's Opposition to Plaintiffs' Motion to Dismiss Defendant's Counterclaims

Pursuant to Rule 201 of the Federal Rules of Evidence, Defendant hereby requests that the Court take judicial notice of the following matters in adjudicating Plaintiffs' Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Among matters subject to judicial notice on a Rule 12(b)(6) motion are those covered in Fed. R. Evid. 201(b), *i.e.*, any fact "not subject to reasonable dispute in that it is either (1) generally known within the

jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned”. *Ieradi v. Mylan Labs., Inc.*, 230 F.3d 594, 600 n.3 (3d Cir. 2000).

When Plaintiffs’ filed their complaint against Mr. Kovalcik, they knew that the investigations performed by MediaSentry could not determine the identity of an alleged infringer nor could they verify what computer, if any, was “distributing” copyrighted material and that this fact gave rise to numerous cases in which incorrect individuals were mistakenly identified and wrongly sued:

- RIAA sent notice to Penn State’s Department of Astronomy and Astrophysics, accusing the University of unlawfully distributing songs by the pop singer Usher. In fact, the RIAA mistakenly identified the combination of the word “Usher” – identifying faculty member Peter Usher – and a capella song performed by astronomers about a gamma ray as an instance of copyright infringement. *See McCullah, RIAA Apologizes for Threatening Letter*, CNET News, May 12, 2003 (http://news.com.com/2100-1025_3-1001095.html).
- A federal judge in California noted the improper purpose of the recording industry sham lawsuits and that “the federal judiciary is being used as a hammer by a small group of plaintiffs to pound settlements out of unrepresented defendants. *See Electra Entertainment Group, et al v. O’Brien*, 06-CV-05289 SJO (C.D. Cal. March 2, 2007).
- Another federal judge in California noted the lack of merits to the sham litigation stating, “Plaintiffs have presented no facts that this allegation [of copyright infringement] is anything more than speculation”. *See Interscope Records, et al v. Rodriguez*, No. 06cv2485-B (NLS)(S.D. Cal. August 17, 2007).
- A federal judge in Maine stated in a recording industry case that “it is difficult to ignore the kind of gamesmanship that is going on...these plaintiffs have devised a clever scheme...but it troubles me that they do so with impunity”. *See Arista Records, LLC et al v. Does 1-27*, 07-CV-00162 JAW (D. Me. January 25, 2008).
- The flaws in MediaSentry’s investigations have been well known to Plaintiffs for years. In *Brein et al v. UPC Nederland B.V. et al*, No. 194741/KGZA-05-462/BL/EV at 4.30.31 (2005), a Dutch court ruled that MediaSentry’s investigation protocol was insufficient to state a claim for copyright infringement because it was unable to identify an actual

individual allegedly engaged in such.

- In *BMG Canada Inc. v. John Doe*, 2005 FCA 193 (2005), the Canadian Federal Court ruled that the investigation protocol used by MediaSentry is so deficient that the “evidence” gathered fails to establish even a prima facie case of infringement.
- RIAA-controlled member companies have filed and dismissed meritless cases across the United States after being forced to admit that they had sued the wrong people. *See, e.g., Atlantic v. Zuleta*, Case No. 06-cv-1221 (N.D. Ga.); *BMG Music v. Thao*, Case No. 07-CV-143 (E.D. Wis.); *Capital Records, Inc. et al v. Foster*, Case No. Civ. 04-1569-W (W.D. Okla.); *Interscope Records v. Leadbetter*, Case No. C05-1149-RSL-MJP (W.D. Wash.); *Priority Records, LLC v. Chan*, Case No. 04-CV-73645-DT (E.D. Mich.); *Virgin Records America, Inc. v. Marson*, Case No. 05-CV-03201 RGK (C.D. Cal.).

ARGUMENT LEGAL STANDARD

To defeat a Rule 12(b)(6) motion to dismiss, Kovalcik's counterclaims must simply "state a short and plain statement of the claim showing that the pleader is entitled to relief." *Swierkiewicz v. Sorema NA.*, 122 S.Ct. 992, 998 (2002). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1969 (2007). Furthermore, when considering the sufficiency of the allegations, the court must view the allegations in a light most favorable to the non-moving party. *See e.g. Hawthorne v. Mac Adjustment, Inc.* 140 F.3d 1367, 1370 (11th Cir. 1998). Well-pleaded counterclaims may proceed even if it appears "that a recovery is very remote and unlikely". *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Unless Plaintiffs demonstrate based on their pleadings alone beyond doubt that Kovalcik can prove no set of facts to support his claim which would entitle him to relief, their motion must be denied. *See R. 12(b)(6); Cleveland Bd. of Edu. V. Loudermil*, 470 U.S. 532 (1985); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

In this case, Kovalcik has stated numerous specific, detailed allegations to support each of the counterclaims, which meets and exceeds the standard expressed in *Swierkiewicz* and reaffirmed in *Twombly*, compelling this Court to deny Plaintiff's Motion. Plaintiffs essentially are asking the Court to dismiss Kovalcik's counterclaim based Plaintiffs' wholly unsupported and conclusory factual assertions. Plaintiffs improperly and without any support assert that (1) Kovalcik engaged in infringing activities; (2) MediaSentry used a lawful computer program to gain access to Kovalcik's computer; (3) MediaSentry was able to determine that Kovalcik was using the computer and (4) that MediaSentry was able to determine that Kovalcik was distributing music files. In ruling on a Rule 12(b)(6) motion to dismiss counterclaims, all allegations of material fact contained in the counterclaims are taken as true and construed in the light most favorable to the non-moving party. *See 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure* § 1368 (1990); and *see e.g. Hawthorne v. Mac Adjustment, Inc.* 140 F.3d 1367, 1370 (11th Cir. 1998). Plaintiffs' unsupported factual assertions offered to contradict Kovalcik's counter-claims should not be considered.

I. No privilege protects Plaintiffs' sham litigation or its non-litigation conduct.

Plaintiffs' claim of immunity under the *Noerr-Pennington* doctrine and state-law litigation privilege fails for two reasons. First, Kovalcik has made specific detailed allegations that Plaintiffs' litigation against his and thousands of others is no more than a sham, and that sham litigation does not enjoy any kind of privilege. Second, Plaintiffs attempt to distort both *Noerr-Pennington* and state-law privileges to cover activities which are clearly beyond their scope.

A. Plaintiffs have no First Amendment right to conduct objectively

baseless litigation.

Plaintiffs' are attempting to vigorously deny Kovalcik his day in court by claiming a First Amendment right to have their own day in court, but that is the heart of Plaintiffs' privilege claim. The Plaintiffs have implemented a massive enterprise of threat and intimidation which has included an investigation protocol that Plaintiffs and MediaSentry know was flawed, illegal in many states, and could not possibly identify Kovalcik and the thousands of others Plaintiffs have wrongly targeted. Plaintiffs' ultimate goal is to maintain, by illegal and improper means, their monopoly over the market for distributing music. Plaintiffs in their Motion to Dismiss list numerous cases that they use to refute Kovalcik's claim that this is sham litigation (Motion at pg 12 footnote 8). Sadly, in those cases the defendants were often *pro se* defendants filing answers to Plaintiffs' complaints that were so deficient that no hearing was ever conducted on the merits of the case. *See e.g.* defendant's answer filed in *Arista Records, LLC v. Butler*, No. 8:07-cv-3-T-23EAJ (M.D. Fla. 2007) (attached as Exhibit B.) No privilege or protection extends to sham litigation, as Kovalcik has alleged here. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). Plaintiffs "driftnet" tactics were employed without true regard to the potential litigation against Kovalcik. *See Id.* At 515 ("First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' which the legislature has the power to control"). This specific exception to *Noerr-Pennington* has already been addressed by the Federal Courts in an identical case in Florida. In the RIAA case of *UMG Recordings, Inc. et al v. Del Cid*, Case No. 8:07-cv-368-T-26TGW (M.D. Fla. Sept. 19 2007) the court denied the recording industry plaintiff's motion to dismiss counterclaims, finding that the counterclaim adequately pleaded that the RIAA infringement suits amounted to sham litigation and were not protected

by the *Noerr-Pennington* immunity. In doing so, the court stated that the “Defendant alleges that Plaintiffs’ copyright infringement suits amount to sham litigation. The allegations are sufficient to overcome a 12(b)(6) motion to dismiss.” *See Id* at 3.

Kovalcik, in contending that the Plaintiffs' litigation efforts are a sham, has plead specific detailed facts to show that the litigation against his and others is both objectively baseless and that it is founded on improper motives. This meets the test set forth by the Supreme Court in *Professional Real Estate Investors, Inc., v. Columbia Pictures Indus., Inc.* 508 U.S. 49 (1993). (establishing two-part test for "sham litigation" exception to *Noerr-Pennington* doctrine). “The applicability of the *Noerr* immunity, varies with the context and nature of the activity.” *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 at 499 (1988). In determining its application to civil litigation, the proper inquiry is whether the conduct can be characterized as “typical” litigation activity, or is “more aptly characterized as commercial activity” that happens to also involve litigation. *Venetian Casino Resort, L.L.C. v. N.L.R.B.*, 484 F.3d 601 (C.A.D.C. 2007), *citing Allied Tube*, 486 U.S. at 507. Further, a sham may be “evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims”. *Otter Tail Power Co. v. U.S.*, 410 U.S. 366, 380 (1973). The Ninth Circuit has applied the sham exception in the case of *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998). There citing *California Motor Transp.*, 404 U.S. at 512, the court found that a sham can be found even where as a matter of chance some of the repetitive lawsuits have merit. Plaintiffs have also provided no authority that could support the proposition that state-law litigation privilege would offer any greater protection to sham litigation of the type Kovalcik has alleged.

Specifically, Kovalcik pleads that Plaintiffs engage in "John Doe" lawsuits not to obtain judgments against the Does, but to abuse the courts' discovery powers to investigate the Does (Amd. Ctclms ¶¶ 6-7); that they file suits against named individuals to obtain publicity and to create fear among computer users (Amd. Ctclms., ¶¶ 8-12); that they file boilerplate lawsuits in the thousands, without regard to the actual innocence of the defendants, yet have never once brought a case to trial (Amd. Ctclms., ¶¶ 8-13); and that they routinely dismiss claims which are contested (Amd. Ctclms., ¶ 46). With respect to the claims against him, Kovalcik alleges that he has not infringed upon Plaintiffs' copyrights consequently Plaintiffs have never observed him uploading, downloading, or disseminating any sound recording in violation of law. (Amd. Ctclms., ¶¶ 15-17). In the context of a 12(b)(6) motion, the Court will consider these facts as true - and if they are true, they are sufficient and detailed enough to support Kovalcik's claim that Plaintiffs' litigation is a sham, both with respect to him individually and the thousands of other defendants.

B. No privilege extends to Plaintiffs' pre-suit computer invasions or extortion attempts.

Because Plaintiff's litigation efforts are a sham, they enjoy no First Amendment protection or privilege. Neither, then, do any of Plaintiffs' pre-suit computer invasions, extortion attempts, and related activity. These activities would be excluded in any event, because no privilege extends to such activities which are objectively baseless in themselves. This was the conclusion in *Theofel v. Farey-Jones*, 359 F.3d 1066, 1078-79 (9th Cir. 2004) (Posner, J.)(rejecting *Noerr-Pennington* doctrine application to a claims including one under the Computer Fraud and Abuse Act):

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

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

Accordingly, since Kovalcik has successfully plead that Plaintiffs' litigation efforts are a sham, and no privilege extends to Plaintiffs' extra-litigation activities, Kovalcik's claims should be allowed to stand.

II. Plaintiffs' computer invasions support a claim for trespass to chattels.

Plaintiffs object to the sufficiency of Kovalcik's factual allegations, yet the allegations as stated in the complaint are more than adequate to support 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, 880 A.2d 700 (Pa Super Ct. 2005)(citing Restatement 2d Torts § 217). "Absence of bad faith can never excuse a trespass, though the existence of bad faith may sometimes aggravate it." *See Spickler v. Lombardo*, 3 Pa. D. & C.3d 591 (Pa. D. 1977). Federal courts have recognized the applicability of the traditional trespass to chattels tort to the appropriation and use of computer technology without the owner's consent. *See CompuServe Inc. v. Cyber Promotions, Inc.* 962 F. Supp. 1015 (S.D. Ohio 1997) (defendants massive deployment of "spam" e-mail would give rise to a trespass claim); *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1069-70 (N.D. Cal. 2000) ("spider" program collecting data from eBay's website was trespassing); *see also Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 405 (2d Cir. 2004) (Second Circuit affirmed preliminary injunction based on the district court's finding that the defendant's use of search robots consumed a significant portion of the capacity of the plaintiff's computer systems.) Kovalcik has plead specific facts meeting

that test: Kovalcik did not authorize any person to obtain information from his computer, (Ctclms., ¶18-20); that Plaintiffs accessed what they allege was Kovalcik's computer, without authorization, (Ctclms., ¶24-25); that the intrusion deprived Kovalcik of the use and possession of the computer, (Ctclms., ¶26 – 27); and that Plaintiff's intrusion breached the integrity of the data therein causing damages exceeding \$5,000, (Ctclms ¶31). Plaintiffs may deny or dispute some of these facts - and they repeatedly do through their motion, claiming that Kovalcik "authorized" their intrusion despite his clear allegations to the contrary - but such disputes cannot serve as a basis to dismiss the counterclaims. *Hawthorne, id*

Plaintiffs also repeatedly state that Kovalcik did not plead adequately for damages, but they misrepresent the nature of damages available for trespass to chattels. In fact, an owner or personal property - such as a personal computer - has a whole range of options as to damages. These include diminution of value, rental value for the time of deprivation, or "any other loss" attributable to the trespass. 75 Am. Jur. 2d, Trespass § 140 (*citing* Restatement, Torts 2d § 928, Comment b) A property owner may also recover nominal damages if unable to prove anything else. *Stockman v. Duke*, 578 So.2d 831 (Fla. Dist. Ct. App. 1991). And like all torts, a property owner may recover punitive damages where such are properly plead and proven. So Plaintiffs' objections as to the damages pleading are misplaced.

Plaintiffs also raise, as they do in every single count, the objection that they are immune from suit for the trespass just because they happen to have also filed a lawsuit. In *Del Cid, supra*, the court held that a counterclaim for trespass to chattels would stand despite the recording industry plaintiffs' assertion of *Noerr-Pennington* immunity. *See Del Cid* at 3-4. For the reasons set forth *supra*, this reliance is unfounded and misplaced. Because Kovalcik has alleged specific facts to state a claim for trespass to chattels under Pennsylvania law, this

Court should deny the motion with respect to Count I of the Amended Counterclaims.

III. Plaintiffs' computer invasions support a claim for violation of the Computer Fraud and Abuse Act.

The Computer Fraud and Abuse Act, 18 U.S.C. § 1030 ("CFAA") prohibits illicit and fraudulent computer-related activities and allows for civil recovery under the circumstances provided in § 1030 (g). That subsection specifically provides: Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief.

Furthermore, the statute requires that the offending activity violate one of the five prongs of § 1030 (a)(5)(B). In this case, the applicable provision is § 1030 (a)(5)(B)(i), addressing "loss to 1 or more persons during any 1-year period... aggregating at least \$5,000 in value" where such loss was caused by qualified conduct under § 1030 (a)(5)(A), prohibiting, among other things, intentionally accessing a computer, without authorization, and causing damage. The statute further defines "loss" in § 1030 (e)(11) as: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service; and "damage" in § 1030 (e)(8): any impairment to the integrity or availability of data, a program, a system, or information.

Under the statute, then, the elements of a CFAA claim are: 1) intentional access to a computer; 2) without authorization, 3) resulting in any impairment to the integrity or availability of data, a program, a system, or information, 4) that causes "any reasonable cost

to any victim" in excess of \$5,000 in the course of a year.

Plaintiffs repeatedly and conclusively state that Kovalcik "authorized" their intrusion into his system, and second, that their intrusion caused no damage. Both of those contentions are without merit. *See, e.g. Theofel, supra.*

A. Kovalcik did not authorize Plaintiffs' intrusion into his computer.

Plaintiffs assert numerous times, without any citation to the Counterclaims, that Kovalcik supposedly authorized their intrusion by means of creating a "shared folder" that he made available to the public. Plaintiffs are free to dispute that point before a jury, but for purposes of this motion, they are bound by the allegations Kovalcik makes in his Counterclaims, which are exactly the opposite of Plaintiffs' claims. Kovalcik alleges, in paragraphs 18-21 of his Counterclaims, that he did not configure any computer to "share" files; that he did not authorize any person to access his computer, and that no one acting for Plaintiffs contacted him in an attempt to obtain authorization. Those clear, specific allegations eviscerate Plaintiffs' improper factual contentions to the contrary.

B. Kovalcik has properly alleged loss.

Plaintiffs' second contention, objecting to Kovalcik's allegations of loss, is similarly unfounded. Kovalcik has clearly pleaded facts to show "impairment" to his data and to his computer system. *See, e.g. Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc.*, 119 F. Supp. 2d 1121, 1126 (W.D. Wash. 2000) (stating "the alleged access and disclosure" of electronic information constituted an "impairment to the integrity of data . . . or information."). In particular, he pleads that Plaintiffs' activities allowed them to obtain data from his computer, (Amd. Ctclms., ¶30), and that such intrusion deprived Kovalcik of the use and possession of the

computer (Amd. Ctclms., ¶30) - thereby stating a "breach in the integrity of data... or system" - and further stated that such intrusion caused damages in an amount exceeding \$5,000.00. (Amd. Ctclms., ¶31). Despite these allegations, Plaintiffs object that there is "not a single factual allegation...to support this element of damage to Defendant's computer." (Motion, p. 19). Under the current statute, however, Kovalcik's allegations are ample to state a claim, and Plaintiffs Motion as to Count II should be denied.

Plaintiffs again rely on the notion that all their statements and their agents are subject to blanket protection under the *Noerr-Pennington* doctrine. In *Del Cid, supra*, the court held that a counterclaim for a CFAA violation would stand despite the recording industry plaintiffs' assertion of *Noerr-Pennington* immunity. *See Del Cid* at 3-4. For the reasons set forth *supra*, this reliance is unfounded and misplaced. The Plaintiffs' interference with the integrity and capacity of Kovalcik's computer impaired the availability and use of files and data. As alleged Kovalcik suffered damages as a result of Plaintiffs' conduct, and while the amount has not yet been formally tabulated, it certainly exceeds \$5,000. (Amd. Ctclms., ¶ 31). Since all elements of CFAA were pled by Kovalcik, the Court must allow this counterclaim to stand.

IV. Kovalcik is entitled to relief for Abuse of Process

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. *Rosen v. American Bank of Rolla*, 426 Pa. Super. 376, 627 A.2d 190, 192 (PA 1993)). Abuse of process is the use of legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process. *McGee v. Feege*, 517 Pa. 247, 259, 535 A.2d 1020, 1026 (1987). Litigation undertaken and continued in an effort to harass and to cause financial and

emotional injury is illegitimate in the context of any civil proceeding in Pennsylvania. *See Shiner v. Moriarty*, 706 A.2d 1228, 1236 (Pa. Super. 1998) citing Pa. Rule of Professional Conduct 3.1 (Comment) (Lawyers may not proceed in a meritless action where "the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person. . . ."); and *Nienstedt v. Wetzel*, 133 Ariz. 348, 651 P.2d 876, 33 A.L.R.4th 635 (Ariz. Ct. App. 1982) (abuse of process claim can be based on motive of harassment). Pursuing litigation primarily to harass and cause injury to the adverse party constitutes a sufficient perversion of the process thereby supporting a claim of abuse of process. *Cf. Hart v. O'Malley*, 436 Pa. Super. 151, 647 A.2d 542, 552-53 (Pa. Super. 1994), *aff'd*, 544 Pa. 315, 676 A.2d 222 (1996). Here, Kovalcik has alleged that Plaintiffs used the threat of expensive and personal intrusion incidental to litigation to attempt to coerce Kovalcik into paying thousands of dollars that he does not owe in spite of Plaintiffs' knowledge that they knew they never observed Kovalcik downloading music. Additionally, Plaintiffs' ultimate goal is to maintain, by illegal and improper means, their monopoly over the market for distributing music. Abuse of process was clearly alleged. Kovalcik suffered defamation, embarrassment, threat of school discipline and damages as a result. (Ctclms., ¶ 31; 37 – 40). Plaintiffs' motion to dismiss this counterclaim should be denied.

V. Kovalcik is entitled to damages for Defamation of Character

Generally, a defamatory action must allege: (1) the defamatory character of the communication; (2) publication; (3) that the communication refers to the complainant; (4) the third party's understanding of the communication's defamatory character; and (5) injury. *Walder v. Lobel*, 339 Pa. Super. 203, 213, 488 A.2d 622, 627 (1985); 42 Pa.C.S. § 8343(a). In *Pelagatti v. Cohen* (370 Pa. Super. 422; 536 A.2d 1337 (Pa. Super. Ct. 1987) the court states that it is well

settled that “a communication which ascribes to another conduct, character, or a condition that would adversely affect his fitness for the proper conduct of his business, trade, or profession, is defamatory per se.” citing *Fram v. Yellow Cab Co. of Pittsburgh*, 380 F.Supp. 1314 (D.C.Pa. 1974); also see *Gordon v. Lancaster Osteopathic Hospital Association, Inc.*, 340 Pa.Super. 253, 260, 489 A.2d 1364, 1368 (Pa. Super. Ct. 1985). Where there is any doubt that the communication disparages or harms the complainant in his business or profession, that doubt must be resolved in favor of the complainant; even where a plausible innocent interpretation of the communication exists, if there is an alternative defamatory interpretation, it is for the jury to determine if the defamatory meaning was understood by the recipient. *Gordon, supra*. Plaintiffs acknowledge that their complaint accusing Kovalcik of committing unlawful acts and owing thousands of dollars in money damages was communicated to Kovalcik’s university as well as publicly filed. Plaintiffs have publicly claimed that Kovalcik stole and possessed songs illegally. Further, Plaintiffs have made countless other widely publicized statements and innuendo portraying those accused of copyright infringement as “pirates and thieves”. As demonstrated in his counterclaims, Kovalcik adequately alleged a set of facts demonstrating that Plaintiffs communicated information to others, either by written or spoken word, relating to Kovalcik that was defamatory on its face or that a reasonable person could draw a defamatory inference. Consequently, Kovalcik’s counter claim for defamation should survive Plaintiffs’ motion.

VI. Kovalcik is entitled to declaratory judgment of non-infringement

Title 28, section 2201 of the U.S. Code provides a procedural right to declaratory relief. Whether the Court will entertain such relief is, as Plaintiffs admit that "district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act." (Motion to Dismiss, p. 26) Accordingly, they have provided a number of

cases in which the courts have, in their discretion, declined to entertain a declaratory judgment action.

However, Plaintiffs' own conduct - as specifically alleged in paragraphs 44 and 45 of the complaint, provides a compelling reason for this Court to exercise its discretion in favor of allowing the claim to go forward - namely, that Plaintiffs, once having cast aspersions upon defendants in the public arena, have a practice of voluntarily dismissing claims without prejudice, leaving the matter unsettled and subject to future litigation, and further depriving defendants of definite resolution of the matter. In a similar recording industry case a district court judge refused to strike a defendant's claim for declaratory judgment absent a showing of confusion or prejudice to the moving party. *See Capital Records, Inc. et al v. Foster*, Case No. Civ. 04-1569-W (W.D. Okla. October 5, 2005) (Order attached as Exhibit C)

In order to promote resolution, this court should allow Kovalcik to maintain his declaratory action claim. No harm comes of it, since the facts and legal questions are already at issue and no additional work need be done.

VII. Kovalcik has stated a claim for conspiracy.

Plaintiffs object to Kovalcik's conspiracy claim on two main grounds: first, the already-addressed matter of litigation privilege; and second, that the conspiracy has chosen acts that Plaintiffs claim are not actionable. Setting aside the first point, as previously addressed, Plaintiffs' second claim is without merit.

A. The illegal acts of the conspiracy support a claim for civil conspiracy.

Under Pennsylvania law in order to support a claim for civil conspiracy a claimant must show 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.” See *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 472 (Pa. 1979). In other words, a conspiracy must involve either an illegal *objective* or illegal *means* in order to meet the elements of the civil conspiracy claim. In this case, Kovalcik has alleged both illegal objective and illegal means. (Amd. Ctclms., ¶¶ 4-12 and 52-57) Notably, Plaintiffs do not dispute whether the specified acts are illegal; they merely dispute whether they are actionable. That distinction will not justify dismissing the conspiracy claim.

Kovalcik’s Amended Answer and Counterclaims contains allegations concerning the common conspiracy of Plaintiffs to develop a massive enterprise of threat and intimidations, the existence of agreement between Plaintiffs and MediaSentry in implementing an investigative protocol that Plaintiffs knew was illegal, flawed and unable to identify Kovalcik or the others targeted.

Even assuming the acts Plaintiffs committed might not be illegal in themselves - although Kovalcik has surely made sufficient allegations to that effect - the massive power of their combination allows them to inflict heavy financial damage on tens of thousands of individual targets, with no sign of slowing down and with no regard for the merits of their cases. The fruits of Plaintiffs’ conspiracy is said to be in the multiple millions, and these suits enable them to maintain their fundamental purpose of control over the distribution of sound recordings.

Plaintiffs again rely on the notion that their conduct and that of their agents are subject to blanket protection under the *Noerr-Pennington* doctrine. In the RIAA case of *UMG Recordings, Inc. et al v. Del Cid*, Case No. 8:07-cv-368-T-26TGW (M.D. Fla. Sept. 19 2007) the court held that a counterclaim for civil conspiracy would stand despite the recording industry plaintiffs’ assertion of *Noerr-Pennington* immunity. The elements of a claim for civil

conspiracy under Florida law are virtually identical as those under Pennsylvania law. For the reasons set forth *supra*, Plaintiffs' reliance on *Noerr-Pennington* immunity is unfounded and misplaced. Because Kovalcik has sufficiently plead the elements of civil conspiracy, Plaintiffs' motion to dismiss should be denied.

CONCLUSION

For all the foregoing reasons, Plaintiffs' Motion to Dismiss the Amended Counterclaims should be denied.

Respectfully submitted,

Dated: July 11, 2008

By: /s/ Richard J. Bove
Richard J. Bove (No. 45289)
Hausch & Bove, LLP
1828 Spruce St., Suite 400
Philadelphia, PA 19103
Telephone 215.545.6006
Facsimile 215.732.7859
Richard@bovanova.com

COUNSEL FOR DEFENDANT
JOHN C. KOVALCIK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 11, 2008, I electronically filed the foregoing Memorandum in Opposition to Plaintiffs' Motion to Dismiss Amended Counterclaims with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Geoffrey L. Beauchamp, Counsel for Plaintiffs

All parties are registered as CM/ECF participants for electronic notification.

Dated July 11, 2008

By: s/ Richard J. Bove
Richard J. Bove, PAB # 45289
Hausch & Bove, LLP
1828 Spruce St., Suite 400
Philadelphia, PA 19103
215.545.6006
Fax: 215.732.7859
Richard@bovanova.com

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|--|---|-----------------------------------|
| MOTOWN RECORD COMPANY, | : | |
| L.P. a California limited partnership; | : | |
| UMG RECORDINGS, INC., a | : | |
| Delaware corporation; SONY BMG | : | CIVIL ACTION NO. 2:07-cv-04702-AB |
| MUSIC ENTERTAINMENT, a | : | |
| Delaware general partnership; | : | |
| ZOMBA RECORDING LLC, a | : | |
| Delaware Limited Liability | : | |
| Company; and ELEKTRA | : | |
| ENTERTAINMENT GROUP INC., | : | |
| a Delaware corporation, | : | |
| | : | |
| | : | |
| Plaintiffs, | : | |
| | : | |
| | : | |
| v. | : | DOCUMENT FILED ELECTRONICALLY |
| | : | |
| | : | |
| JOHN C. KOVALCIK, | : | PLAINTIFF'S MOTION TO |
| | : | DISMISS COUNTERCLAIMS |
| Defendant. | : | |

This matter comes before the Court on the Plaintiffs' Motion to Dismiss Defendant's Counterclaims. Having reviewed the motion, and Defendant's memorandum in opposition thereto, and being fully advised, the Court DENIES Plaintiffs' Motion to Dismiss Defendant's Counterclaims.

AND IT IS SO ORDERED.

| | |
|-------|------------------------------------|
| Date: | BY THE COURT |
| | |
| | UNITED STATES DISTRICT COURT JUDGE |

EXHIBIT B

ADRIENE BUTLER
V.

ARITA RECORDS LLC, A Delaware limited Liability company; **UMG RECORDINGS, INC.**, A Delaware corporation; **SONY BMG MUSIC ENTERTAINMENT**, a Delaware general Partnership; **INTERSCOPE RECORDS**, a California general partnership; and **ELETRA ENTERTAINMENT GROUP INC.**, a Delaware Corporation,

CASE NUMBER:
8:07-cv-0003-T-23EAJ

TO:

ARITA RECORDS LLC, A Delaware limited Liability company; **UMG RECORDINGS, INC.**, A Delaware corporation; **SONY BMG MUSIC ENTERTAINMENT**, a Delaware general Partnership; **INTERSCOPE RECORDS**, a California general partnership; and **ELETRA ENTERTAINMENT GROUP INC.**, a Delaware Corporation,

07 MAR 30 AM 9:16
CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

FILED

I, Adrienne Butler am answering the complaint which was served 3/10/07 regarding a civil action for copyright infringement. I dispute these accusations against me submitted in the summons.

Adrienne Butler
Adrienne Butler 3/30/07
2242 14th Ave North
St. Petersburg, Florida
33713

EXHIBIT A

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UMG RECORDINGS, INC.,
a Delaware corp., et al.,

Plaintiffs,

v.

CASE NO: 8:07-cv-368-T-26TGW

SUZY DEL CID a/k/a
SUZANA BLANCA DEL CID,

Defendant.

_____ /

ORDER

This cause comes before the Court on Plaintiffs' motion to dismiss amended counterclaims and exhibits (dkt. 20) and Defendant's memorandum in opposition thereto (dkt. 22).

The complaint in this action seeks redress for the infringement of 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 various sound recordings. Plaintiffs allege that Defendant, by way of an online media distribution

system over a peer-to-peer sharing network, downloaded 1,062 of their copyrighted audio files to her personal computer and then allowed the files to be accessed by others who use peer-to-peer networks via a “shared folder.” Defendant filed an answer, affirmative defenses, and five counterclaims in response to the complaint. (Dkt. 7.) Defendant then amended her counterclaims to include the following six claims: (1) trespass to chattels; (2) computer fraud and abuse under 18 U.S.C. § 1030; (3) copyright misuse; (4) deceptive and unfair trade practices under Section 501.201, Florida Statutes (“FDUTPA”); (5) declaratory judgment; and (6) civil conspiracy. Plaintiffs assert that each of the counterclaims should be dismissed under Rule 12(b)(6), Florida Rules of Civil Procedure, for failure to state a claim on which relief can be granted.

In determining whether to grant a Fed. R. Civ. P. 12(b)(6) motion, the Court shall not dismiss a claim if it includes “enough facts to state a claim for relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1974 (2007) (dismissing complaint because plaintiffs had not “nudged their claims across the line from conceivable to plausible”); see also Franklin v. IRS, 2007 WL1831787 *1 (M.D. Fla. 2007); Anderson v. Nichols, 2007 WL2020165 *1 (N.D. Fla. 2007). The Court takes the well-pled facts of a claim as true and construes the facts favorably to the plaintiff. See 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1368 (1990). While a claim attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, 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." Twombly, 127 S. Ct. at 1964-65. To survive a motion to dismiss under Twombly, a complaint's factual allegations, if assumed to be true, "must be enough to raise the right to relief above the speculative level." Id. at 1965.

At the outset of their motion, Plaintiffs assert that all of Defendant's counterclaims should be dismissed because they are based on alleged conduct that is protected by Florida's litigation privilege and the Noerr-Pennington¹ Doctrine. Plaintiffs maintain that all of the conduct alleged in the counterclaims 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. However, neither Florida's litigation privilege nor the Noerr-Pennington Doctrine serves as a shield for sham litigation. See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993); Echevarria v. Cole, 950 So. 2d 380 (Fla. 2007) (citing Fridovich v. Fridovich, 598 So. 2d 65 (Fla. 1992)). In paragraphs 6-17 of the amended counterclaims ("Facts Common to All Counterclaims"), Defendant alleges that Plaintiffs' copyright infringement suits amount to sham litigation. The allegations are sufficient to overcome a Rule 12(b)(6) motion to dismiss.

In her first counterclaim, Defendant asserts an action for trespass to chattels. Trespass to personal property is the intentional use of, or interference with, a chattel

¹ Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965).

which is in the possession of another, without justification. See Coddington v. Staab, 716 So. 2d 850, 851 (Fla. Dist. Ct. App. 1998); 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.”) Plaintiffs argue that none of the elements of trespass to chattels appears on the face of Defendant’s counterclaim, nor can they be implied or derived from her pleading. However, Plaintiffs acknowledge that they accessed files on Defendant’s personal computer and Defendant alleges that she did not authorize any person to obtain information from her computer, that she did not configure her computer to share files, and that the Plaintiffs’ intrusion into her computer deprived her of use and possession of the computer. As such, there is, at this early juncture in the proceedings, a genuine issue of fact as to whether Plaintiffs’ access to Defendant’s computer was “authorized.” Further, a property owner may be entitled to nominal damages for trespass to chattels, if unable to prove anything more. See Stockman v. Duke, 578 So. 2d 831, 832 (Fla. Dist. Ct. App. 1991). Defendant actually alleges that Plaintiff’s intrusion into her computer and breach to the integrity of the data therein caused damages in an amount exceeding \$5,000. In light of the foregoing, there is no basis to dismiss Defendant’s first counterclaim.

Defendant's second counterclaim alleges that Plaintiffs actions in accessing her computer files violated the Computer Fraud and Abuse Act ("the Act"), 18 U.S.C. § 1030. Under the Act, the elements of a claim are: (1) intentional access to a computer; (2) without authorization; (3) resulting in any impairment to the integrity or availability of data, a program, a system, or information; and (4) that causes "any reasonable costs to any victim" in excess of \$5,000 in the course of a year. 18 U.S.C. § 1030(a). Plaintiffs dispute the Defendant has adequately pleaded the required elements of a claim under the Act. Nevertheless, they concede that they intentionally accessed her computer and Defendant alleges that she did not authorize anyone to obtain information from her computer, that she did not configure her computer to share files, and that the Plaintiffs' intrusion into her computer deprived her of use and possession of the computer. She adds that Plaintiff's intrusion into her computer and breach to the integrity of the data therein caused damages in an amount exceeding \$5,000. Defendant's allegations are sufficient to survive a Rule 12(b)(6) motion to dismiss.

Defendant next asserts, in her third counterclaim, that Plaintiffs' actions amount to copyright misuse. Copyright misuse is derived from the equitable defenses of misuse and unclean hands, forbids a copyright holder from using a copyright "to secure an exclusive right or limited monopoly not granted by the [Copyright] Office and which it is contrary to public policy to grant." Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 792 (5th Cir. 1999) (quoting Lasercomb, Am. Inc. v. Reynolds, 911 F.2d 970, 979 (4th Cir. 1990) (quoting Morton Salt Co. v. G.S. Suppiger, 314 U.S. 488, 492 (1942))). Plaintiffs

correctly argue that copyright misuse is not recognized by courts of this Circuit as a cause of action. See Microsoft Corp. v. Jesse's Computer & Repair, Inc., 211 F.R.D. 681, 684 (M.D. Fla. 2002) (noting that the Eleventh Circuit courts have not applied a copyright misuse affirmative defense, let alone an affirmative claim for relief) (citing Bellsouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc., 933 F.2d 952 (11th Cir. 1991), vacated, 977 F.2d 1435 (11th Cir. 1992)). The cases cited by Defendant in her response to the instant motion, at best, show that other circuits may recognize copyright misuse as an affirmative defense in limited factual circumstances. The doctrine of copyright misuse has its historical roots in the unclean hands defense, see Qad. Inc. v. ALN Assocs., Inc., 974 F.2d 834, 836 (7th Cir. 1992); Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400, 1408 (9th Cir. 1986), which Defendant raises in her affirmative defenses (dkt. 7, p. 2). Therefore, Plaintiff's third counterclaim is due to be dismissed.

In her fourth counterclaim, Defendant alleges that Plaintiffs' actions violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Sections 501.201, *et seq.*, Florida Statutes. To maintain a FDUTPA claim, a party must allege: "(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." Rollins, Inc. v. Orkin Exterm. Co., Inc., 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006). The FDUTPA prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." § 501.204, Fla. Stat. Plaintiffs contend that Defendant fails to plead any of the required elements of a FDUTPA claim. To the contrary, the Court finds that Defendant sets out

the elements of a FDUTPA claim in paragraphs 40 through 42 (“Count IV”) of her amended counterclaims and then alleges adequate facts to support these elements in paragraphs 4 through 21 (“Facts Common to All Counterclaims”) of her amended counterclaims. (See Dkt. 16.) Defendant’s allegations in her fourth counterclaim are sufficient to survive a Rule 12(b)(6) motion to dismiss.

In her fifth counterclaim, Defendant seeks a declaratory judgment of non-infringement of copyright. Plaintiffs argue that the claim is a mirror image of their claim for declaratory judgment and should be dismissed as redundant and unnecessary. However, in light of Defendant’s allegations that Plaintiffs have a pattern and practice of bringing these copyright infringement actions, alleging civil and criminal wrongdoing against the defendants, and then dismissing the actions without prejudice once contested, the Court finds that Defendant’s counterclaim should proceed. Defendant is entitled to resolution of the matter of copyright infringement. No prejudice will be caused to Plaintiff because the facts and legal questions at issue in the counterclaim mirror those in the complaint and, thus, the motion to dismiss is due to be denied as it relates to Defendant’s fifth counterclaim.

Defendant’s sixth, and final, counterclaim alleges that Defendants engaged in a civil conspiracy. Under Florida law, the following elements are required to establish such a claim:

- (a) a conspiracy between two or more parties; (b) to do an unlawful act or to do a lawful act by unlawful means; (c) the doing of some overt act in

pursuance of the conspiracy; and (d) damage to plaintiff as a result of the acts done under the conspiracy.

Additionally, an actionable conspiracy requires an actionable underlying tort or wrong. See Raimi v. Furlong, 702 So. 2d 1273, 1284 (Fla. Dist. Ct. App. 1997). Plaintiffs maintain that Defendant fails to plead any of these required elements. However, paragraphs 49 through 53 of the amended counterclaims (“Count VI - Civil Conspiracy”) set out the elements of a civil conspiracy claim and paragraphs 4 through 21 (“Facts Common to All Counterclaims”) allege adequate facts to support these elements. (See Dkt. 16.) Although Plaintiffs argue that Defendant fails to plead any underlying tort or wrong, the Court finds that at this juncture of the proceedings Defendant sufficiently alleges an alternative basis for the civil conspiracy claim, namely, a peculiar power of coercion possessed by Plaintiffs virtue of their combination, which an individual acting alone would not possess. See Walters v. Blankenship, 931 So. 2d 137, 140 (Fla. Dist. Ct. App. 2006). Therefore, the motion to dismiss is due to be denied as it relates to Defendant’s sixth counterclaim.

ACCORDINGLY, it is **ORDERED AND ADJUDGED**:

Plaintiffs’ motion to dismiss amended counterclaims (dkt. 20) is granted to the extent that Defendant’s third counterclaim (“Count III - Copyright Misuse”) is dismissed. The motion (dkt. 20) is denied in all other respects. Plaintiffs shall file an answer to amended counterclaims 1, 2, 4, 5, and 6 within ten (10) days from the date of this Order.

DONE AND ORDERED at Tampa, Florida, on September 19, 2007.

s/Richard A. Lazzara

RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

FILED

OCT 5 2005

ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY AS DEPUTY

Capitol Records, Inc., et al.,)
Plaintiffs,)
vs.)
)
Debbie Foster and Amanda Foster,)
Defendants.)

Case No. Civ. 04-1569-W

ORDER

Before the Court is the Plaintiffs' Motion to Dismiss Defendant's Prima Facie Tort Counterclaim and to Strike Defendant's Declaratory Judgment Counterclaim. The matter has been fully briefed. The Court notes the defendant's request that the plaintiffs' motion be converted to a motion for summary judgment. However, the Court's determinations set forth below do not rely upon the parties' evidentiary exhibits, and conversion of the motion to one for summary judgment is inappropriate.

1. Motion to Strike Claim for Declaratory Judgment of Non-Infringement

As Count 1 of her counterclaims against the plaintiffs, the defendant, Deborah Foster, requests a declaratory judgment for non-infringement. The plaintiffs argue that the counterclaim for declaratory relief should be stricken pursuant to Rule 12(f) of the Federal Rules of Civil Procedure because it is duplicative and unnecessary. The plaintiffs contend that the counterclaim is simply the "mirror image" of their copyright infringement claim and thus merely restates the issues already before the Court as part of the plaintiffs' affirmative case. Rather than address the purported redundancy of her declaratory judgment counterclaim, Ms. Foster attempts to frame the counterclaim as one based upon the plaintiffs' alleged extortion. While it appears doubtful that any such claim would be cognizable, the Court need not wade into those waters as Ms. Foster has asserted no counterclaim based upon extortion. Should she wish to pursue such a claim, Ms. Foster must first obtain leave of court to amend her pleading. The Court will address only the counterclaims properly before it.

Rule 12(f) permits the Court, upon motion by a party, to order any redundant materials stricken from any pleading. However, motions to strike are not generally favored and are strictly construed. Gilbreath v. Phillips Petroleum Co., 526 F.Supp. 657, 659 (W.D. Okla. 1980). “Modern litigation is too protracted and expensive for the litigants and the court to expend their time and effort pruning or polishing the pleadings.” 5C C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1382 at 458 (3d ed. 2004). The Court is thus, loath to grant a motion to strike for redundancy absent some showing of confusion or prejudice to the moving party. See Duran v. Clover Club Foods Co., 616 F.Supp. 790, 793 (D.Colo. 1985); see also Butler v. Pollard, 482 F.Supp. 847, 852 (E.D. Okla. 1979). As the plaintiffs’ have made no such showing, the Court finds that the motion to strike should be denied.

2. Motion to Dismiss Counterclaim for Prima Facie Tort

Count 2 of Deborah Foster’s counterclaims is a claim for prima facie tort arising out of the copyright infringement suit filed against her by the plaintiffs. Ms. Foster asserts that the plaintiffs brought their copyright action against her without having any “actual knowledge or information” that she participated in improper activities and that they continued to prosecute their suit in the face of her denials of liability. Ms. Foster maintains that such actions are generally culpable and not justified under the circumstances and that they are, therefore, actionable under the prima facie tort doctrine as set out in the *Restatement of Torts (Second)* at § 870.

The prima facie tort doctrine has been adopted in only a handful of states. See Merrick v. Northern Natural Gas Co., 911 F.2d 426, 433 (10th Cir. 1990). Oklahoma does not appear to be among that handful. In Patel v. OMH Medical Center, Inc., the Oklahoma Supreme Court observed that “the expression ‘prima facie tort’ does not appear ever to have been recognized in Oklahoma.” 987 P.2d 1185, 1189-90 n. 2 (Okla. 1999), *cert. denied*, 528 U.S. 1188 (2000). Prior to Patel, at least one Tenth Circuit case suggested that Oklahoma would recognize a cause of action for prima facie tort in certain circumstances. See Merrick, 911 F.2d at 433. In light of the Oklahoma Supreme Court’s clarification in Patel, however, the Tenth Circuit has expressed considerable doubt as to whether any such claim is cognizable under Oklahoma law. Cardtoons v. Major League

Baseball Payers Ass'n, 335 F.3d 1161, 1167 (10th Cir. 2003); see also Estate of Trentadue v. United States, 397 F.3d 840, 862 (10th Cir. 2005).


This Court need not speculate as to whether there exist circumstances under which Oklahoma would recognize a claim for prima facie tort because the circumstances of this case are so clearly unsuited to its application. Even courts which have recognized the viability of the prima facie tort doctrine have generally adopted the view that it is reserved for conduct falling outside the parameters of an established tort. See Schuler v. McGraw-Hill Companies, Inc., 989 F.Supp. 1377, 1391 (D.N.M. 1997), *aff'd.*, 145 F.3d 1346 (10th Cir. 1998), *cert. denied*, 525 U.S. 1020 (1998); Kwoun v. Southeast Missouri Professional Standards Review Organization, 62 F.Supp 520, 531 (D. Mo. 1985). Here, the conduct of which the defendant complains appears to fit within the contours of such traditional tort causes of action as malicious prosecution and abuse of process. Both of these torts are recognized under Oklahoma law. Ms. Foster cannot be permitted to employ the prima facie tort doctrine so as to “evade the stringent requirements of other established doctrines of law.” Schuler at 989 *quoting*, Schmitz v. Smentowski, 785 P.2d 726, 734 (N.M. 1990).

Because this Court finds no reason to conclude that Oklahoma would recognize a cause of action for prima facie tort arising from the allegedly wrongful initiation and prosecution of civil litigation, Count 2 of Ms. Foster’s counterclaims against the plaintiffs must be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Conclusion

For the foregoing reasons, the plaintiffs’ motion to strike defendant Deborah Foster’s counterclaim for a declaratory judgment of non-infringement is DENIED. Their motion to dismiss Ms. Foster’s counterclaim for prima facie tort is GRANTED.

ENTERED this 5th day of October 2005.


LEE R. WEST
UNITED STATES DISTRICT JUDGE