## UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION

No.: 5:08-cv-00131-D

SONY BMG MUSIC ENTERTAINMENT, UMG RECORDINGS INC., ELECTRA ENTERTAINMENT GROUP, INC., BMG MUSIC, AND MOTOWN RECORD COMPANY, L.P.,

Plaintiffs/Counterclaim Defendants.

v.

SHAHANDA NOELLE MOURSY,

Defendant/Counterclaim Plaintiff/Third-Party Plaintiff,

v.

RIAA, and SAFENET, INC. f/k/a MEDIASENTRY, INC.,

Third-Party Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS

## MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS <u>DEFENDANT'S COUNTERCLAIMS</u>

Pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiffs respectfully move to dismiss Defendant's five counterclaims. <sup>1</sup>

#### **INTRODUCTION**

Defendant has asserted five counterclaims against Plaintiffs, including: (1) Trespass to Chattels; (2) violations of the Computer Fraud and Abuse Act (18 U.S.C. § 1030); (3) violations

<sup>&</sup>lt;sup>1</sup> While Defendant's counterclaims have only been served upon Plaintiffs, the arguments herein apply equally to the third-party defendants named in the counterclaims.

of North Carolina's Deceptive and Unfair Trade Practices Act ("DUTPA") (N.C. Gen. Stat. § 75-1.1 *et seq.*); (4) Declaratory Judgment; and (5) Civil Conspiracy. Each of Defendant's counterclaims fail because, while they are heavy on hyperbole, they fall short of alleging sufficient facts to support the essential elements of each of her counterclaims. As set forth herein, there is extensive case law from around the country in which similar counterclaims have been regularly dismissed as improper.

Moreover, Defendant's Counterclaims are little more than an unambiguous attempt by the Defendant to hold Plaintiffs liable for their legitimate efforts to enforce their copyright. 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 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).

For these reasons, and as more fully set forth below, each of Defendant's five 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 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.<sup>2</sup>

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).

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 <a href="http://www.cybercrime.gov/IPTaskForceReport.pdf">http://www.cybercrime.gov/IPTaskForceReport.pdf</a>, 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 April 22, 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 498 audio files on her 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 152.7.44.142 to connect to the Internet. In observing the infringement, MediaSentry uses the same functionalities that are built into P2P programs that any user of the software can utilize on the network.<sup>3</sup> 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

<sup>&</sup>lt;sup>3</sup> 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).

address. The ISP, North Carolina State University, identified Shahanda Moelle Moursy as the individual in question. The Parties were unable to resolve the matter and in September 2008 Plaintiffs initiated this action against Ms. Moursy for damages and injunctive relief against the Defendant.

### **LEGAL STANDARD**

In considering a motion to dismiss pursuant to Rule 12(b)(6), the Court should "construe factual allegations in the non-moving party's favor and []treat them as true . . . ." See Robinson v. American Honda Motor Co., 2009 U.S. App. LEXIS 5, 8 (4th Cir. 2009). While all facts must be construed in favor of the nonmoving party, this Court "is not bound by the complaint's legal conclusions." See id. 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 (2007) (emphasis added); see also Robinson, 2009 U.S. App. LEXIS 5, 8.

#### ARGUMENT AND AUTHORITY

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

"The basis of a trespass to chattel cause of action lies in 'injury to possession." Fordham v. Eason, 521 S.E.2d 701, 704 (N.C. 1999). "A successful action for trespass to chattel requires the party bringing the action to demonstrate that she had either actual or constructive possession of the personalty or goods in question at the time of the trespass . . .and that there was an unauthorized, unlawful interference or dispossession of the property." See id. (citations

omitted); see *also 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").

None of the elements of trespass to chattels appear on the face of Defendant's counterclaim, nor can they be implied or derived from her pleading. Defendant does not and cannot claim that Plaintiffs or their agents ever "had either actual or constructive possession" over Defendant's computer, or that Plaintiffs deprived Defendant of the right to possess or use her computer files when it detected the infringement by using the same Limewire software functionalities used by individuals engaged in file swapping. Kirschbaum v. McLaurin Parking Co., 656 S.E.2d 683, 686-87 (Plaintiff failed to establish a claim for trespass to chattels when a private parking garage placed a boot on his vehicle because "there was no 'unauthorized, unlawful interference or dispossession of the property," in fact, defendants "were privileged to attach that boot to plaintiff's car."); see also Elektra Entm't Group Inc. v. Santangelo, No. 7:06cv-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 B). Defendant does not even allege that the computer that Plaintiffs allegedly "accessed" belonged to her. (Counterclaims at ¶¶ 29-34.)

Defendant's entire claim of Trespass to Chattels is based primarily on Defendant's contention that "Plaintiffs have accessed a computer without authorization and obtained information from that computer system in violation of Moursy's rights." (Counterclaim at ¶ 32.) 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*, 5:05-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 C); *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-topeer 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.").

Likewise, there is no suggestion that when Plaintiffs' detected Defendant's copyright infringement that Plaintiffs, or their agents, interfered with, or otherwise impaired, altered, or damaged 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.*; *see also Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 517 (4th Cir. 1999) (holding that "consent is a defense to a claim of trespass." (citing *Miller v. Brooks*, 472 S.E.2d 350, 355 (N.C. Ct. App. 1996)))

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." Accordingly, Defendant's trespass to chattels counterclaim should be dismissed.

## II. 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.

See International Assoc. of Machinists and Aerospace Workers v. Werner Matsuda, 390 F.Supp.2d 479, 495 (D. Md. 2005); 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 ¶¶ 37-38, 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., International Assoc. of Machinists and Aerospace Workers, 390 F.Supp.2d at 498-99. Here, as a matter of law, Defendant cannot show that Plaintiffs and/or their agents acted without authorization, nor can Defendant show that Plaintiffs damaged Defendant's computer, let alone that Plaintiffs intentionally did so; therefore, Defendant fails to adequately allege facts sufficient to state a CFAA claim under Twombly.

Defendant's CFAA counterclaim may recite segments of the CFAA, but "a formulaic recitation of the elements" will not be sufficient to state a claim that Plaintiffs have violated the CFAA. *See 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. Specifically, 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. 3:07-CV-1824 W (JMA), slip op. at 9 (S.D. Cal. Dec. 28, 2007)(dismissing Defendant's CFAA counterclaim)(attaches as Exhibit D). Defendant fails to assert any of these factual allegations in her 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 her 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 her computer without authorization and that she did not "configure any computer to 'share' files," (Counterclaim at ¶¶ 24-25), she does not deny that Limewire, or a similar program which gave her access to Limewire, was installed on her 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-OLG, slip op. at 9 (rejecting similar CFAA claim)(Exhibit C); *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 her 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 Defendant 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 her 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). There is not a single factual allegation in Defendant's counterclaims to support this element of damage to Defendant's computer and her 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.

## III. DEFENDANT'S NORTH CAROLINA DUTPA CLAIM (COUNT III) SHOULD BE DISMISSED BECAUSE SHE HAS NOT AND CANNOT PLEAD ANY OF THE ELEMENTS OF SUCH A CLAIM.

Defendant's third counterclaim for violation of the North Carolina DUTPA fails as a matter of law because Defendant has not, and cannot, plead essential elements of the claim. To

maintain a claim under the North Carolina DUTPA, a party must allege "(1) an unfair or deceptive act or practice; (2) in or affecting commerce, (3) which proximately caused actual injury to the claimant." *See Durling v. King*, 554 S.E. 2d 1, 4 (N.C. Ct. App. 2001). Other than conclusory repetition that Plaintiffs' alleged conduct is a deceptive and unfair practice (*see* Counterclaims at ¶¶ 14 and 42), which is insufficient under *Twombly*, Defendant fails to allege any facts to support any of these three required elements of her North Carolina DUTPA counterclaim.

As with all of her claims, Defendant's North Carolina DUTPA claim, based solely on allegations of Plaintiffs' legitimate efforts to vindicate their copyrights, are insufficient to state a claim under the North Carolina DUTPA. As a threshold matter, Defendant does not allege the type of claim that the North Carolina DUTPA is aimed at addressing. The DUTPA is a consumer protection statute aimed at unfair trade practices in the market-place. *See American Rockwool, Inc. v. Owens-Corning Fiberglass Corp.*, 640 F. Supp. 1411, 1427 (E.D. N.C. 1986)(The purpose of DUTPA is to provide "an effective cause of action for individuals and businesses in North Carolina who have been victimized by unscrupulous methods of competition or trade practices.") The North Carolina DUTPA specifically prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce . . . ." N.C. Gen. Stat. §75-1.1(a). Defendant has failed to allege any facts that would suggest that Plaintiffs' efforts to protect their copyrights could be considered the type of "market-place" conduct the North Carolina DUTPA is intended to protect.

Moreover, Defendant has failed to allege that Plaintiffs engaged in an "deceptive act or practice." *See Durling*, 554 S.E. 2d at 4. Defendant's sole allegations of a "deceptive act or practice" are that Plaintiffs engaged in "deceptive and unfair practices in the conduct of

commerce," (Counterclaims at ¶ 42), and that "the Settlement Support Center, which engages in deceptive and illegal practices aimed at extracting money from people allegedly identified from the secret lawsuits." (Counterclaims at ¶ 14.) "In order 'to succeed under [N.C. DUTPA], it is not necessary for the plaintiff to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception, *plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception.*" Chastain v. Wall, 337 S.E.2d 150, 153-54 (N.C. Ct. App. 1985)(citing Overstreet v. Brookland, Inc., 279 S.E. 2d 1, 7 (1981))(emphasis added). Defendant allegations of a deceptive act or practice are wholly inadequate to establish a claim under the North Carolina DUTPA. None of Defendant's allegations establish or even suggest that Plaintiffs' conduct "possessed the tendency or capacity to mislead." Neither do Defendant's allegations establish that Plaintiffs' conduct "created the likelihood of deception."

Neither has Defendant alleged that Plaintiffs have engaged in an unfair act or practice. An unfair practice under the North Carolina DUTPA is when the practice "offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *See Johnson v. Berverly-Hanks & Assoc., Inc.*, 400 S.E.2d 38, 42 (N.C. 1991)(citations omitted). Defendant's allegations amount to nothing more than Plaintiffs' legitimate efforts to enforce their copyrights in the face of massive piracy occurring through the P2P file sharing networks. (Counterclaims at ¶¶ 12-20); *see Background, supra.* Not only do Plaintiffs' attempts to enforce their copyrights not offend public policy, but federal policy favors copyright enforcement by copyright holders. *See Kebodeaux*, 33 U.S.P.Q.2d at 1224. Moreover, Defendant cannot establish that Plaintiffs' conduct is immoral, unethical,

oppressive, unscrupulous, or substantially injurious to consumers." *See Johnson*, 400 S.E.2d at 42.

Defendant has also failed to establish the second element of a DUTPA claim, that Plaintiffs alleged "unfair or deceptive act or practice" was "in or affecting commerce." See Durling, 554 S.E.2d at 4 (emphasis added). "[C]ommerce" is defined in the DUTPA to "include[] all business activities . . . ." Other than a single, wholly conclusory allegation that Plaintiffs engaged in "deceptive and unfair practices in the conduct of *commerce*," (Counterclaims at ¶ 42)(emphasis added), Defendant fails to establish that Plaintiffs alleged conduct was "in or affecting commerce. At issue in Defendant's Counterclaims is whether Plaintiffs' action were proper in identifying Defendant as an individual liable for copyright infringement and in pursuing that claim. Defendant does not and cannot plead that Plaintiffs' actions were "in or affecting commerce" as defined by the Act; Plaintiffs' actions were not "business activities"; and Plaintiffs and Defendant are not in a consumer transaction. See Durling, 554 S.E.2d at 5 (holding that Defendant's actions of withholding commissions did not violate North Carolina DUTPA.) Plaintiffs' efforts to protect its copyright by initiating litigation against the Defendant and its efforts to resolve that legal claim cannot be considered the type of "business activity" to which the Act is directed.

Furthermore, Defendant does not even allege that she is a consumer, let alone that she was misled. In fact, the very crux of Plaintiffs' claim of copyright infringement against the Defendant is that she was not a legitimate consumer, but instead chose to infringe Plaintiffs' copyright, as opposed to legally purchasing Plaintiffs' sound recordings. Based on these facts, Defendant has failed to allege any facts establishing that any of Plaintiffs' actions "possessed the tendency or capacity to mislead, or created the likelihood of deception." *See Chastain*, 337

S.E.2d at 154. Defendant's allegations amount to nothing more than Plaintiffs' legitimate efforts to enforce their copyrights in the face of massive piracy occurring through the P2P file sharing networks. (Counterclaims at ¶¶ 12-18); *see Background, supra.* 

Finally, even if Defendant could establish an unfair or "deceptive act or practice . . . in or affecting commerce," Defendant cannot establish that she has suffered any injury caused by Defendant's alleged deceptive act or practice. See Durling, 554 S.E. 2d at 4 (N.C. Ct. App. 2001). In fact, Defendant does not and cannot allege she suffered actual damage as a result of the non-existent unlawful trade practice. Defendant's computer was not affected by Plaintiffs' agents examining files openly available on the Internet. To the extent that Defendant alleges damage to her computer, those damages would have been the result of Plaintiffs' alleged investigation, and not the result of the alleged acts of Plaintiffs' representative regarding settlement by which Defendant claims she was misled. (Counterclaim ¶ 14.) Moreover, Defendant has not settled the underlying suit, thus, she was not "misled" by any alleged conduct. Defendant has not sustained any actual damages. Accordingly, Defendant's conclusory allegations are insufficient to sustain the claim. See Santangelo, No. 7:06-cv-11520 (SCR)(MDF), slip op. 11 (dismissing unfair trade practices counterclaim because Defendant did not allege sufficient unfair trade practice or false advertising and did not plead "how Defendant's themselves were actually injured")(Exhibit B).

Accordingly, Defendant's counterclaim for violation of the North Carolina DUTPA (Count III) fails to state a claim and should be dismissed.

# IV. DEFENDANT'S DECLARATORY JUDGMENT COUNTERCLAIM (COUNT IV) 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. 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 unnecessary where allegations of counterclaim were already before court as a defense).

<sup>&</sup>lt;sup>4</sup> See, e.g., Tschirhart, Case No. SA-05-CA-372, slip op. at 9 (Exhibit C); Virgin Records America, et al. v. Thompson, Case No. SA-5:06-CA-592 OLG, slip op. at 1 (W.D. Tex. Sept. 21, 2006) (Exhibit E); Elektra Entm't Group, et al. v. Garrett, Case No. 6:07-CA-037 WSS, slip op. at 1-2 (W.D. Tex. June 22, 2007) (attached as Exhibit F); 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 G); Interscope Records, et. al. v. Duty, Case No. 05-CV-3744-PHX-FJM, slip op. at 5 (D. Ariz. April 14, 2006) (Exhibit H); 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).

Here, Defendant seeks a declaration of non-infringement (Counterclaims at ¶ 48) that is entirely duplicative of Plaintiffs' claim of infringement against Defendant (Compl., ¶¶ 15-16) and of Defendant's own defenses (Answer at ¶¶ 15-16; Aff. Defenses at ¶ 11). 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 C); *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 I). 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 her 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 a redundant, unnecessary counterclaims like the one offered by Defendant here.

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

"To create a civil liability for conspiracy there must have been a wrongful act resulting in injury to another committed by one or more of the conspirators pursuant to the common scheme and in furtherance of the objective." *North Carolina v. Ridgeway Brands Manufacturing*, 666 S.E.2d 107, 115 (N.C. 2008). Under North Carolina law, the following elements are required to establish a claim for civil conspiracy:

(1) a conspiracy, (2) wrongful acts done by certain of the alleged conspirators in furtherance of that conspiracy, and (3) injury as a result of that conspiracy,

See id.(citations omitted).

Yet none of the alleged "illegal acts" committed by Plaintiffs "to further the ends of their conspiracy" provide the "wrongful acts" required to establish Defendant's civil conspiracy claim. (Counterclaims at ¶ 51). The "wrongful acts" committed by Plaintiffs on which Defendant's civil conspiracy claim are based is as follows:

(a) use of private investigators to conduct investigations in North Carolina against North Carolina residents, without license, in violation of N.C. Gen. Stat. § 74C-1, et seq.; (b) access, without authorization, of a protected computer system . . . in violation of 18 U.S.C. § 1030; (c) extortion and attempted extortion in violation of the Hobbs Act, 18 U.S.C. § 1951; and (d) access, without authorization, of a computer system of a North Carolina resident in violation of N.C. Gen Stat. § 14-453 et seq."

*Id.* However, contrary to Defendant's allegations, Plaintiffs have not violated N.C. Gen. Stat. § 74C-1, *et seq.*, the Computer Fraud and Abuse Act, the Hobbs Act or N.C. Gen Stat. § 14-453 *et al.*, and, therefore, Defendant's civil conspiracy claim must fail.

First, contrary to Defendant's allegations, Plaintiffs have not used a private investigator in violation of N.C. Gen. Stat. § 74C-1, et seq. (hereinafter the "Private Protective Services Act" or "PPSA"), therefore, there is no "wrongful act" on which Defendant's civil conspiracy claim can rely. While Defendant does not allege any specific facts relating to the alleged violation of the PPSA, Plaintiffs assume that Defendant is alleging that Media Sentry, a third-party that discovered Defendant's infringement on behalf of Plaintiffs, was operating without a license in violation of the PPSA. However, MediaSentry was not required to be licensed under the PPSA and, even if they were, Defendant cannot establish that Plaintiffs use of an unlicensed investigator is an *actionable* underlying tort or wrong.

The purpose of the PPSA is to regulate professions that overlap the functions of the public police. *See Shipman v. North Carolina Private Protective Servs. Bd.*, 346 S.E. 2d 295, 297 (N.C. App. 1986). Yet, observing and downloading sound recordings and other digital

information that another has placed on the Internet, available to each and every member of the general public, is not an activity that materially overlaps with the functions of the public police. Furthermore, in order for MediaSentry's activities to be determined illegal, only the Private Protective Services Board ("PPSB") or the Attorney General or the district attorneys of the State have authority to take any action against MediaSentry. Defendant's counsel has in fact taken this very issue before the PPSB but the PPSB concluded that it did not have jurisdiction and dismissed the administrative proceeding. Moreover, neither the North Carolina Attorney General or the district attorneys have taken any action to prosecute and obtain a conviction against MediaSentry for violation of the PPSA. See N.C. Gen. Stat. § 74C-17(b). Accordingly, Defendant does not have standing to assert a claim under the PPSA. Finally, in order for a violation of the PPSA to serve as the "wrongful act" underlying Defendant's civil conspiracy claim, Defendant must be able to establish that Plaintiffs' use of any unlicensed investigator is actionable. There is no provision of the PPSA which penalizes or criminalizes the use of an unlicensed investigator. Therefore, the alleged violation of the PPSA by MediaSentry cannot satisfy the "wrongful act" element of Defendant's civil conspiracy claim against Plaintiffs.

Second, as discussed above, Defendant has failed to allege a claim under the CFAA, 18 U.S.C. § 1030, thus that provision does not provide the underlying "wrongful act" for Defendant's civil conspiracy claim. *See* § II *supra*.

Third, Defendant's reliance on the Hobbs Act, a federal statute prohibiting robbery or extortion, as a basis for its civil conspiracy claim is entirely misplaced. 18 U.S.C. 1951 *et seq.*; *U.S. v. Pringle*, 350 F.3d 1172, 1175 (11<sup>th</sup> 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 (11<sup>th</sup> Cir. 2002). Threats of litigation, however, do not constitute extortion. *See Vemco v. Camardella*, 23 F.3d 129, 134 (6<sup>th</sup> Cir. 1994) ("A threat of litigation if a party fails to fulfill even a fraudulent contract . . . does not constitute extortion."); *DirecTV, 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.").

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 B). In fact, all of the alleged acts that Defendant would rely on to show a Hobbs Act violation are *privileged* and not wrongful. *See* § VI-VII *infra*.

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. She has not settled the underlying case. Plaintiffs have not obtained any money from her. Thus, there is no extortion.

Likewise, there are also no factual allegations to support any agreement among the Plaintiffs to engage in a robbery or extortion as required by the Act.

Finally, Defendant has failed to allege any actionable violations of N.C. Gen. Stat. § 14-453 et. seq., which is an Article within the North Carolina Criminal Code identifying various computer-related crimes. While Defendant fails to identify which particular section of the statute Plaintiffs have violated as part of the alleged conspiracy, it appears that Defendant is attempting to rest her claim ("access, without authorization, of a computer system of a North Carolina resident in violation of N.C. Gen Stat. § 14-453 et seq.") on N.C. Gen. Stat. § 14-454 (b), which provides that it is a crime to access a computer for any purpose other than those enumerated elsewhere in the subsection, if such access occurs "willfully and without authorization". See N.C. Gen. Stat. § 14-454 (b). This claim cannot succeed, however, because Defendant cannot provide the necessary proof that Plaintiffs accessed Defendant's computer without authorization. As repeatedly discussed above, Defendant herself authorized the entire Internetusing public to access her shared folder. See §§ I-II supra. Defendant, therefore, cannot show that Plaintiffs acted without authorization, let alone that Plaintiffs did so willfully. Thus, any claim predicated on a violation of N.C. Gen. Stat. § 14-453 et. seq. fails as a matter of law.

Accordingly, none of the statutes Defendant lists in her civil conspiracy counterclaim provide the underlying "wrongful act" necessary to sustain her claim. As for the other elements of civil conspiracy, Defendant does not, and cannot, allege any conspiracy or agreement between Plaintiffs to commit "wrongful acts . . . in furtherance of [the] conspiracy." 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 commit wrongful acts in furtherance of the alleged conspiracy. And there is no factual support for Defendant's conclusory allegations.

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.

## VI. DEFENDANT'S COUNTERCLAIMS FOR VIOLATION OF THE NORTH CAROLINA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT AND CIVIL CONSPIRACY ARE BARRED BY THE NOERR-PENNINGTON DOCTRINE.

In addition to failing to adequately allege a claim under North Carolina Deceptive and Unfair Trade Practices Act and for civil conspiracy claim (Counts III and V), both of these counterclaims are also 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." (Counterclaim at ¶ 18). However, Defendant's allegations of "sham litigation" 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.

<sup>&</sup>lt;sup>5</sup> Defendant uses the term "sham litigation" throughout her 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., IGEN Int'l, Inc. v. Roche Diagnostics GMBH, 335 F.3d 303, 310 (4th Cir. 2003)("The Noerr-Pennington doctrine grants First Amendment immunity to those who engage in petitioning activity. This includes the pursuit of litigation."). Some Courts have broadly expanded the application of the *Noerr-Pennington* doctrine, and found that it applies in all contexts. See White v. Lee, 227 F.3d 1214, 1231 (9th Cir. 2000) ("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."); 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."). The Fourth Circuit has not broadly concluded that the Noerr-Pennington doctrine applies in all contexts, however, the Fourth Circuit has determined that the doctrine has been applied to business torts and conspiracy claims. See BCD, LLC v. BMW Mfg. Co., LLC, 2008 U.S. Dist. LEXIS 7410, 37-39 (D.S.C. Jan. 31, 2008) ("While the Noerr-Pennington doctrine was "originally developed in the antitrust context, the doctrine has now

<sup>&</sup>lt;sup>6</sup> See also Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 122 (3d. Cir. 1999); 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).

universally been applied to business torts," including tortious interference. The doctrine also applies to conspiracy claims." (citations omitted)).

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 Wholesale Co., Inc. v. Philip Morris Inc.*, 263 F.3d 239, 254 (3d. Cir. 2001)(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)).

Although Defendant is far from clear as to the alleged conduct upon which her North

Carolina Deceptive and Unfair Trade Practices Act ("DUTPA") claim is based, Plaintiffs

surmise that the claims is premised on Defendant's claim that the "Settlement Support Center . . .

engages in deceptive and illegal practices aimed at extracting money from people allegedly

<sup>&</sup>lt;sup>7</sup> 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); DirecTV, Inc. v. Milliman, 2003 U.S. Dist. LEXIS 20938, at \*23-24 (E.D. Mich. 2003) (dismissing deceptive trade practice counterclaim under Noerr-Pennington).

identified from the secret lawsuits." (Counterclaims at ¶ 14.) Defendant further claims that the Settlement Support Center "demand[s] that [defendants] pay thousands of dollars each to avoid the prospect of a federal lawsuit against them." (Counterclaim at ¶ 15.) However, efforts to settle litigation is the very type of conduct the *Noerr-Pennington* doctrine is intended to protect; therefore, Defendant's North Carolina DUTPA counterclaim is barred.

The same is true of Defendant's civil conspiracy claim (Count V). Here again, Defendant strikes at the foundation of *Noerr-Pennington* protection which is intended to immunize "petitioning activity." *See IGEN*, 335 F.3d at 310. 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 ¶¶ 12 and 18), 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. Thus, Defendant's civil conspiracy claim (Count V) is barred.

### B. The Sham Litigation Exception Does Not Apply.

Defendant's conclusory references to "sham litigation" which are peppered throughout her counterclaims (*see* Counterclaims at ¶¶ 16, 18, 30, 36, 45) 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); *see also A Fisherman's Best, Inc. v. Recreational Fishing Alliance,* 310 F.3d 183, 191-92 (4th Cir. 2002)(rejecting sham litigation exception to *Noerr-Pennington* immunity where Plaintiff had successfully lobbied for legislation); 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 A Fisherman's Best,* 310 F.3d at 192 (citing *Professional Real Estate Investors,* 508 U.S. at 60-61.)

## 1. <u>Plaintiffs' Claims Are Not Objectively Baseless.</u>

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." *Professional Real Estate Investors*, 508 U.S. at 62; *A Fisherman's Best*, 310 F.3d at 191 ("The existence of probable cause to institute legal or administrative action precludes a finding that an antitrust defendant has engaged in sham litigation.") The Supreme 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." Professional Real Estate Investors, 508

U.S. at 62; A Fisherman's Best, 310 F.3d at 191 ("The necessary probable cause requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication.")

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 simply moving to dismiss, Defendant acknowledges that Plaintiffs had probable cause to bring their lawsuit.

Moreover, 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.<sup>8</sup> This information alone gives Plaintiffs adequate probable cause for both actions.

<sup>&</sup>lt;sup>8</sup> 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); Atlantic Recording Corp., et al. v. Raleigh, 2008 U.S. Dist. LEXIS 62977, Civ. No. 4:06-CV-1708 CEJ, 9-11 (E.D. MO Aug. 18, 2008); 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 songs by a file-sharing program attached to an internet account registered to [defendant]") (attached as Exhibit E); 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."); 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).

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. 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. <u>Plaintiffs' Claims Against the Defendant Cannot Be Considered an Attempt to Interfere with the Business Relationship of a Competitor.</u>

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

<sup>&</sup>lt;sup>9</sup> 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 J); 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 K); Arista Records, LLC v. Butler, No. 8:07-cv-3-SDM EAJ, slip op. at 8 (M.D. Fla. December 21, 2007) (granting plaintiff record companies summary judgment on claims for copyright infringement)(attached as Exhibit L); 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 M); 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 N); BMG Music, et al. v. Briscoe, No. CV-1:05-5409(DGT), slip op. at 1 (E.D.N.Y. December 6, 2006)(same) (attached as Exhibit O); 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 P); UMG Recordings, Inc., et al. v. Francis, No. 1:06-cv-04435-LTS-THK, slip op. at 5 (S.D.N.Y. Aug. 28, 2007) (same) (attached as Exhibit Q); Sony BMG Music Entm't, et al. v. Keovongsavang, No. CA 1:06-cv-124 ML-DLM, slip op. at 1 (D. R.I. April 11, 2007) (same) (attached as Exhibit R).

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 North Carolina DUTPA and civil conspiracy counterclaims are barred by *Noerr-Pennington* and must be dismissed.

## VII. DEFENDANT'S COUNTERCLAIMS SHOULD BE DISMISSED BECAUSE PLAINTIFFS' ALLEGED CONDUCT IS PROTECTED BY THE NORTH CAROLINA JUDICIAL PROCEEDINGS PRIVILEGE.

North Carolina recognizes that "defamatory statements made in the course of a judicial proceeding are absolutely privileged and will not support a civil action for defamation, even if made with malice." *See Jones v. Coward*, 666 S.E.2d 877, 879 (N.C. Ct. App. 2008). While this privilege will bar an "action for defamation," the North Carolina Court of Appeals has also recognized that were a party to pursue other claims based on statements made in the course of a judicial proceeding, "the privilege we have held protects defendant from an action for defamation would be eviscerated." *See id.* at 880 (barring claims for intentional infliction of emotional distress and negligence because they were based on same statements that were subject to the judicial proceedings privilege and could not support a claim of defamation.) As such, it is

clear that the judicial proceedings privilege has a broader application and is not limited to claims

of defamation. Furthermore, the North Carolina judicial proceedings privilege extends to "not

only . . . statements made in the course of a pending judicial proceeding but also with respect to

communications relevant to proposed judicial proceedings." See Harris v. NCNB Nat'l Bank,

355 S.E.2d 838, 842 (N.C. Ct. App. 1987).

Defendant's rhetoric and hyperbole aside, all of the alleged conduct that Defendant

complains of in her 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. (Counterclaims at ¶¶ 12-19; 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.

**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.

This 28<sup>th</sup> day of January, 2009.

/s/ Lacey M. Moore

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on January 28, 2009, a copy of the foregoing **PLAINTIFFS' MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS** was filed with the Clerk of Court using the CM/ECF system, and a copy of the same served upon the following CM/ECF participant via electronic mail:

Stephen E. Robertson Robertson, Medlin & Blocker, PLLC 127 N. Green St., Third Floor Greensboro, NC 27401 Attorney for Defendant srobertson@robertsonmedlin.com

/s/ Lacey M. Moore

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