IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:08-CV-00131-D

SONY BMG MUSIC ENTERTAINMENT, Inc., UMG RECORDINGS Inc., ELECTRA ENTERTAINMENT GROUP, Inc., BMG MUSIC, and MOTOWN RECORD COMPANY, L.P., Plaintiffs/Counterclaim Defendants, vs. SHAHANDA MOELLE MOURSY, Defendant/ Counterclaim Plaintiff/Third-party Plaintiff, vs. RIAA, and SAFENET, Inc. f/k/a MEDIASENTRY, Inc., a Delaware corporation, , Third-party Defendants.	)	MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM

Defendant, Shahanda Noelle Moursy, files this memorandum in opposition to the Plaintiffs motion to dismiss all five counterclaims [docket no. 27] asserted by Moursy in her amended answer. [docket no. 22].

FACTS

Plaintiffs complain that the Defendant, Shahanda Noelle Moursy ("Moursy") infringed certain of their copyrights in musical recordings. In her counterclaim and third party

complaint, Moursy alleges that the Plaintiffs and the Third-party Defendants committed: (1) trespass to chattels, (2) computer fraud and abuse, (3) unfair and deceptive trade practices, and (4) conspiracy. Moursy also prays the Court declare she has not infringed.

LEGAL STANDARD

To defeat a Rule 12(b)(6) motion to dismiss, Moursy's counterclaims must simply "state a short and plain statement of the claim showing that the pleader is entitled to relief."[1] "[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."[2] Furthermore, when considering the sufficiency of the allegations, the court must view the allegations in the light most favorable to the non-moving party, [3] and a "[m]otion to dismiss for failure to state claim should only be granted if, after accepting all well-pleaded allegations in [non-moving party's pleading] as true and drawing all reasonable factual inferences from those facts in [non-moving party's] favor, it appears certain that [the non-moving party] cannot prove any set of facts in support of claim entitling him or her to relief."[4]

In this case, Moursy has set out numerous specific, detailed allegations in support of each counterclaim which meet or exceed the standard set out in *Swierkiewicz,* and reaffirmed in *Twombley*, and the Fourth Circuit precedents of *Battlefield Builders* and *Edwards*, such that this Court should deny Plaintiff's motion.

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[1] *Swierkiewicz v. Sorema N.A.*, 122 S. Ct. 992, 998 (2002).
[2] *Bell Atlantic Corp. v. Twombley*, 127 S.Ct. 1955, 1969 (2007).
[3] *See e.g. Battlefield Builders, Inc. v. Swango,* 743 F.2d 1060, 1062 (4th Cir.1984).
[4] *Edwards v. City of Goldsboro,* 178 F.3d 231, 244 (4th Cir.1999)

ARGUMENT

I. MOURSY STATES A CLAIM FOR TRESPASS TO CHATTELS.

Plaintiffs object to the sufficiency of Moursy's factual allegations, yet the allegations in the counterclaim are more than sufficient to support the claim. The elements for a claim for trespass to chattels under North Carolina common law are: (1) the plaintiff had either actual or constructive possession of the personalty or goods in question at the time of the trespass; and (2) there was an unauthorized, unlawful interference or dispossession of the property.[5]

Moursy's Counterclaim satisfies both elements. She asserts that Media Sentry, the Plaintiffs' unlicensed, illegal investigator, invaded the computer in question [docket no. 22, Counterclaim, ¶ 12]. There is but one computer (personalty or good) in question to wit: the computer accessed by Media Sentry at IP address 152.7.44.142 on April 22, 2007 at 06: 59:13 EDT [docket no. 19, First Amended Complaint, ¶ 15]. Plaintiffs believe this computer belongs to Moursy. Of course, Moursy wishes to preserve her defense that the Internet Service Provider misidentified the computer. It remains for the Plaintiffs to prove that the computer in question is Moursy's. Nevertheless, Moursy's allegations allow the Court, for the purpose of this claim and this motion, to make the presumption, as it must, in her favor: that she is the owner of the computer in question, that she did not grant permission for anyone to obtain information from her computer, and did not configure her computer to share files. [docket no. 25, Counterclaim, ¶¶ 24-25].

Importantly, Moursy also alleges that the Counterclaim/Third-party Defendants intruded into the computer in question to obtain information [docket no. 25, Counterclaim, ¶ 31]. All of these allegations create a factual dispute. Did "Plaintiffs simply [detect] Defendant's copyright

infringement, as any other user of peer-to-peer network could have done"? [docket no. 28, Plaintiffs' Memorandum, p. 6]. Or, did Plaintiffs intrude into Moursy's personal, private computer? Plaintiffs wish to wave away this factual contention with reference to a case decided under Texas law.[6] Plaintiffs' argument that Moursy has not stated a proper claim is unavailing to it under North Carolina law as shown below.

It is uncontested that our Supreme Court set out the required elements in *Fordham v. Eason* where they reversed the Court of Appeals decision sustaining the Superior Court in granting summary judgment in favor of Plaintiff on Defendant's counterclaim for trespass to chattels.[7] The holding in *Fordham* is inapposite to Plaintiffs' position. "At the time Fordham entered the Easons' property and removed the timber, he had no rights in the timber, and his entry on the property was both unauthorized and unlawful."[8] The *Fordham* standard has been applied to computer intermeddling cases similar to Moursy's by: the North Carolina Business Court in *Burgess v. American Express,*[9] (12(b)(6) motion to dismiss trespass to chattels claim denied where Plaintiff alleged specifically that Defendants through the services of a third-party intermediary, delivered unauthorized "pop-up" advertisements to his computer); in the North Carolina Western District *Burgess v. Eforce Media, Inc.*[10] ("[p]laintiff's *pro se* pleadings are not a model of clarity but nevertheless suffice to state a claim for trespass to chattels" where defendants were alleged to be intermeddling with plaintiff's computer); in the Eastern District of

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[5] *See Fordham v. Eason*, 521 S.E.2d 701, 704 (1999).
[6] *See Arista Records, LLC, et al v. Tschirhart*, 5:05-CV-372-OLG, slip op. at 7 (W.D. Tex. May 24, 2006) attached to Plaintiffs Memorandum as Plaintiffs' Exhibit C.
[7] *Fordham v. Eason*, 521 S.E.2d 701 (N.C. 1999).
[8] *Id*., 521 S.E.2d 701, 706.
[9] *Burgess v. American Express*, 2007 NCBC 15, N.C.Super. (NO. 07 CVS 40) (Exhibit A).
[10] *Burgess v. Eforce Media, Inc.*, 1:07-CV-231, (W.D.N.C. November 8, 2007) (Exhibit B).

Virginia, *America Online v. LCGM, Inc.*[11] (the transmission of electrical signals through a computer network is sufficiently "physical" contact to constitute a trespass to property); and in the Northern District of Illinois, *Sotelo v. DirectRevenue,*[12] (cause of action for trespass to personal property may be asserted by individual computer user who alleges unauthorized electronic contact with his computer system).

Here, it is straightforward that Moursy sufficiently alleges actual possession of the computer in question and unauthorized, unlawful interference with her use of this personal property. Accordingly, Plaintiffs are not entitled to dismissal of Moursy's counterclaim for trespass to chattels before Moursy has an opportunity to show through discovery that Plaintiffs did more than simply do what others do on peer-to-peer networks.[13]

II. MOURSY STATES A CLAIM THAT PLAINTIFFS VIOLATED 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 losses or damages set forth in § 1030(a)(5)(B). In this case, the applicable loss is § 1030(a)(5)(B)(i): "loss to 1 or more persons during any 1-year period … aggregating at least $5,000 in value" where

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[11] *America Online, Inc. v. LCGM, Inc.*, 46 F.Supp.2d 444, 451 (E.D. Va. 1998).
[12] *Sotelo v. DirectRevenue, LLC*, 384 F.Supp. 1219 (N.D. Ill. 2005).
[13] Third-party Defendants have been properly joined in the case and, as such, they are not yet before the Court on this or any other claim against them.

such loss was caused by qualified conduct under § 1030(a)(5)(A), prohibiting, *inter alia*, intentionally accessing a computer without authorization, and causing damage.

The CFAA 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" is defined in § 1030(e)(8) as: "any impairment to the integrity or availability of data, a program, a system, or information."

To survive the motion, Moursy's cause of action must allege these elements: 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.

The crux of Plaintiffs argument is that the intrusion into the computer at issue was authorized and caused no damage. Both of these contentions are without merit.

Plaintiffs say Moursy used "the Limewire file-sharing software … to trade files over the Internet." And, "Defendant's shared folder was open to the public …."[docket no. 28, Plaintiffs' Memorandum, p. 9]. But these are not facts in evidence. These are mere allegations [docket no. 19, Amended Complaint, ¶ 15] which Moursy denied [docket no. 25, Amended Answer, ¶ 15]. Moursy goes on in her counterclaim to state: she "did not authorize any person to obtain information from her computer via the 'online media distribution system,' and, did not configure any computer to share files." [docket no. 25, Counterclaim, ¶¶ 24-25]. Despite the unequivocal paragraph 15 denial, the Plaintiffs say Moursy "does not deny that Limewire, or a

similar program which gave her access to Limewire was installed on her computer." At this stage of the proceeding, these facts are decided not in Plaintiffs favor, but in Moursy's favor. In other words, Plaintiffs admitted intentional access to Moursy's computer was without authorization.[14]

Plaintiffs' second contention, objecting to Moursy's allegations of loss, is also unavailing. Plaintiff's memorandum appears to cite the statute in its pre-2002 amendment form; § 1030 (e)(8)(A) no longer exists as such. Moursy pleaded facts to show impairment to her data and to her system. In *Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc.*, the Court stated: "the alleged access and disclosure" of electronic information constituted an "impairment to the integrity of data … or information." Plaintiffs have illegally accessed the computer in question. In addition to the harm suffered by illegal invasion of her personal privacy, Moursy has incurred reasonable costs, including the cost of responding to the illegal intrusion as she must defend herself in this lawsuit and pursuing the illegal investigator, MediaSentry, for its wrongdoing. These are among the damages asserted by the Plaintiff [docket no. 25, Counterclaim ¶37] and falling under the plain language of the statute at § 1030(e)(11).

III. MOURSY STATES A CLAIM FOR UNFAIR AND DECEPTIVE TRADE PRACTICES.

Plaintiffs argue that they are not engaged in trade or commerce, that their actions are neither unfair nor deceptive, and that their actions have not damaged Moursy. None of these contentions withstand scrutiny.

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[14] As if Plaintiffs bodacious assertion of facts in the light most favorable to themselves isn't bad enough, Plaintiffs cleverly try to meld the "intentional" requirement to argue that the wrongdoer must intentionally access **and** damage. However, only intentional access or intentional harm, not both is required [docket no. 28, p. 8].

To establish a prima facie claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice; (2) the action in question was in or affecting commerce; and (3) the act proximately caused injury to the plaintiff. N.C. Gen. Stat. § 75-1.1(a) A practice is "unfair," for purposes of statute prohibiting unfair and deceptive trade practices, if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive. N.C. Gen. Stat. § 75-1.1. Moursy has generally alleged all three elements [docket no. 25, Counterclaim ¶¶ 40-43]. In support of the claims, Moursy alleges specific acts that constitute unethical or unscrupulous acts that have a tendency to deceive. Specifically, Moursy says:

> Counterclaim/Third-party Defendants, through various concerted efforts and cartels, control or attempt to control the channels of creation, distribution, and sale of musical works throughout the United States and the world. They are not artists, songwriters, or musicians. They did not write or record the songs. For a number of years, a group of large, multinational, multi-billion dollar record companies, including these Record Company Counterclaim Defendants, have been abusing the federal court judicial system for the purpose of waging a public relations and public threat campaign targeting digital file sharing activities. As part of this campaign, these Record Company Counterclaim Defendants hired an unlicensed private investigator, MediaSentry, – in violation of North Carolina and other applicable law – which receives a bounty to invade private computers and private computer networks to obtain information – in the form of Internet Protocol ("IP") addresses – allowing them to identify the computers and computer networks that they invaded. MediaSentry performs these investigations in North Carolina and other states [docket no. 13, Counterclaim ¶ 11].

And, " [the] demands, and illegal investigations, are part of a concerted pattern of sham litigation… [the] true purpose is not to obtain the relief claimed in its sham litigation, but to intimidate, harass, and oppress the defendant" [docket no. 25, Counterclaim ¶ 18].

The Plaintiffs lawsuit begins with an illegal act. Although Plaintiffs wish to dismiss this unfortunate circumstance out of hand, the allegation that its agent, MediaSentry, acted illegally must be taken as true, and the record companies hired MediaSentry to conduct the illegal

investigation into Moursy. Clearly, these are facts in or affecting commerce for purposes of the Unfair and Deceptive Trade Practices Act.

IV. MOURSY IS ENTITLED TO DECLARATORY JUDGMENT OF NON-INFRINGEMENT.

Title 28, Section 2201 of the U.S. Code provides a procedural right to declaratory relief. District courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act. Plaintiffs provide a number of cases where the courts have declined to entertain a declaratory judgment. Moursy is concerned, though, that Plaintiffs have a practice of dismissing claims without prejudice, leaving the matter unsettled and subject to future litigation. Moursy does not wish to be deprived of definite resolution of the matter. In order to promote resolution, this Court should allow Moursy to maintain her declaratory judgment claim. No harm comes of it, since the facts and legal questions are already at issue and no additional work need be done – unless the Plaintiffs, spying a potential defeat, try to withdraw from their case without resolving it. Then, if the Court allows the declaratory judgment action to remain, Moursy will have the opportunity to obtain an affirmative disposition exonerating her.

V. MOURSY STATES A CLAIM FOR CIVIL CONSPIRACY.

Plaintiffs properly state the elements of civil conspiracy as: (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.[15] Again, Moursy specifically pleaded each of the elements of the claim [docket no. 25, Counterclaim ¶¶ 49-55]. Moursy has already discussed Plaintiffs' violation of the CFAA (Section II, infra.), and she alleges the CFAA violations were committed in concert with the Third-party Defendants including MediaSentry [docket no. 25, Counterclaim

[15] *North Carolina v. Ridgeway Brands Manufacturing*, 666 S.E. 2d 107, 115 (N.C. 2008).

¶51]. Below, Moursy discusses: (a) the 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 computer system of a North Carolina resident in violation of N.C. Gen. Stat. § 14-453 *et seq*. and, (c) extortion and attempted extortion in violation of the Hobbs Act, 18 U.S.C. § 1951.

To the extent Plaintiffs have a right to enforce their copyrights, and that public policy even encourages them to do so, Moursy does not begrudge them. But, Plaintiffs do not have a right to use illegal methods to do it. This action began with a conspiracy to commit an illegal act, and the commission of the illegal act. The Private Protective Services Act, (the "Act") N.C. Gen. Stat. § 74C-1, *et seq*., mandates that persons engaged in the "private protective services profession or activity in this State" must comply with the Act's provisions. N.C. Gen. Stat. § 74C-2(a).

The "private protective services profession" includes, pursuant to the Act, a "private detective or private investigator," defined, in relevant part, as follows:

> Any person who engages in the profession of or accepts employment or furnishes, agrees to make, or makes inquiries or investigations concerning any of the following on a contractual basis: …
>
> b. The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person….
>
> e. Securing evidence to be used before any court, board, officer, or investigative committee.
>
> N.C. Gen. Stat. § 74C-3(a)(8).

A person desiring to engage in private protective services activity must first make a verified application to the Private Protective Services Board. N.C. Gen. Stat. § 74C-8(a). Unless and until a license is issued by the Board, the person may not hold himself out to perform services requiring a license. N.C. Gen. Stat. § 74C-16(c).

It is straightforward that MediaSentry, "on a contractual basis," makes investigations concerning a person's "identity," "conduct," "activity," "transactions," and/or "acts," and is thus engaged by the Plaintiffs as a private detective or private investigator for purposes of § 74C-3(a)(8). Moursy states that MediaSentry is engaged in such activity against her while she was in this State, so the Plaintiffs conspired with MediaSentry to violate, and did violate, the Private Protective Services Act ("PPSA").

Plaintiffs argue that a violation of the PPSA is not criminal [docket no. 28, Plaintiffs Memorandum p. 19]. Plaintiffs overlook § 74C-17(b): "Any person, firm, association, or corporation or their agents and employees violating any of the provisions of this Chapter or knowingly violating any rule promulgated to implement this Chapter shall be guilty of a Class 1 misdemeanor…." Plaintiffs and MediaSentry conspired to commit, and did commit, a crime under the PPSA.

The Plaintiffs and MediaSentry conspired to commit and did commit the crime of computer trespass under N.C. Gen. Stat. § 14-458:

> (a) Except as otherwise made unlawful by this Article, it shall be unlawful for any person to use a computer or computer network without authority and with the intent to do any of the following:…
>
> (5) Make or cause to be made an unauthorized copy, in any form, including, but not limited to, any printed or electronic form of computer data….

Moursy alleges that the Plaintiffs intrusion into her computer was without authorization, and Plaintiffs admit they have made a copy of materials from her computer [docket no. 19-1 Exhibit A to Amended Complaint]. For the purpose of this motion, the Court is bound to conclude Plaintiff has stated the elements of Plaintiffs criminal conduct according to N.C. Gen. Stat. § 14-458.

The Plaintiffs committed a violation of the Hobbs Act by agreeing with Third-party Defendants to obtain property by committing electronic trespass, and by placing Moursy in fear by using their power under color of official right.[16] These acts are committed, largely, by misuse of the federal court system. This Court has broad inherent powers to hold Plaintiffs accountable for their misuse of the federal courts. The Supreme Court has long held that federal courts have the inherent power to do what is necessary to preserve their integrity.[17] Among their inherent powers is the authority to "sanction parties for abusive litigation practices."[18] When necessary to protect a court's integrity, this power can be far-reaching: "exercise of judicial power by entry of orders not expressly sanctioned by rule or statute in order to correct the legal process or avert its misfunction has been approved in varied circumstances."[19] This Court should exercise its inherent power to allow redress to Moursy for Plaintiffs' abuse of law and federal civil court

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[16] Moursy maintains that the Plaintiffs are operating under color of state in that the "Digital Theft Deterrence … Act of 1999" is unconstitutional because it is essentially a criminal statute, punitively deterrent in its every substantive aspect, from which it follows that: a defendant prosecuted pursuant to this act is entitled to the process protections of the criminal law, including the rules and constitutional law of criminal procedure and the right to trial by jury empowered to act by general verdict; Congress has exceeded its power by placing the executive function of prosecuting an essentially criminal statute in private hands; and, Congress has violated constitutional separation of powers by requiring the judicial branch to try cases pursuant to their essentially criminal mandate by inappropriate civil process. [docket no. 13, Affirmative Defenses, ¶19].

[17] *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764-765.

[18] *Ibid*.

[19] *Carlisle v. U.S.*, 517 U.S. 416, 439 (1996).

process. As detailed in Moursy's Counterclaim [docket no. 25, Counterclaim ¶¶ 12-27], Plaintiffs are using any and all available avenues of federal process to pursue grossly disproportionate – and unconstitutional – punitive damages in the name of making an example of her. The case at hand warrants the use of inherent federal power not just because of what Plaintiffs are doing to Moursy in this Court, but because of the manner in which Plaintiffs are abusing the federal courts all across the country. Plaintiffs have wielded federal process as a bludgeon, threatening legal action to such an extent that settlement remains the only viable option to financial ruin. This Court has an inherent interest in deciding whether it will continue being used as the bludgeon in Plaintiffs' campaign of sacrificing individuals in this way, or it will allow Moursy to move forward with her Hobbs Act claim.

VI. PLAINTIFFS ARE NOT ENTITLED TO NOERR-PENNINGTON IMMUNITY.

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

No privilege or protection extends to sham litigation.[20] Moursy contends that Plaintiffs' litigation efforts are a sham, has plead specific details to show that the litigation is a sham, and asserts that it is objectively baseless, founded in improper motives, and grounded in illegal

[20] *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972). *See also Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993).

activity [docket no. 13, Counterclaim ¶¶ 11-26]. In *Theofel v. Farey-Jones*,[21] the Ninth Circuit rejected the doctrine's application to the CFAA:

> 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.

Similarly, as Plaintiffs acknowledge [docket no. 28, Plaintiffs' Memorandum, p.23], Courts in the Fourth Circuit have narrowly interpreted *Noerr-Pennington*. *See DIRECTV, Inc. v. Cephas*,[22] (*Noerr-Pennington* bars ongoing litigation from becoming basis of counterclaim only under limited circumstances, usually employed in antitrust cases and Supreme Court has described it as a 'doctrine of antitrust immunity' citing *Professional Real Estate Investors, Inc.*); and, *O'Leary et al. v. Purcell Co., et al.*,[23] (holding the doctrine exempts any petitioning activity designed to influence legislative or governmental bodies).

CONCLUSION

For all of the reasons stated, the Court should deny Plaintiffs' Motion to Dismiss.

Respectfully submitted, this the 2nd day of March, 2009.

By: /s/ Stephen E. Robertson
Stephen E. Robertson
ROBERTSON, MEDLIN & BLOCKER, PLLC
Attorney for Defendant, N.C. State Bar No. 27608
127 North Greene Street, Third Floor
Greensboro, NC 27401
Telephone: (336) 378-9881
Facsimile: (336) 378-9886
srobertson@robertsonmedlin.com

[21] *Theofel v. Farey-Jones*, 359 F.3d 1066, 1078-79 (9th Cir. 2004).
[22] *DIRECTV, Inc. v. Cephas* 294 F. Supp. 2d, 760, 766 (M.D.N.C., 2003).
[23] *O'Leary et al. v. Purcell Co., et al.* C-83-691-R, *8 (M.D.N.C. 1984) (Exhibit C).

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of March, 2009, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Lacey M. Moore
Nexsen Pruet Adams Kleemeier, PLLC
210 South Tryon St.
Suite 1200
Charlotte, NC 28202
lmoore@nexsenpruet.com

By: /s/ Stephen E. Robertson
Stephen E. Robertson
ROBERTSON, MEDLIN & BLOCKER, PLLC
Attorney for Defendant
N.C. State Bar No. 27608
127 North Greene Street, Third Floor
Greensboro, NC 27401
Telephone: (336) 378-9881
Facsimile: (336) 378-9886
srobertson@robertsonmedlin.com