

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SONY BMG MUSIC)
ENTERTAINMENT, a Delaware)
general partnership; UMG)
RECORDINGS, INC., a Delaware)
corporation; VIRGIN RECORDS)
AMERICA, INC., a California)
corporation; LAFACE RECORDS LLC,)
a Delaware limited liability company;)
and WARNER BROS. RECORDS) CIVIL ACTION FILE
INC., a Delaware corporation,)
) No. 1:08-cv-03728-CC
)
Plaintiffs,)
)
)
v.)
)
)
LINDSEY SIMMS,)
)
)
Defendant.)
)
_____)

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS
DEFENDANT'S COUNTERCLAIM**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Plaintiffs respectfully move to dismiss Defendant's Counterclaim.

I. INTRODUCTION

Defendant's Counterclaim does not allege even a single cognizable claim for relief. For this reason, Defendant's counterclaim fails to comply with Rule 8 of the Federal Rules of Civil Procedure and should be dismissed.

Moreover, Defendant's Counterclaim is little more than an unambiguous attempt by the Defendant to hold Plaintiffs liable for their legitimate efforts to enforce their copyright. That is not only improper, but is contrary to the public policy desire to have copyright owners enforce 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. Tex. May 16, 2007), attached as **Exhibit A**.

For these reasons, and as more fully set forth below, Defendant's Counterclaim should be dismissed.

II. 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.¹

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

On January 15, 2007, Media Sentry, a third party retained by Plaintiffs,

¹ 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).

detected an individual using the Ares online media distribution system over a peer-to-peer file-sharing network. This individual had over 142 audio files on her computer and was distributing them to the millions of people who use peer-to-peer networks. MediaSentry determined that the individual used Internet Protocol (“IP”) address 138.47.157.89 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.² In fact, MediaSentry does not do anything that other users of a P2P network cannot do; the only information it obtains is the information that is available to anyone who logs onto a P2P network.

In this case, after filing a “Doe” lawsuit against the individual using the IP address detected by MediaSentry, Plaintiffs served a court-ordered third-party subpoena on the Internet Service Provider (“ISP”) to determine the identity of the individual responsible for the IP address. The ISP, Louisiana Tech University, identified Lindsey Simms as the individual in question. The Parties were unable to resolve the matter and on December 10, 2008, Plaintiffs initiated this action against Defendant Lindsey Simms for damages and injunctive relief against the Defendant.

² 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).

III. LEGAL STANDARD

In considering a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept all of the claimant's material allegations as true and must construe all doubts in the light most favorable to the claimant. *See Jackson v. Bellsouth Commc'ns*, 372 F. 3d 1250, 1262 (11th Cir. 2004). While all facts must be construed in favor of the nonmoving party, "conclusory allegations, unwarranted deductions of fact or legal conclusions masquerading as facts" are insufficient to defeat a motion to dismiss. *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).

Further, courts in the Eleventh Circuit routinely dismiss complaints for failure to state a claim upon which relief can be granted where an affirmative defense, such as the *Noerr-Pennington* doctrine and the Georgia doctrine of judicial immunity bars recovery on the claim. *See, e.g., Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003); *Glades Pharms., LLC v. Murphy*, No. 1:06-CV-0940-TWT, 2006 U.S. Dist. LEXIS 90154, 15-17 (N.D. GA Dec. 12, 2006); *City*

of *Gainesville v. Fla. Power & Light Co.*, 488 F. Supp. 1258, 1264 (S.D. Fla. 1980).

IV. ARGUMENT AND AUTHORITY

A. **DEFENDANT’S COUNTERCLAIM FAILS TO ASSERT AN ACTUAL CAUSE OF ACTION AGAINST PLAINTIFFS.**

In accordance with Rule 8 of the Federal Rules of Civil Procedure, Defendant’s Counterclaim “requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ so that a plaintiff’s allegations need only be sufficiently detailed—at least for the purpose of stating an adequate claim on the merits—to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests’” *Weissman v. NASD, Inc.*, 500 F.3d 1293, 1304 (11th Cir. 2007). Defendant, however, has failed to give the Plaintiffs “fair notice of what the claim is” as Defendant has not alleged any cause of action against the Plaintiffs.

As currently alleged, Plaintiffs can only speculate as to the potential claim Defendant may have intended to assert in her Counterclaim. Is Defendant attempting to assert a cause of action for abuse of process or some other cause of action that Plaintiffs have not yet been able to deduce from the Counterclaim? A party is not required to speculate or guess as to the causes of action being asserted against it. Rather, it is Defendant’s burden to plead a recognizable claim. Fed. R.

Civ. P. 8. Moreover, because Plaintiffs cannot discern what causes of action Defendant is asserting, Plaintiffs cannot even begin to determine whether Defendant has adequately alleged “the grounds upon which [her claims] rest.”

Accordingly, because Defendant has failed to adequately plead her counterclaim by identifying the specific causes of action that are being asserted against Plaintiffs, Defendant’s Counterclaim should be dismissed.

B. DEFENDANT’S COUNTERCLAIM IS BARRED BY THE NOERR-PENNINGTON DOCTRINE.

While it is unclear what specific cause of action Defendant is asserting against Plaintiffs, the explicit basis of Defendant’s Counterclaim is Plaintiffs’ “claims and allegations set forth in the Complaint” (Counterclaim ¶ 23.) However, any such claim based on Plaintiffs’ filing of its Complaint is barred by the *Noerr-Pennington* doctrine.

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 Cal. 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., Andrx Pharm., Inc. v. Elan Corp., PLC*, 421 F.2d 1227, 1234

(11th Cir. 2005); *Video Int'l Prod., Inc. v. Warner-Amex Cable Comm.*, 858 F.2d 1075, 1082-83 (5th Cir. 1988); *Chemicor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 128-129 (3d. Cir. 1999); *Havoco Am., Ltd. v. Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983). “While the *Noerr-Pennington* doctrine originally arose in the antitrust context, it is based on and implements the First Amendment right to petition and therefore . . . applies equally in all contexts.” *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000); *Cal. Motor Transp.*, 404 U.S. at 510; *Tec Cogeneration v. Fla. Power & Light Co.*, 76 F.3d 1560, 1570 (11th Cir. 1996); *see also Video Int'l Prod.*, 858 F.2d at 1084; *Lockheed Martin Corp. v. The Boeing Co.*, No. 6:03-cv-796-Orl-28KRS, 2005 U.S. Dist. LEXIS 15265 at * 5 (M.D. Fla. March 21, 2005) (“[T]he *Noerr-Pennington* doctrine generally immunizes individuals from liability for statements which they make in the context of petitioning the government for redress.”). Thus, Defendant’s claim that Plaintiffs initiated this action to “harass” Defendant and cause her “unnecessary costs” is barred by the *Noerr-Pennington* doctrine and Defendant’s Counterclaim, based as it is on the filing of Plaintiffs’ Complaint, should be dismissed.

Moreover, the *Noerr-Pennington* doctrine also bars Defendant’s claims based on Plaintiffs’ efforts to settle its claims against Defendant. Defendant asserts in its counterclaim that Plaintiffs have filed their Complaint “to extract from

Defendant a settlement of a claim for which Plaintiff has no evidentiary support” (Counterclaim ¶ 23.) Contrary to Defendant’s allegations, Plaintiffs have not “extracted” a settlement from Defendant—as evidenced by the existence of this lawsuit, the parties were unable to settle this matter prior to Plaintiffs’ filing of the Complaint. More importantly, 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. Prof’l Real Estate Investors, Inc.*, 944 F.2d 1525, 1528 (9th Cir. 1991), *aff’d*, 508 U.S. 49 (1993). 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)).³

³ 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*).

Therefore, even if Defendant were able to identify a particular cause of action, Defendant's counterclaim should be dismissed because the alleged conduct of Plaintiffs upon which the claim is based is clearly subject to immunity under the *Noerr-Pennington* doctrine.

C. DEFENDANT'S COUNTERCLAIM SHOULD BE DISMISSED BECAUSE PLAINTIFFS' ALLEGED CONDUCT IS PROTECTED BY THE GEORGIA DOCTRINE OF JUDICIAL IMMUNITY.

Defendant's rhetoric and hyperbole aside, *all* of the alleged conduct that Defendant complains of in her Counterclaim is based on Plaintiffs' "claims and allegations set forth in the Complaint." (Counterclaim ¶ 23.) Under Georgia law, Plaintiffs' "claims and allegations" set forth in their Complaint are absolutely privileged. Georgia recognize a broad litigation privilege which provides "[a]ll charges, allegations, and averments contained in regular pleadings filed in a court of competent jurisdiction, which are pertinent and material to the relief sought, whether legally sufficient to obtain it or not, are privileged. However false and malicious such charges, allegations, and averments may be, they shall not be deemed libelous." O.C.G.A. § 51-5-8. "While this Code section does not use the term 'absolute,' [Georgia] courts have determined that [O.C.G.A. § 51-5-8] confers an absolute privilege for statements made in judicial pleadings. Absolute privilege means that there can never be any damages for such

allegations.” *Davis v. Shavers*, 484 S.E.2d 243, 246 (Ga. Ct. App. 1997) (internal citations omitted).

Thus, the alleged conduct of Plaintiffs that is at issue in the Counterclaim is privileged and cannot form the basis of any counterclaim.

V. **CONCLUSION**

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

Respectfully submitted this 23rd day of February, 2009.

s/ Robert F. Glass

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 23, 2009, a copy of the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM** was served upon the Defendant via United States Mail at the following address:

Lindsey Simms
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s/ Robert F. Glass

Robert F. Glass
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CERTIFICATE OF COUNSEL REGARDING FONT SIZE

Counsel certifies that the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM** has been prepared using Times New Roman font size 14 in accordance with Local Rules 5.1(C) and 7.1(D).

This 23rd day of February, 2009.

s/ Robert F. Glass

Robert F. Glass

Georgia Bar No. 115504