

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

UMG RECORDINGS, INC., a Delaware corporation; SONY BMG MUSIC ENTERTAINMENT, a Delaware general partnership; BMG MUSIC, a New York general partnership; ARISTA RECORDS LLC, a Delaware limited liability company; and FONOVISIA, INC., a California corporation,

Plaintiffs,

v.

SUZY DEL CID (AKA SUZANA BLANCA DEL CID),

Defendant.

Case No.: 8:07-cv-00368-RAL-TGW

**PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS
WITH MEMORANDUM OF LAW IN SUPPORT**

Pursuant to Fed. R. Civ. P. 12(b)(6) and Local Rule 3.01, Plaintiffs, after having conferred with counsel for Defendant on this matter, respectfully move to dismiss each of the five counterclaims asserted against them by Defendant Suzy Del Cid as such counterclaims fail to state claims upon which relief can be granted.

INTRODUCTION

Not only does Defendant fail to allege facts to support the essential elements of each of her counterclaims, but the underlying basis of all of Defendant's claims is that Plaintiffs should somehow be held liable for their legitimate efforts to enforce their copyrights. That, of course, is not only improper, but is contrary to the public policy desire to have copyright owners enforcing their rights. *See Kebodeaux v. Schwegmann Giant Super Markets, Inc.*, 33 U.S.P.Q.2d 1223, 1224 (E.D. La. 1994) (holding that it would be inconsistent with the purposes

of the Copyright Act to “deter plaintiffs . . . from bringing suits when they have a reason to 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. Taking aggressive action, as Plaintiffs have, to defend their copyrights is certainly not sanctionable conduct under Rule 11. The right to come to court to protect one’s property rights has been recognized in this country since its birth.

Atlantic Recording Corp. v. Heslep, Civil Action No. 4:06-cv-132-Y, slip op. at 11-12 (N.D. Texas May 16, 2007) (attached hereto as Exhibit A).

As set forth below, each of Defendant’s counterclaims are subject to dismissal. All of the claims should be dismissed because the alleged conduct is protected by Florida’s litigation privilege and/or the *Noerr-Pennington* doctrine. In short, the legitimate conduct of which Defendant complains is not actionable, and her counterclaims should be dismissed in their entirety. Further, all of the counterclaims founder because Defendant has not and cannot plead one or more necessary elements of each of her claims.

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. Moreover, to enable users to search the computers of complete strangers, the software often scans the "share" folders of those connected to the network, extracts information from each user's files, and automatically creates indices of the sound recordings and other works to facilitate their further distribution.

To download a copyrighted work to a user's computer, the user searches for a particular artist or work, then clicks on an entry from the list of search results. The service then automatically makes a perfect digital copy of the desired sound recording from the computer of one or more other users. The copying user has a new and permanent audio copy that he or she can listen to or transfer to a digital device, such as an Apple iPod, as often as desired. Each time a user makes an unauthorized copy, that copy immediately becomes subject to further

distribution to others – resulting in an exponentially multiplying (or “viral”) creation and redistribution of perfect digital copies.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 determined 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. As a result of the rise of online media distribution systems, Plaintiffs have sustained and continue to sustain devastating financial losses. Plaintiffs’ losses from this copyright infringement have also resulted in layoffs of thousands of employees in the music industry. 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 May 25, 2005, Plaintiffs’ investigators detected an individual with the username “Lucy@Kazaa” using the Kazaa online media distribution system over a peer-to-peer file-sharing network. This individual had 1,062 audio files on her computer and was distributing them to the millions of people who use peer-to-peer networks. Plaintiffs’ third-party investigators, MediaSentry, Inc., determined that the individual used Internet Protocol (“IP”) address 172.139.31.90 to connect to the Internet. In observing the infringement, MediaSentry

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).

uses the same functionalities that are built into P2P programs that any user of the software can utilize on the network.² Therefore, MediaSentry does not do anything that any other user of a P2P network cannot do; it does not obtain any information that is not 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, America Online, Inc., identified Suzy Del Cid as the individual in question. After learning her identity, Plaintiffs’ counsel sent Ms. Del Cid a letter on October 21, 2005 advising her that copyright infringement had been detected and provided a telephone number and e-mail address she could contact to discuss this matter and possibly resolve it before the commencement of litigation. Having heard no response to Plaintiffs’ October 21, 2005 letter, Plaintiffs’ settlement representatives thereafter contacted Ms. Del Cid in the hope of engaging in settlement negotiations, but the ensuing discussions failed. Accordingly, on February 27, 2005, Plaintiffs filed their Complaint (doc. #1) against Defendant for copyright infringement.

On June 1, 2007, Defendant filed her Answer, Affirmative Defenses and Counterclaims (doc. #12) (“Answer”) in which she brings five counterclaims against Plaintiffs: Trespass to Chattels (Count I), Computer Fraud and Abuse under 18 U.S.C. § 1030 (Count II), Deceptive and Unfair Trade Practices under Fla. Stat. § 501.201 (“FDUTPA”) (Count III), Civil Extortion (Count IV), and Civil Conspiracy (Count V). For the reasons set forth below, each of these five counterclaims should be dismissed under Rule 12(b)(6).

² See *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1106 n.4 (D. Kan. 2000). (explaining detection through file-sharing program); *Heslep*, No. 4:06-cv-132-Y (attached as Exhibit A).

LEGAL STANDARD

The Federal Rules of Civil Procedure provide for dismissal for “failure to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6). 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 Communications*, 372 F. 3d 1250, 1262 (11th Cir. 2004). However, “conclusory allegations, unwarranted deductions of fact or legal conclusions masquerading as facts will not prevent dismissal.” *Id.* A motion to dismiss should be granted where “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.*

Courts in the Eleventh Circuit routinely dismiss complaints for failure to state a claim upon which relief can be granted where, as here, an affirmative defense appears on the face of the pleading. *See, e.g., Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003) (“A complaint is subject to dismissal under Rule 12(b)(6) when its allegations, on their face, show that an affirmative defense bars recovery on the claim.”); *City of Gainesville v. Florida Power & Light Co.*, 488 F. Supp. 1258, 1264 (S.D. Fla. 1980) (“[D]eference to the statements of the complaint must not extend to completely conclusory statements which fail to give adequate notice to the opposing party or the court. In addition, the pleader should not be able to rely solely on enigmatic averments which on their face comprehend activity clearly exempt from liability.”).

ARGUMENT AND AUTHORITY

- I. ALL OF DEFENDANT’S CLAIMS SHOULD BE DISMISSED BECAUSE THEY ARE BASED ON ALLEGED CONDUCT THAT IS PROTECTED BY FLORIDA’S LITIGATION PRIVILEGE AND/OR THE NOERR-PENNINGTON DOCTRINE.**

Florida courts recognize a broad litigation privilege which provides “legal immunity for actions that occur in judicial proceedings.” *Echevarria v. Cole*, 950 So. 2d 380, 383 (Fla. 2007). This broad immunity extends to all tort and statutory claims. *Id.* at 383-84 (extending litigation privilege to statutory claims); *see also Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606, 608 (Fla. 1994) (extending litigation privilege to all tort claims). Moreover, the litigation privilege not only covers “any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior . . . so long as the act has some relation to the proceeding,” *Echevarria*, 950 So. 2d at 383, but also encompasses any act “necessarily preliminary thereto.” *Id.* (Pariente, J., concurring) (citing *Ange v. State*, 98 Fla. 538 (Fla. 1929)); *Boca Investors Group, Inc. v. Potash*, 835 So. 2d 273, 275 (Fla. Dist. Ct. App. 2002) (“The privilege arises upon the doing of any act necessarily preliminary to judicial proceedings.”) The Florida courts have long recognized that to avoid the chilling effect produced by litigants fearing civil liability for conduct during suit, an outcome “which would seriously hamper the adversary system,” the litigation privilege must extend not only to those acts occurring during the judicial proceeding but also to those acts that are necessarily preliminary to the action, regardless of the type of conduct at issue: “Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their conduct in a subsequent civil action for misconduct.” *Levin*, 639 So. 2d at 608.

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. *See Heslep*, No. 4:06-cv-132-Y (attached as Exhibit A).

Plaintiffs have a protected right to pursue their legitimate claims. Defendant does not allege a single act by Plaintiffs that is not in some way related to Plaintiffs' legitimate and privileged efforts to enforce their copyrights through judicial process, as they are authorized to do by the Copyright Act. Thus, all of the alleged conduct is privileged and cannot form the basis of any counterclaim.

Even if Florida's litigation privilege did not bar Defendant's counterclaims, Defendant's civil conspiracy, civil extortion and deceptive and unfair trade practices claims (Counts III-V) are 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. The Supreme Court has declared the right to petition to be "among the most precious rights of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). 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, numerous courts have shielded litigants from claims relating to the filing of litigation. *See, e.g., 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).

The *Noerr-Pennington* doctrine "was originally promulgated to protect efforts to influence legislative or executive action from liability under the Sherman Act." *Oregon Natural Resources Council v. MOHLA*, 944 F.2d 531, 533 (9th Cir. 1991). The United States Supreme

Court has since extended the doctrine to protect the First Amendment right to petition the government, including the courts. *See California Motor Transp.*, 404 U.S. at 510. “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); *Tec Cogeneration v. Florida Power & Light Co.*, 76 F3d 1560, 1570 (11th Cir. 1996) (The *Noerr-Pennington* doctrine “protects First Amendment rights to assemble and petition government. It springs . . . from the right of individuals to petition the sovereign.”); *see also Video Int’l Prod.*, 858 F.2d at 1084 (“There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust.”); *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) (“Although it originally arose out of the antitrust context, the *Noerr-Pennington* doctrine generally immunizes individuals from liability for statements which they make in the context of petitioning the government for redress.”).

The filing of a lawsuit is not the only conduct that is 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). Even the mere *threat* of a lawsuit is protected by the *Noerr-Pennington* doctrine. *See Oneida Tribe of Indians of Wis. v. Harms*, 2005 WL 2758038, at *3 (E.D. Wis. Oct. 24, 2005). And counterclaims are certainly subject to dismissal under this doctrine. *See id.* (dismissing counterclaims based on filing of lawsuit on *Noerr-Pennington* grounds).

Thus, Defendant's claims which are premised on statements made during the course of the lawsuit or settlement negotiations are barred, including Defendant's Deceptive and Unfair Trade Practices claim, Defendant's Civil Extortion claim and Defendant's Civil Conspiracy claim (Counts III-V). Although Defendant is far from clear as to the alleged conduct upon which her FDUTPA claim (Count III) is based, Plaintiffs surmise that the claim is premised on Defendant's claim that the " 'Settlement Support Center' . . . engages in deceptive and illegal practices aimed at extorting money from people allegedly identified from secret lawsuits." (Answer at ¶ 7.) 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." (Answer at ¶ 8.) Defendant's allegations amount to nothing more than a bald assertion that Plaintiffs are somehow liable for attempting to settle their valid copyright infringement claims. Not only does Defendant fail to state a claim under FDUTPA, as discussed in Section IV, *infra* but settling a lawsuit is conduct protected by the *Noerr-Pennington* doctrine and thus, Defendant's FDUTPA claim is barred.

Likewise, Defendant's claim for civil extortion (Count IV) is also barred by the *Noerr-Pennington* doctrine. Once again, the factual premise of Defendant's claim is unclear from the face of her counterclaims, however, Plaintiffs again surmise that this claim likewise arises out of Plaintiffs' alleged attempts to settle their valid copyright infringement claims and the filing of lawsuits upon the failure of settlement discussions. (Answer at ¶¶ 7-10.) Indeed, Defendant's central allegation with respect to her civil extortion claim is that Plaintiffs filed the present suit against Defendant, and other similar lawsuits against similarly situated defendants. (Answer at ¶ 10) ("The instant suit is just one example, yet it is an integral part of Plaintiffs' extortion campaign."). Efforts to prosecute and/or settle lawsuits are at the very core of the type of

conduct that the *Noerr-Pennington* doctrine protects. See *California Motor Transp.*, 404 U.S. at 510. Thus, Defendants' civil extortion claim (Count IV) 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. Indeed, the doctrine originated to protect "concerted action by individuals to influence the government." *Gainesville*, 488 F. Supp. at 1264. 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] the federal court system . . ." (Answer at ¶¶ 4-5) is the very activity that *Noerr-Pennington* was first established to protect: the right to petition government to redress grievances. See *United Mine Workers*, 389 U.S. at 222; *Tec Cogeneration*, 76 F3d at 1570 (The *Noerr-Pennington* doctrine "protects First Amendment rights to assemble and petition government. It springs . . . from the right of individuals to petition the sovereign."). Thus, Defendant's civil conspiracy claim (Count V) is likewise barred.

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

"Trespass to personal property is the intentional use of, or interference with, a chattel which is in the possession of another, without justification." *Coddington v. Staab*, 716 So. 2d 850, 851 (Fla. Dist. Ct. App. 1998) (holding trespass adequately pled where defendant deprived plaintiff of the use of his personal property); see also RESTATEMENT 2D TORTS § 218 ("One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if, (a) he dispossesses the other of the chattel, or (b) the chattel is impaired as to its condition, quality, or value, or (c) the possessor is deprived of the use of the chattel for a substantial time, or (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which

the possessor has a legally protected interest.”); *Pearl, LLC v. Standard I/O, Inc.*, 257 F. Supp. 2d 326, 354 (D. Me. 2003) (granting summary judgment on trespass claim where there was no evidence that allegedly unauthorized access to computer network “impaired its condition, quality or value”). The proper measure of damages in a trespass to chattels action is the “value of the goods at the time and place of the wrongful taking and removal.” *Coddington*, 716 So.2d at 851. Damages for emotional harm are “outside the scope of the proper measure of damages for trespass.” *Id.*

In addition to being barred by Florida’s litigation privilege, 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. In particular, Defendant has not alleged that Plaintiffs used Defendant’s computer nor that Plaintiffs interfered with or deprived her of her use of her property as required under Florida law. *Id.* Indeed, Defendant has not identified any personal property of hers that has been dispossessed. To the contrary, the very heart of this action is Plaintiffs’ allegation that it was Defendant who misused Plaintiffs’ property when she downloaded and distributed their copyrighted sound recordings over the Internet.

Defendant does not and cannot claim that MediaSentry deprived her of the right to possess or use her computer files when it detected the infringement by using the same Kazaa software functionalities used by individuals engaged in file swapping. Likewise, there is no suggestion that Defendant’s computer files were impaired, altered, or otherwise damaged by MediaSentry. 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 Kazaa program was open for the world to see. Plaintiffs cannot have committed any trespass in looking at the contents of Defendant’s Kazaa

share folder because Defendant invited the entire Internet-using public to see those files. *See, e.g., Tschirhart*, 05-CV-372-OLG, slip op. at 7 (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 B); *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 267 (D.D.C. 2003) (When an ISP subscriber “opens his computer to permit others, through peer-to-peer file sharing, to download materials from that computer, it is hard to understand just what privacy expectation he or she has after essentially opening the computer to the world.”); *see also Florida Publishing Co. v. Fletcher*, 340 So. 2d 914, 917 (Fla. 1976) (consent, which may be implied by custom, usage or conduct, “is an absolute defense to an action for trespass.”)

Defendant also does not allege any legally cognizable damages. All Defendant alleges with respect to damages is that Plaintiffs “proximately caused injury . . .” to Defendant. (Answer at ¶ 13.) This conclusory allegation falls far short of alleging “value of the goods at the time and place of the wrongful taking and removal.” *Coddington*, 716 So.2d at 851. Defendant has not and cannot allege the value of goods wrongfully taken or removed since no such activity occurred. To the extent that Defendant is alleging that Plaintiffs took monies from her in the context of settlement that allegation falls short since there was no settlement. To the extent Defendant is alleging that Plaintiffs improperly took copies of sound recordings from her computer, those sound recordings were never hers and she was never dispossessed of them. Moreover, the allegation is insufficient to suggest that Defendant’s possession of her computer files was ever disturbed or harmed, much less to plead a causal connection between the alleged trespass and the “injury” she claims to have suffered. *See Tschirhart*, 05-CV-372-OLG24, slip op. at 7 (holding that defendant could not maintain cause of action for electronic trespass where

there was no allegation that plaintiffs damaged the computer or denied defendant access to it).

As a matter of law, therefore, no claim for trespass to chattels (Count I) can lie against Plaintiffs in this action.

III. DEFENDANT’S CLAIM THAT PLAINTIFFS HAVE VIOLATED THE COMPUTER FRAUD AND ABUSE ACT, 18 U.S.C. § 1030 (COUNT II) SHOULD BE DISMISSED BECAUSE DEFENDANT HAS NOT PROPERLY PLED THE ELEMENTS OF A CIVIL CLAIM UNDER THAT ACT.

Defendant’s second claim alleges violations of the Computer Fraud and Abuse Act (“CFAA”). The CFAA “is primarily a criminal statute, but it also creates a private cause of action in Section 1030(g).” *In re America Online, Inc. Version 5.0 Software Litigation*, 168 F. Supp. 2d 1359, 1368 (S.D. Fla. 2001). Section 1030(g) authorizes a civil cause of action only in limited circumstances. 18 U.S.C. § 1030(g).³

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. It is impossible to tell from the face of Defendant’s counterclaim which provision she contends Plaintiffs have violated. Nonetheless, all of the activities prohibited by the CFAA require the access of or intentional damage to another’s computer *without authorization*. See, e.g., *In re America Online*, 168 F. Supp. 2d at 1369-72 (differentiating between 18 U.S.C. §§ 1030 (a)(5)(B) and (C) which prohibit *access* of a

³ Defendant fails to specify the prong under which her CFAA claim is brought. The only damages pleaded by Defendant in this counterclaim are “direct and consequential damages and harm to [Defendant] in excess of \$5,000.” (Answer at 6-7.) Therefore, she presumably intends to assert that Plaintiffs’ alleged actions involve a loss to Defendant “in excess of \$5,000” – thereby falling under “clause (i) . . . of subsection (a)(5)(B).” See 18 U.S.C. § 1030(a)(5)(B)(i) (“loss to [one] or more persons . . . aggregating at least \$5,000 in value”) She certainly has not pled any of the other factors. Defendant does not plead damage to her computer system or to a computer system compromising national security. See 18 U.S.C. § 1030(a)(5)(B)(i) & (ii). Defendant also does not plead the compromise or impairment of an individual’s medical treatment or any physical injury caused by Plaintiffs’ alleged actions. See 18 U.S.C. § 1030(a)(5)(B)(iv) & (v).

computer by an outsider from 18 U.S.C. § 1030 (a)(5)(A) which prohibits *intentional damage* to a computer by an outsider or insider); *Theofel v. Farey-Jones*, 359 F.3d 1066, 1078 (9th Cir. 2004). Here, as a matter of law, Defendant cannot show that Plaintiffs and/or their investigators acted without authorization, nor can Defendant show that Plaintiffs damaged Defendant's computer, let alone that Plaintiffs *intentionally* did so.

As previously discussed, Plaintiffs' investigators were able to access Defendant's shared folder because the Kazaa peer-to-peer software utilized by Defendant to swap files over the Internet has a file-sharing feature that was enabled at the time the infringement was detected. This feature gives anyone else on the Internet access to any files in the "shared folder" that the user distributes over the peer-to-peer networks. *See Kennedy*, 81 F. Supp. 2d at 1106 n.4 (explaining detection through file-sharing program). Defendant's action in enabling the file-sharing feature authorized the whole world to access her music files – making them as publicly accessible as any other web site on the Internet. By making the "shared folder" available to the public, Defendant has granted exactly the type of authorization contemplated by the CFAA. *See, e.g., Tschirhart*, 05-CV-372-OLG, slip op. at 9 (Exhibit B) (rejecting similar CFAA claim); *International Ass'n of Machinists & Aerospace Workers v. Werner*, 390 F. Supp. 2d 479 (D. Md. 2005) (dismissing claim under CFAA where defendant had authorization to access computer at issue); *see also In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d at 267; *Elektra Entm't Group, Inc. v. Does 1-9*, 2004 WL 2095581, at *5 (S.D.N.Y. Sep. 8, 2004) (holding Defendant has "minimal 'expectation of privacy in downloading and distributing copyrighted songs without permission'").

In short, Defendant's own actions effectively provided a blanket authorization for others to access the contents of her shared folder. As a result, no claim under the CFAA

§1030(a)(5)(B) and (C) for unauthorized access to Defendant's computer is available to her 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, that . . . causes loss aggregating at least \$5,000 in value during any one year period to one or more individuals." 18 U.S.C. § 1030(e)(8)(A); *Miles v. America Online, Inc.*, 202 F.R.D. 297 (M.D. Fla. 2001). There is not a single factual allegation in Defendant's counterclaims to support this element beyond the conclusory and legally insufficient statement that Plaintiffs "interfer[ed] with [Defendant]'s possession of her computer." (Answer at 6.) *See Jackson*, 372 F.3d at 1262 ("Conclusory allegations . . . will not prevent dismissal.") Thus, Defendant's counterclaim likewise fails.

IV. DEFENDANT'S CLAIM FOR VIOLATION OF THE FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT (COUNT III) SHOULD BE DISMISSED BECAUSE SHE HAS NOT AND CANNOT PLEAD THE ELEMENTS OF SUCH A CLAIM

Defendant's third counterclaim, for violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") fails as a matter of law because, in addition to being protected by Florida's litigation privilege and the *Noerr-Pennington* doctrine, *see supra* Section I, Defendant has not, and cannot, plead essential elements of the claim. Florida Statute § 501.204 provides that "Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." To maintain a claim under FDUTPA, a party must allege "(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." *Rollins, Inc. v. Orkin Exterminating Co., Inc.*, 951 So. 2d

860, 869 (Fla. Dist. Ct. App. 2006). Other than conclusory repetition of this very language (*see* Answer at ¶¶ 20-21), Defendant fails to allege any facts to support any of these three required elements of her FDUTPA counterclaim.

A. Defendant does not and cannot adequately plead that Plaintiffs engaged in a deceptive act or unfair practice in trade or commerce.

As with all of her claims, Defendant's FDUTPA claim, based solely on allegations of Plaintiffs' legitimate efforts to vindicate their copyrights, are insufficient to state a claim under the FDUTPA. Put simply, "the issue when considering a claim under the Act is whether the alleged practice was likely to deceive a consumer acting reasonably in the same circumstances." *State v. Commerce Commercial Leasing, LLC*, 946 So. 2d 1253, 1258 (Fla. Dist. Ct. App. 2007).

As a threshold matter, Defendant does not allege the type of claim that the FDUTPA is aimed at addressing. The FDUTPA is a consumer protection statute aimed at unfair trade practices in the market-place. *See Rollins*, 951 So. 2d at 869. ("FDUTPA is intended to protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce."). Moreover, the Act prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." "Trade or commerce" is defined in the Act as "the advertising, soliciting, providing, offering, or distributing, whether by sale, rental or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated." Fla. Stat. § 501.203(8). Other than a single, wholly conclusory allegation that Plaintiffs engaged in "deceptive and unfair practices in the conduct of commerce," (Answer at ¶ 20), Defendant fails to plead any factual allegations that bring her claims within the purpose of the Act. That is, Defendant does not and cannot plead that Plaintiffs engaged in any practice "likely to deceive a consumer" or, for that matter, any "trade or

commerce” as defined by the Act. Plaintiffs and Defendant are not in a consumer transaction relationship and the conduct alleged is not the type of market-based conduct to which the Act is directed. Plaintiffs’ legitimate attempts to enforce their copyrights through the judicial process do not form the basis of a claim under the Act.

Further, Defendant’s counterclaim does not allege that Plaintiffs engaged in any deceptive act or unfair practice in trade or commerce. A deceptive act is “one that is likely to mislead consumers.” *Rollins*, 951 So. 2d at 869. An unfair practice is “one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” *Id.*(emphasis added). Putting aside Defendant’s hyperbolic characterization, 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. (Answer at ¶¶ 4-10); 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 (it is 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”).

B. Defendant does not and cannot adequately plead that she suffered actual damage under the Act.

Defendant does not and cannot allege she suffered actual damage as a result of the non-existent unlawful trade practice. See *Macias v. HBC of Florida, Inc.*, 694 So. 2d 88, 90 (Fla. Dist. Ct. App. 1997). Moreover, the Act “only allows recovery of damages related to the property which was the subject of the consumer transaction.” *Rollins, Inc. v. Heller*, 454 So. 2d 580, 584 (Fla. Dist. Ct. App. 1984). “The standard for determining the actual damages recoverable under FDUTPA is well-defined in the case law:

The measure of actual damages is the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties.

Rollins, 951 So. 2d at 867.

Defendant has not alleged any actual damage and certainly has not alleged “the fair market value of any product or service.” Her computer was not affected by Plaintiffs’ investigators examining files openly available on the Internet. Moreover, Defendant has not settled the underlying suit, thus, she was not “misled” by any alleged conduct. Defendant has not sustained any actual damages. Defendant’s conclusory allegation that she “suffered damages . . . and is entitled to recover actual damage” is insufficient to sustain the claim. (Answer at ¶ 21.) *See Jackson*, 372 F.3d at 1262 (“Conclusory allegations . . . will not prevent dismissal.”)

V. DEFENDANT’S CLAIM FOR CIVIL EXTORTION (COUNT IV) SHOULD BE DISMISSED BECAUSE FLORIDA LAW DOES NOT RECOGNIZE THE CAUSE OF ACTION, THERE IS NO BASIS TO APPLY CALIFORNIA LAW, AND DEFENDANT LACKS STANDING TO SUE UNDER CALIFORNIA LAW

Defendant’s claim for civil extortion fails because Florida does not recognize the tort of civil extortion. *See Lacombe v. Verizon Communications, Inc.*, No. 8:06-cv-1942-T-24 MSS, 2006 U.S. Dist. Lexis 86980 at *6 (M. D. Fla. November 29, 2006) (holding violation of criminal extortion statute §836.05 does not give rise to a civil cause of action). Thus, in an apparent attempted end-run around the law of the forum state, Defendant brings a claim for civil extortion under the California Penal Code §§ 519 and 523. Defendant has not alleged a single fact that justifies the application of California law to this action. Choice of law analysis dictates against the application of California law.

The first step in choice of law analysis requires the Court to determine which choice of law rules to apply. A federal district court applies the choice of law rules of the forum state, in

this case, Florida. *See Nelson v. Freightliner, LLC*, No. 04-13762, 2005 U.S. App. Lexis 21256 at *7 (11th Cir. September 29, 2005). In tort cases, Florida applies the “significant relationship test” which “involves consideration of several factors to determine which state has the most contacts with the action or the greatest interest in the outcome.” *Id.* Contacts to be taken into account include (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (4) the place where the relationship, if any, between the parties is centered. *Id.* The Court must then consider which state has the most significant relationship to the occurrence. *Id.*

Defendant has not alleged a single fact that supplies the basis for applying California law in this case. Defendant has not alleged a single contact with California anywhere in her allegations. Likewise, Defendant has failed to allege any relationship California bears to this action. Defendant cannot simply pick a state out of thin air and bring suit under its laws. And Defendant has provided no basis for applying the law of an unrelated state to her claims. Thus, Defendant’s civil extortion claim, a claim not recognized by Florida law, should be dismissed.

Moreover, Defendant does not have standing to bring suit under California law. Defendant has not alleged that any of the conduct she complains of occurred in California, nor that she ever lived there or indeed has any connection to the state. As such, she is not within the class of people California law seeks to protect and she does not have standing to bring suit under those laws. *See Stone v. Crispers Restaurant Inc.*, No. 6:06-cv-1086-Orl-31KRS, 2006 U.S. Dist. Lexis 71997 at *2 (M.D. Fla. October 3, 2006) (holding that where party did not allege having resided or worked in any state other than Florida, party lacked standing to bring claims under laws of Alabama, Georgia, South Carolina or Tennessee).

Even if Defendant could bring a claim under California law, which she cannot, she has failed to allege any of the required elements of a claim for civil extortion under California law. Civil extortion under California law is “a cause of action for the recovery of money obtained by the wrongful threat of criminal or civil prosecution.” *Fuhrman v. California Satellite Systems*, 179 Cal. App. 3d 408, 425 (1986). “It is essentially a cause of action for *money obtained by duress, a form of fraud.*” *Id.* (emphasis added). Further, “to be actionable, the threat of prosecution must be made with the knowledge of falsity of the claim.” *Id.* Defendant has not and cannot allege that Plaintiffs obtained any money from her. As discussed above, Defendant has not settled the underlying action, thus Plaintiffs have not obtained any money from her. Moreover, Defendant has entirely failed to allege that any of Plaintiffs’ alleged conduct was done with the knowledge that Plaintiffs’ claim for copyright infringement was false. Rather, Plaintiffs brought suit against Defendant to vindicate their copyrights. *See Heslep*, No. 4:06-cv-132-Y, slip op. at 11-12 (“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”) (Exhibit A).

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

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

- (a) a conspiracy between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.

Florida Fern Growers Ass'n v. Concerned Citizens, 616 So. 2d 562, 565 (Fla. Dist. Ct. App. 1993). “Additionally, an actionable conspiracy requires an actionable underlying tort or wrong.” *Raimi v. Furlong*, 702 So. 2d 1273, 1284 (Fla. Dist. Ct. App. 1997). Acts which are privileged cannot provide the basis for the underlying actionable tort or wrong. *See Wright v. Yurko*, 446 So. 2d 1162, 1164-65 (Fla. Dist. Ct. App. 1984) (“Since privilege bars [plaintiff]’s causes of actions against [defendants] for defamation, it follows that there can be no actionable conspiracy to commit the same acts. An actionable wrong requires an actionable underlying tort or wrong. An act which does not constitute a basis for a cause of action against one person cannot be made the basis for a civil action for conspiracy.”); *Feliu v. Rundle*, No. -5-20169-CIV-Hoeveler, 2007 U.S. Dist. Lexis 36217 at *10 (S.D. Fla. May 16, 2007) (“It is clear that acts for which a prosecutor enjoys absolute immunity may not be considered as evidence of the prosecutor’s membership in a conspiracy for which the prosecutor does not have immunity.”).

As discussed above, all of Defendant’s allegations in this suit relate to Plaintiffs’ actions in prosecuting this action. As such, Plaintiffs’ conduct is privileged under Florida’s litigation privilege and/or the *Noerr-Pennington* doctrine and cannot form the basis of any conspiracy or any *actionable* underlying tort or wrong upon which a civil conspiracy claim must be based.

Moreover, none of the provisions Defendant cites to provide the basis of an actionable underlying tort or wrong for her civil conspiracy claim. Defendant cites Florida Statute Chapter 493 regarding Florida’s licensing requirements for investigators in Florida (Answer at ¶ 26) but does not, and cannot, cite any authority for the proposition that a violation of Chapter 493 constitutes a tortious act or gives rise to any private cause of action under Florida law, let alone a private cause of action for conspiracy. *See Junior Money Bags, Ltd. v. Segal*, 970 F.2d 1, 11 (5th

Cir. 1992) (holding that it is not for the federal courts to adopt novel theories of recovery under state law, “but simply to apply that law as it currently exists”).

Defendant also fails to allege facts showing a violation of Florida Statute Chapter 493. Florida’s licensing scheme cannot apply to non-Florida entities conducting activities in other states, especially where such entities may be subject to other licensing requirements. *See Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989) (A statute that seeks to control commerce occurring wholly outside the boundaries of a State “exceeds the inherent limits of the enacting State’s authority and is invalid.”) Here, Defendant fails to allege a single fact to show that Plaintiffs or anyone acting on Plaintiffs’ behalf conducted any investigation activity (or any activity at all) in the State of Florida that would subject them to the Florida’s licensing statute. (Answer at ¶¶ 4-10.) Defendant does not allege that Plaintiffs or MediaSentry’s alleged conduct in obtaining the IP addresses occurred in Florida, nor could she so allege. Simply put, neither MediaSentry nor Plaintiffs conducted any activity in Florida that would subject them to the licensing provisions of the Florida statutes.

None of the other provisions cited by Defendant are an actionable underlying tort or wrong. (*See* Answer ¶26) (listing, in addition to Fla. Stat. Ch. 493, 18 U.S.C. 1030(a)(2)(C), Cal. Penal Code §§ 519 and 523, 15 U.S.C. § 1692(a) and Fla. Stat. § 559.72). As discussed above, Defendant has failed to allege a claim under 18 U.S.C. 1030 and Cal. Penal Code §§ 519 and 523, thus those provisions cannot provide the basis of the underlying *actionable* tort or wrong. The only remaining possibility is Defendant’s misplaced reliance on federal and state Fair Debt Collection Practices Acts, 15 U.S.C. 1692(a) and Fla. Stat. § 559.72. Defendant has in no way alleged the elements of an actionable tort or wrong arising under either of these acts. Nowhere in her allegations does Defendant so much as mention debt-collection and indeed, she cannot do so

in good faith. Plaintiffs are *litigants* who seek to vindicate their copyrights. They are not debt collectors, nor are they trying to attempt to collect on a debt, thus neither of the debt collection acts cited by Defendant can supply the basis for the underlying wrong necessary for Defendant to maintain her conspiracy claim.

For all of these reasons, Defendant's civil conspiracy claim fails as a matter of law. *See Raimi*, 702 So. 2d at 1284; *Wright*, 446 So. 2d at 1164-65

CONCLUSION

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

Dated this 27th day of July, 2007.

/s/ Chaila D. Restall

L. JOSEPH SHAHEEN, JR.

Florida Bar No. 212385

CHAILA D. RESTALL

Florida Bar No. 0581771

AKERMAN SENTERFITT

SunTrust Financial Centre

401 E. Jackson Street, Suite 1700

Tampa, Florida 33602

Main: (813) 223-7333

Fax: (813) 223-2837

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 27, 2007 I electronically filed the foregoing, Motion to Dismiss Counterclaims - Memorandum of Law In Support. I further certify that a true and correct copy has been provided to the following via the CM/ECF system and by U.S. Mail:
Michael Alex Wasylik, Esquire, P.O. Box 2245, Dade City, Florida 33526.

s/ Chaila D. Restall
Chaila D. Restall