

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION

**Atlantic Recording Corporation**, a Delaware corporation; **Elektra Entertainment Group, Inc.**, a Delaware corporation; **Capitol Records, Inc.**, a Delaware corporation; **UMG Recordings, Inc.**, a Delaware corporation; **Sony BMG Music Entertainment**, a Delaware general partnership; and **Arista Records, LLC**, a Delaware limited liability company,

Plaintiffs,

vs.

**Catherine Njuguna**,

Defendant.

No. 4:06-CV-2341-CWH

**Memorandum of Law in Opposition to Plaintiffs' Motion to Dismiss**

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**INTRODUCTION**

**I. Background**

This case is another skirmish in the RIAA's<sup>1</sup> four-year war to use the Federal Courts to shore up the American recording industry's failing business model. In the late nineties, various websites, FTP<sup>2</sup> servers, and the infamous Napster software changed the face of music forever. MPEG layer 3 audio files ("mp3s"), a compressed sound file format, made it possible to transfer music via computer files quickly and with little loss in sound quality. These files allowed any music lover with a little Internet aptitude the ability to quickly discover new music and share their music with the

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<sup>1</sup> The Recording Industry Association of America ("RIAA") is the trade group that represents the U. S. recording industry, and is the entity ultimately behind this lawsuit.

<sup>2</sup> "File Transfer Protocol" – the protocol for exchanging files over the Internet. An FTP server would allow a person utilizing FTP client software to upload files to and download files from the FTP server.

entire world. Unfortunately, it also allowed an unprecedented level of unauthorized and illegal duplication of music in violation of the federal Copyright Act.<sup>3</sup>

The wave of internet piracy of music, movies, books, and software has led to a frenzy of hand-wringing, hyperbole, and hysterics on the part of media companies. NBC Universal's<sup>4</sup> general counsel recently went as far as suggesting America wastes entirely too much money policing crimes like burglary, fraud, and bank robbery when it should be doing something about piracy instead.<sup>5</sup> This hysteria is not unprecedented. In 1982, MPAA<sup>6</sup> president Jack Valenti said to congress "I say to you that the VCR is to the American film producer and the American public as the Boston Strangler is to the woman home alone."<sup>7</sup> The VCR did not "strangle" the film industry, which now makes very healthy profit from video sales and rentals. In the 1980s, British record companies believed copying albums on equipment like twin cassette decks would put them out of business and launched a "Home Taping is Killing Music" campaign. While a number of unfortunate mix tapes were made by teenagers, home taping didn't kill the music.

What is different from these previous "crises" is the massive, organized campaign of *litigation* intended to punish pirates and deter piracy. Since 2003, thousands of lawsuits have been filed across the United States against a wide variety of defendants. These defendants include actual pirates, copying and distributing music for profit without paying royalties, and lazy teenagers that just didn't feel like they had to pay \$15 for a CD to get the one decent song it contained. These defendants have violated the law and the plaintiffs are within their rights to pursue them.

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<sup>3</sup> 17 U.S.C. § 101 *et seq.*

<sup>4</sup> Universal Music Group is a plaintiff in this action.

<sup>5</sup> Ken Fisher, *Copyright coalition: Piracy more serious than burglary, fraud, bank robbery*, available at <http://arstechnica.com/news.ars/post/20070615-copyright-coalition-piracy-more-serious-than-burglary-fraud-bank-robbery.html> (last visited August 12, 2007).

<sup>6</sup> The MPAA is the trade organization of the American film industry, analogous to the RIAA.

<sup>7</sup> <http://cryptome.org/hrcw-hear.htm> (last visited August 12, 2007).

However, the Plaintiffs, and other RIAA-affiliated companies, have also sued dead people,<sup>8</sup> children,<sup>9</sup> the disabled,<sup>10</sup> people who do not own computers,<sup>11</sup> or simply sued the wrong person.<sup>12</sup> These scattershot tactics have created considerable enmity for the RIAA from the public, and the RIAA's subsequent treatment of innocent defendants has further tarnished its reputation, leading to a growing number of defendants asserting counterclaims, and one potential nationwide class action.<sup>13</sup>

## II. The Case at Bar<sup>14</sup>

*"When you fish with a net, you sometimes are going to catch a few dolphin."*

- Amy Weiss, RIAA spokeswoman<sup>15</sup>

The Defendant in this action, Catherine Njuguna, is one of the "dolphin" so flippantly described by the RIAA.

Defendant received a letter from Time Warner Cable in January of 2006 informing her that her personal information had been disclosed pursuant to a subpoena issued in an *ex parte* "John

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<sup>8</sup> Toby Coleman, *Deceased Woman Named in File-Sharing Suit*, CHARLESTON GAZETTE, Feb. 4, 2005 at P1A. See also Dmitri Davydov, *10 Most Outrageous [sic] Frivolous Lawsuits*, available at <http://madconomist.com/10-most-outrageous-frivolous-lawsuits> (Last visited September 8, 2007) (lawsuit #8).

<sup>9</sup> *Electra Entertainment Group, Inc. et al. v. Santangelo*, 06-cv-11520 (S.D.N.Y. 2006).

<sup>10</sup> *Electra Entertainment Group, Inc. et al. v. Schwartz*, 06-cv-03533 (E.D.N.Y. 2006).

<sup>11</sup> *UMG Recordings, Inc., et al. v. Lindor*, 05-cv-1095 (E.D.N.Y. 2005).

<sup>12</sup> *Atlantic Recording Corp., et al. v. Zuleta*, 06-cv-1221 (N.D.Ga. 2006); *BMG Music et al. v. Thao*, 07-cv-143 (E.D. Wis 2007); *Capital Records, Inc., et al. v. Foster*, 04-cv-1569 (W.D.Okla 2004); *Interscope Records, Inc., et al. v. Leadbetter*, 05-cv-1149 (W.D. Wash 2005); *Priority Records, LLC, et al. v. Chan*, 04-cv-73645 (E.D. Mich 2004); *Virgin Records America, Inc, et al. v. Marson*, 05-cv-3201 (C.D.Cal. 2005).

<sup>13</sup> *Anderson v. Atlantic Recording Corp., et al.*, No. 07-934-BR (D.Or. 2007). The Amended Complaint in this action is attached at Exhibit A.

<sup>14</sup> A number of allegations made in this section are not found in the counterclaims. To the extent that it is necessary, the Defendant asks leave of the Court to amend its counterclaims consistent with these allegations if the court holds the allegations found in the complaint are insufficient. See Argument, Sec. I, *infra*.

<sup>15</sup> Dennis Roddy, *The Song Remains the Same*, PITTSBURGH POST-GAZETTE, Sept 14, 2003, available at <http://www.post-gazette.com/columnists/20030914edroddy0914p1.asp> (last visited August 12, 2007).

Doe” action filed against several IP addresses in 2005.<sup>16</sup> This letter provided her a number to call with any questions. This number was for the “record companies’ representatives” and included the email of [info@SettlementInformationLine.com](mailto:info@SettlementInformationLine.com). These lines of communication connected the Defendant to Settlement Support Center, LLC, (“SSC”) a company employed by the Plaintiffs to negotiate settlements with persons accused by the Plaintiffs of copyright infringement.

Defendant called the Settlement Support Center and spoke with a representative, who informed her that they had evidence that a computer with IP address 67.9.63.16, which had been identified as Defendant’s, had shared over 450 music files via KaZaA file-sharing software on October 30, 2005 at 3:22 am. This accusation was troubling to the Defendant, as she did not know what file-sharing was, did not know how to download music, did not have any file-sharing software installed on her computer, and did not have the alleged music files on her computer. She was also in Oklahoma City that night, and her computer was turned off. The Settlement Support Center offered to settle the claims against her for \$3750.00, or slightly more if she wished to pay over time.

Over the next two months, Defendant attempted to prove her innocence to the Plaintiffs, through Settlement Support Center. She repeatedly argued that the issue must be a case of mistaken identity. Defendant tried to explain she listened to Christian contemporary music, not the music found in the Complaint, which included songs titled “Teenage Dirt Bag” [sic], “She fuckin hates me” [sic], “I touch myself” [sic], “That Nigger’s Crazy” [sic], and “Fuck You Softly.” [sic]

Defendant, with the assistance of an employee of SSC she had on the phone, searched her computer for the alleged software and music; they found none. She offered to have her computer inspected; her offer was not accepted.<sup>17</sup> SSC continued to threaten to file suit if she did not pay the

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<sup>16</sup> Lava Records, LLC, et al. v. Does 1-213, 05-cv-10075 (S.D.N.Y. 2005).

<sup>17</sup> Tanya Anderson, another falsely accused Defendant, made a similar offer, and was rebuked. Ex. A ¶¶ 6.29-6.30, 6.39.

\$3750.00. When Defendant asked how she, a person of limited means, could afford the settlement, the SSC representative suggested she get a credit card.<sup>18</sup>

Plaintiffs filed suit on August 22, 2006, against a “Cathryn Njuguna,” a name the Defendant has never used before and has never seen before. The SSC informed the Defendant that the settlement demand was \$4500.00, or \$4750.00 paid over time.

In March, Defendant began to correspond directly with the Plaintiffs' counsel. At this point, she was told that another incident of file sharing they attributed to her had taken place in May of 2006. Plaintiffs' counsel discovered that this incident was a mistake in their records, and in a commendable show of professionalism, informed Defendant of the mistake, but apparently did not inform SSC.

In March of 2007, the Defendant decided the cost to litigate and be exonerated was too high and called the SSC to profess her innocence one final time and settle the case.<sup>19</sup> The representative was rude, telling Defendant there was no way she could have not shared music via KaZaA, as they now had evidence of two incidents. Defendant attempted to explain that the second incident was a mistake on the Plaintiffs' part, but said explanation fell on deaf ears. The representative became progressively ruder, and eventually told Defendant that she would face criminal prosecution should her infringement continue. After this conversation, Defendant boxed up her old computer and purchased a new one; she then retained counsel.

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<sup>18</sup> Other representatives have suggested “...that students drop out of college or go to community college in order to be able to afford settlements.” Cassi Hunt, *Run Over by the RLA Don...t [sic] Tap the Glass*, available at <http://www-tech.mit.edu/V126/N15/RIAA1506.html> (last visited September 8, 2007).

<sup>19</sup> In the Anderson case, an employee of SSC stated that the record company plaintiffs would not stop in their efforts to force payment, as to do so would encourage other people to defend themselves. The threat of protracted and costly litigation would discourage most Defendants from clearing their name. Ex. A ¶ 6.28.

Defendant answered the Plaintiffs' Complaint and asserted counterclaims on May 2, 2007. On July 11, 2007, Plaintiffs moved to dismiss the Defendant's counterclaims. This Memorandum opposes Plaintiffs' Motion.

### ARGUMENT

The issue before this Court is whether, in a universe of factual scenarios consistent with the allegations of the Defendant's counterclaims, there exists **one** scenario where the Defendant is entitled to relief. This is a low threshold and as such, the Plaintiffs' motion should be **denied**.

#### I. **Standard - Fed. R. Civ. P. 12(b)(6)**

The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint. Ostrzenski v. Seigel, 177 F.3d 245 (4th Cir. 1999). In considering a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the court should accept the well-pleaded allegations as true, and view the case in the light most favorable to the non-moving party. A Counterclaim should not be dismissed unless it is clear that no relief could be granted under *any* set of facts that could be proved consistent with the allegations. Id. The Court should not dismiss the case unless the non-moving party can prove no set of facts which would entitle it to relief. Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811 (M.D.N.C. 1995). It is also the duty of the court to examine the complaint to determine if the allegations provide for relief on any possible legal theory, not just those asserted by the Defendant. 5B Charles Allen Wright & Arthur R. Miller, Federal Practice and Procedure § 1357, at 676 (3d ed. Supp. 2007) (hereinafter "Wright & Miller").

Rule 12(b)(6) also limits the court's inquiry; it is not a vehicle for the court to assess the record or resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses. Republican Party of NC v. Martin, 980 F.2d 943, 952 (4th Cir. 1993). "A party moving to dismiss a complaint under Rule 12(b)(6) is 'test[ing] the sufficiency of [the] complaint' and asserting, in effect, 'that the plaintiff [is not] entitled to relief *under any legal theory which might plausibly*

*be suggested by the facts alleged.*” State v. Trimble Navigation, 484 F.3d 700 (4th Cir. 2007). (Traxler, J., dissenting) (quoting Edwards v. City of Goldsboro, 178 F.3d 231, 243-44 (4th Cir.1999)) (emphasis in original). Furthermore,

A dismissal under Rule 12(b)(6) generally is not final or on the merits and the court normally will give plaintiff leave to file an amended complaint. The federal rule policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that plaintiff be given every opportunity to cure a formal defect in his pleading. This is true even though the court doubts that plaintiff will be able to overcome the defects in his initial pleading. Amendment should be refused only if it appears to a certainty that plaintiff cannot state a claim. The better practice is to allow at least one amendment regardless of how unpromising the initial pleading appears because except in unusual circumstances it is unlikely that the court will be able to determine conclusively on the face of a defective pleading whether plaintiff actually can state a claim.

Ostrzenski at 252-53 (citing 5A Charles Allen Wright & Arthur R. Miller, Federal Practice and Procedure § 1357, at 360-67 (2d ed. 1990)).

“The district court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel or even ‘extreme,’ since it is important that new legal theories be explored and assayed in the light of the actual facts rather than a pleader’s suppositions.” 5B Wright & Miller § 1357 at 686; see also Virginia Hosp. Ass’n v. Baliles, 830 F.2d 1308, 1315 (4th Cir. 1987) (Phillips, J., dissenting) (citing the foregoing principle in an argument to deny summary judgment).

## **II. Defendant's Counterclaims Clearly Meet the Minimal Requirements of the Federal Rules**

"Notice Pleading" has been the system of pleading in federal courts since the introduction of the Federal Rules of Civil Procedure in 1938. The Fourth Circuit, in Ostrzenski, aptly describes the standard as thus:

Federal Rule of Civil Procedure 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). "This portion of Rule 8 indicates the objective of the rules to avoid technicalities and to require that the pleading discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the claim. . . ." 5 Charles Alan Wright &

Arthur R. Miller, Federal Practice and Procedure § 1215 (2d ed. 1990) (footnote omitted). Under Rule 8(a)(2), a claim is acceptable if "a plaintiff colorably states facts which, if proven, would entitle him to relief." *Adams v. Bain*, 697 F.2d 1213, 1216 (4th Cir. 1982). But, a claimant need not set out in detail all of the facts upon which the claim for relief is based; rather, he need only provide a statement sufficient to put the opposing party on fair notice of the claim and the grounds supporting it. See *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 568 n. 15 (1987); *Karpel v. Inova Health Sys. Servs.*, 134 F.3d 1222, 1227 (4th Cir. 1998); *Gilbane Bldg. Co. v. Federal Reserve Bank*, 80 F.3d 895, 900 (4th Cir. 1996).

Ostrzenski at 251; see also Register v. Cameron & Barkley Co., 467 F.Supp.2d 519, 525 (D.S.C. 2006). Relatively few complaints fail to meet this liberal standard. 5A Wright & Miller § 1357 at 676. The 2007 Thomson/West edition of the Federal Rules of Civil Procedure, undoubtedly within eyeshot of the reader of this memorandum, contains several examples of this style of pleading on pages 65-71.

Plaintiffs go to great pains to describe a handful of scenarios where Defendant would arguably be denied relief. As stated previously, a counterclaim should not be dismissed unless it is clear that no relief could be granted under *any* set of facts that could be proved consistent with the allegations. Ostrzenski, *supra*. It follows that if relief could be granted under any one set of facts consistent with the allegations of the counterclaim, then dismissal is not warranted. What follows in this memo are only a few possible scenarios where the Court can find the Plaintiff liable.

**A. Defendant's Unfair Trade Practices Counterclaim Meets the Minimal Requirements of the Federal System**

“Under the [South Carolina Unfair Trade Practices Act, S.C. Code § 39-5-10 *et seq.* (“SCUPTA”)], a trade practice is unfair when it is offensive to the public policy or when it is immoral, unethical, or oppressive, and often involves misrepresentations to consumers.” Williams-Garrett v. Murphy, 106 F.Supp.2d 834 (D.S.C. 2000) (citations omitted). The bad acts of the Plaintiffs and SSC are described in paragraph 41 of the Answer and Counterclaim and the introduction of this memorandum, and include misrepresentation and misconduct during negotiation that is unethical and oppressive at best, and unauthorized practice of law at worst.

**1. Plaintiffs, by and through SSC, Have Engaged in Unfair and Deceptive Acts**

Some of the bad acts of the Plaintiffs/SSC could constitute unauthorized practice of law, which in and of itself is an unfair and deceptive trade practice.<sup>20</sup> The practice of law is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability. Linder v. Ins. Claims Consultants, 348 S.C. 477, 560 S.E.2d 612 (2002). Such other “activities” include:

- plea negotiations. In re Lexington County Transfer Court, 334 S.C. 47, 512 S.E.2d 791 (1999);
- negotiation with representatives of the Second Injury Fund. S.C. Bar. Ethics Advisory Committee Opinion 90-12, 1990 WL 709792 (1990);
- advising clients on their rights under an insurance policy. Linder, *supra*.
- developing a strategy to use in collecting a debt and sending letters designed to induce payment. Roberts v. LaConey, Op. No. 26376, 2007 WL 2479501 (S.C. filed September 4, 2007).

In this case, the Plaintiffs' servant SSC has attempted to negotiate a settlement with the Defendant, both before and after litigation had commenced. (Answer ¶ 41(a)). SSC, as a limited liability corporation, cannot practice law. See S.C. Code § 40-5-320. SSC also took it upon itself to

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<sup>20</sup> Defendant is aware that In re Unauthorized Practice of Law Rules Proposed by the S.C. Bar, 309 S.C. 304, 422 S.E.2d 123 (1992) and its progeny stand for the proposition that there is no private right of action for unauthorized practice of law (“UPL”). However, the bad acts of the Plaintiffs/SSC are not limited to acts that could be considered UPL. See Answer ¶ 41.

Furthermore, assuming, *arguendo*, the Plaintiffs’ only bad acts were UPL and there exists no private right of action for UPL, SCUPTA would be an exception. This Court has held an action for SCUPTA can lie for behavior that violates a statute, even when a private right of action is barred for the violation of said statute, as long as the acts complained of are unfair, deceptive, and detrimental to the public interest. See Raco Car Wash Systems, Inc. v. Smith, 730 F.Supp. 695, 706 (D.S.C. 1989) (copyright infringement claim was barred by innocent infringer defense, but the same act was actionable under SCUPTA).

advise the Defendant, incorrectly,<sup>21</sup> that she is subject to criminal penalties for the acts the Plaintiffs allege, presumably to cow the Defendant into settlement. (Answer ¶41(b-c)).

The Supreme Court of Washington has held that the unauthorized practice of law is an unfair and deceptive trade practice under Washington's Unfair and Deceptive Trade Practices Act, R.C.W. 19.86.010 *et seq.* Bowers v Transamerica Title Ins. Co., 675 P.2d 193 (Wash. 1983). In Bowers, an escrow agent that prepared closing documents for a real estate transaction failed to advise a buyer of the risks of an unsecured sale of real estate. The Washington Supreme Court, sitting *en banc*, held that the escrow agent had engaged in the unauthorized practice of law, and more important to the instant litigation, that authorized practice of law constitutes an unfair and deceptive trade practice under the Washington Consumer Protection Act, R.C.W. 19.86.020, a statute substantially similar to South Carolina's Unfair and Deceptive Trade Practices Act.

Bowers is not an isolated ruling. Unauthorized practice of law is an Unfair and Deceptive Trade Practice under the Florida Deceptive and Unfair Trade Practices Act. In re Samuels, 176 B.R. 616 (Bankr.M.D.Fla.1994). (Citing Fla. Stat. § 501.204.). Unauthorized practice of law is also an unfair and deceptive trade practice under Section 110(i) of the bankruptcy code. See In re Medley,

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<sup>21</sup> 17 U.S.C. § 506 provides in pertinent part:

- (a) Criminal Infringement.— Any person who infringes a copyright willfully either—
- (1) for purposes of commercial advantage or private financial gain, or
  - (2) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000, shall be punished as provided under section 2319 of title 18, United States Code. For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement.

In Exhibit B to their Complaint, Plaintiffs appear to allege approximately 456 musical works have been infringed. Each of the works have a retail value of approximately \$1.00. E.g. <http://www.apple.com/itunes/store/music.html> (last visited September 9, 2007) ; [http://blogs.guardian.co.uk/technology/archives/2007/08/10/universal\\_plans\\_drmfree\\_downloads\\_without\\_apple.html](http://blogs.guardian.co.uk/technology/archives/2007/08/10/universal_plans_drmfree_downloads_without_apple.html) (last visited August 21, 2007)

2005 WL 3093392 at \*4 (Bkrctcy.M.D.N.C. 2005); In re Barcelo, 313 B.R. 135 (Bkrctcy.E.D.N.Y. 2004). Furthermore, authority exists that unauthorized practice of law is an unfair and deceptive trade practice under the law of North Carolina. See Pinehurst, Inc. v. O'Leary Bros. Realty, Inc., 338 S.E.2d 918 (N.C.Ct.App. 1986) (acts that subjected party to unauthorized practice of law investigation served as basis for unfair and deceptive trade practices claim).

According to the allegations of the Answer and Counterclaims (¶ 41), the Plaintiffs, by and through SSC, have engaged in advising the Defendant on the criminal law of copyright and attempted to negotiate a settlement with the Defendant. Furthermore, they have misrepresented that a computer could download music when the power was not turned on. (Answer ¶ 41(d)). These actions are immoral, unethical, oppressive, and involve misrepresenting the law and facts to the Defendant. Actions in a similar vein are considered unfair and deceptive in other jurisdictions, and, for the protection of the public of South Carolina, should be considered unfair and deceptive here.

## **2. The Plaintiffs Engage in Unfair Practices in "Trade" in South Carolina**

The Plaintiffs argue that the pleadings do not allege they engage in "trade", as defined under SCUPTA, and thus should be dismissed. The Plaintiffs are multi-million-dollar entities in the business of manufacturing music for the consumption of consumers worldwide. The Plaintiffs' campaign of litigation is ostensibly meant to protect this revenue stream and is intertwined with the business model of the Plaintiffs. Speaking of their litigation campaign, an RIAA spokeswoman said "This is part of an ongoing strategy to help revive sales in the stores and online." Roddy, note 15 *supra*. The Plaintiff asks the Court to take judicial notice of the Plaintiffs' trade in South Carolina.

## **3. The Plaintiffs have Engaged in this Behavior in the Past, and Thus Their Behavior has an Adverse Effect on the Public Interest**

For claims to be actionable under South Carolina's Unfair Trade Practices Act, the alleged unfair trade practice must affect the public interest, which impact may be made if the practice has potential for repetition. Wingard v. Exxon Co., U.S.A., 819 F.Supp. 497 (S.C. 1992); Haley Nursery

Co., Inc. v. Forrest, 298 S.C. 520, 381 S.E.2d 906 (1989); Barnes v. Jones Chevrolet Co., Inc., 292 S.C. 607, 358 S.E.2d 156 (Ct. App. 1987). A party may prove potential for repetition by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or by showing a company's procedures create potential for repetition of the unfair and deceptive acts. Harrington v. Blackston, 322 S.C. 470, 473 S.E.2d 47 (1996).

The similarities between the allegations of Tanya Anderson in her Amended Complaint, attached as Exhibit A, to that of the Plaintiff (and the fact that they are part of a putative class action) should be evidence enough to show the Plaintiffs have engaged in similar behavior in the past, and thus creates potential for repetition. See Ex. A, ¶¶ 6.26-6.43.

#### **4. Defendant has Adequately Plead Damages**

Defendant has pled damages directly and proximately caused by the Plaintiffs, consistent with the rule 8 prescription to make a “short and plain statement of the claim showing that the pleader is entitled to relief.” The Defendant's style of pleading is consistent with the prevailing style of complaints currently before this court, the vast majority of whom have been tested on their merits and not been subjected to a motion under 12(b)(6). Should this Court require more detail, the Defendant has suffered special monetary damages when she purchased a new computer due to the Plaintiffs'/SSC's statements and she has suffered severe emotional distress as a result of the harassment she has endured at the hands of the Plaintiffs'/SSC, both during and before litigation.

**B. Defendant Sets Forth a Proper Negligence Action in Accordance with the Minimal Federal Requirements**

Defendant has alleged negligence on the part of the Plaintiffs under a multitude of theories. In order for the Plaintiffs to prevail in their motion to dismiss, they must prove under the facts as plead, and the reasonable inferences therefrom, the Defendant is utterly incapable of meriting any relief whatsoever. The Plaintiffs cannot meet this threshold, and as such their motion must fail.

**1. Plaintiffs Owe Defendant a Clear Duty**

*a. Duty to Negotiate in Good Faith*

In their memorandum, Plaintiffs appear to argue that two opposing parties in litigation have no duty to negotiate in good faith. This apparent argument runs counter to the goals of the American justice system and to the upbringing of most honest American citizens. In addition, in August of 2002 the ABA Section on Litigation published its Ethical Guidelines for Settlement Negotiations<sup>22</sup> (hereinafter “ABA Guidelines”), an admittedly exhortatory document that is based on the state-adopted Model Code or Model Rules of Professional Conduct. Section 2.2 of the ABA Guidelines provides: “A lawyer’s conduct in negotiating a settlement should be characterized by honor and fair-dealing.”

The ABA Guidelines also state that there is an affirmative duty for the opposing side to disclose material facts when: “(1) a lawyer has previously made a false statement of material fact or a partially true statement that is misleading by reason of omission; (2) a lawyer learns of a client’s prior misrepresentation of a material fact; and (3) a lawyer learns that his or her services have been used in the commission of a criminal or fraudulent act by the client, ‘unless such disclosure is prohibited by the ethical duty of confidentiality.’” ABA Guidelines at 4.1.2 (Notes).

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<sup>22</sup> Available at <http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf> (last visited September 8, 2007).

Furthermore, any settlement and release reached by parties to litigation is subject to the law of contracts. See generally Ecclesiastes Prod. Min. v. Outparcel Asso., Op. No. 4254 (S.C.Ct.App. Filed June 14, 2007). As such, a settlement agreement reached through negotiation that was not made in good faith can be set aside on a multitude of grounds, such as unilateral mistake (*e.g.* misrepresentations, omissions), mutual mistake, or unconscionability.

The Plaintiffs/SSC have not honored their obligation and duty to negotiate in good faith and in a fair manner. They have advised an unrepresented client regarding her legal rights, sometimes incorrectly, and misled the Defendant in order to force her into a settlement that is a pure contract of adhesion, with unconscionable terms, at a cost that is extraordinarily excessive considering alleged loss of the Plaintiffs. The bad acts of the Plaintiffs/SSC simply cannot be “business as usual”, and thus conduct without consequence.

*b.        Undertaking to Advise the Defendant*

Plaintiffs are correct in their assertion that they and Defendant are now adverse parties in a lawsuit, and Plaintiffs are correct that the common law does not normally impose a duty to act. However, this is different from a Kitty Genovese situation, where the Plaintiffs are within their rights to listen to a young woman be stabbed to death without aiding her. In this case the Plaintiffs wield the knife.

“The common law ordinarily imposes no duty on a person to act; however, where an act is voluntarily undertaken, the actor assumes the duty to use due care.” Miller v. City of Camden, 329 S.C. 310, 494 S.E.2d 813 (1997); *Cf* Restatement (Second) of Torts § 324A (1965) (liability for physical harm due to a voluntary undertaking). When a layman voluntarily undertakes to perform the functions of an attorney, it is axiomatic that he be held to the same standard of care. See Bowers, supra; Wright v. Langdon, 623 S.W.2d 823 (Ark. 1981).

Plaintiffs/SSC were not expected or required to undertake the practice of law, authorized or unauthorized, on behalf of the Defendant. They did anyway, advising the Defendant of the criminal law of copyright, the mechanics of file-sharing software, and engaged in settlement negotiations. (Answer ¶41). Furthermore, the Plaintiffs/SSC advised the Defendant to get a credit card in order to pay their proposed settlement.

*c. Unlawful Communication*

South Carolina Code § 16-17-430 provides, in pertinent part:

(A) It is unlawful for a person to:

\* \* \*

(2) threaten in a telephonic communication or any other electronic means an unlawful act with the intent to coerce, intimidate, or harass another person;

\* \* \*

(6) knowingly permit a telephone under his control to be used for any purpose prohibited by this section.

\* \* \*

According to the Defendant's allegations and the reasonable inferences arising therefrom, the Plaintiffs/SSC have used the telephone to harass the Defendant and to coerce and intimidate her into settlement. The essential purpose of this statute is to protect the Defendant from the Plaintiffs'/SSC's bad acts described previously.

*d. Wire Fraud*

The Plaintiffs are correct that the gravamen of a violation of 18 U.S.C. §§ 2314 & 1343 is the misuse of interstate communications facilities to execute a scheme or artifice to defraud. U.S. v. Condolon, 600 F.2d 7, 8 (4th Cir. 1979). The Defendant's allegations and the reasonable inferences arising therefrom contend that the Plaintiff is using the telephone and Internet to defraud her of monies by forcing her into a settlement in a case where she is innocent. Defendant is clearly within the class of people the Wire Fraud statute is meant to protect, and prevention of misconduct like the Plaintiffs' is clearly the essential purpose of the statute.

**2. Defendant has Suffered Cognizable Damages**

Defendant has suffered damages arising from the Plaintiffs'/SSC's bad acts, as described in II.A.4, *supra*.

### III. The Noerr-Pennington Doctrine Does Not Apply To The Defendant's Counterclaims

Plaintiffs contend that their various bad acts are protected by the Noerr-Pennington doctrine. The Noerr-Pennington doctrine grew out of antitrust litigation, and is still largely confined to the realm of business litigation, as the cases cited by the Plaintiffs will attest. Furthermore, the cases cited by the Plaintiffs are primarily business torts and related actions, whether antitrust, tortious interference with business relations, or torts related to business activities.

Courts recognize one, possibly two exceptions to the Noerr-Pennington Doctrine. The first is the "sham" exception, where the litigation must be objectively baseless, in the sense that no reasonable litigant could realistically expect success on the merits. Igen Int'l Inc. v. Roche Diagnostics, 335 F.3d 303 (4th Cir. 2003); Baltimore Scrap Corp. v. David J. Joseph Co., 237 F.3d 394, 399 (4th Cir 2001). If the litigation is found to be baseless, then the lawsuit must further conceal an attempt to interfere directly with the business relationships of a competitor. Baltimore Scrap at 399.

The second is the "fraud" exception, which was described, but not explicitly adopted, by the Fourth Circuit in Baltimore Scrap. Under the "fraud" exception, misrepresentations that "got to the core of the case", *i.e.* deprive the case of legitimacy, do not enjoy Noerr-Pennington immunity. Id. at 401-2.

Applying the Noerr-Pennington doctrine to this case is akin to hammering a square peg in a round hole. The case at bar is a not a business dispute. Plaintiffs are not filing suit to interfere with Defendant's business relationships, the appropriate situation to assert Noerr-Pennington immunity. The "sham" exception makes no sense in the context of this litigation whatsoever. Defendant's

counterclaims lay out a case of underhanded, unethical, bad faith negotiation and bullying that happened to take place prior to and during litigation. Such acts are *not* protected by the First Amendment of the United States Constitution (through the Noerr-Pennington doctrine), as the Plaintiffs contend.

Should the Court nonetheless apply the Noerr-Pennington doctrine to this case, the fraud exception would bar immunity. As described in Section II.B.1.a, *supra*, a settlement reached as a result of the Plaintiffs' bad acts would be unenforceable. If the negotiations have been robbed of such legitimacy so as to void a settlement agreement, then clearly the Plaintiffs' fraud has gotten to the "core of the case".

#### **IV. The Litigation Privilege described by the Plaintiffs does Not Apply in these Facts**

The cases cited by the Plaintiffs, Woodward v. Weiss, 932 F. Supp. 723 (D.S.C. 1996) and Carbin v. Wash. Fire and Marine Ins. Co., 278 F. Supp. 393 (D.S.C. 1968), both address the absolute privilege from defamation actions. The authorities these cases rely upon, Crowell v. Herring, 301 S.C. 424, 392 S.E.2d 464 (Ct. App. 1990), and Restatement (Second) §§ 585, 587, 588 (1977), likewise address solely the absolute privilege against defamation that statements made in the course of litigation enjoy. The Plaintiffs' authority is inapposite to this proceeding, as the Defendant has not asserted a claim for defamation. As such, their argument is without merit and is not a basis upon which dismissal may be maintained.

#### **V. The Defendant is Entitled to Declaratory Relief**

Defendant's entitlement to a declaratory judgment action has been frequently litigated in file-sharing cases similar to the one at bar. Currently, there is a split in authority; some district courts have dismissed such actions, while others have let them stand. The Electronic Frontier Foundation *amicus* brief in Lava Records, LLC, et al. v. Amurao, 07-cv-321 (S.D.N.Y. 2007), best explicates the

argument against dismissal of the Defendant's declaratory judgment action; the Defendant incorporates the argument it contains by reference and attaches it to this memorandum as Exhibit B.

### CONCLUSION

The Defendant has shown that facts consistent with her allegations will support a claim for relief, and she is entitled to assert a declaratory judgment action. Furthermore, as the Defendant's counterclaims assert novel claims, especially with respect to her SCUPTA counterclaims, they should be preserved and examined on their merits. The Plaintiffs' Motion to Dismiss should be **denied**.

If this Court should decide to grant the Plaintiffs' motion to dismiss, said dismissal should be **without prejudice** and should allow the Defendant **leave to amend** the complaint to address any deficiencies.

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