

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

DMITRIY SHIROKOV, on behalf of himself)	
and all others similarly situated,)	
)	
Plaintiff,)	
)	
v.)	Civ. A. No. 1:10-cv-12043-GAO
)	
DUNLAP, GRUBB & WEAVER, PLLC;)	
US COPYRIGHT GROUP; THOMAS DUNLAP;)	
NICHOLAS KURTZ; GUARDALEY, LIMITED;)	
and ACHTE/NEUNTE BOLL KINO)	
BETEILIGUNGS GMBH & CO KG,)	
)	
Defendants.)	
)	

**PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT ACHTE/NEUNTE BOLL KINO BETEILIGUNGS GMBH & CO. KG’S
MOTION TO DISMISS THE SECOND AMENDED CLASS ACTION COMPLAINT**

Plaintiff Dmitriy Shirokov (“Plaintiff”) respectfully submits this response in opposition to Defendant Achte/Neunte Boll Kino Beteiligungs Gmbh & Co Kg’s (“Achte” or “Moving Defendant”) Motion to Dismiss the Second Amended Class Action (ECF No. 46) and its supporting memorandum of law (ECF No. 48, “Motion to Dismiss” or “MTD”), both filed May 23, 2011.¹ For the reasons given in the following memorandum, the MTD should be denied.

¹ In addition to the reasons given in this memorandum, Achte’s motion should be denied because it was not filed timely. A complaint and summons were timely served on Achte on April 18, 2011. Achte then was obligated to answer the complaint within 21 days, by May 9, 2011. Fed. R. Civ. P. 12(a)(1)(A)(i). It did not file an answer timely then; rather, Achte filed its notice of appearance on May 12, 2011. Dkt No. 38. Also on May 12, Achte filed an assented-to motion to extend its time to respond to the complaint to May 18, 2011. ECF Nos. 38 & 39. But Achte did not file the instant motion until May 23, 2011, five days after the already-extended deadline for its answer.

INTRODUCTION

Moving Defendant defrauded Plaintiff and thousands of similarly situated individuals (collectively, the “proposed Class” or the “Class”). Achte’s copyright in its motion picture *Far Cry* was registered untimely, rendering it ineligible for awards of statutory damages or attorney’s fees against any infringers. Despite this knowledge, Achte and its co-defendants acting as Achte’s agents and/or co-conspirators—Dunlap, Grubb & Weaver, PLLC (“DGW”), US Copyright Group (“USCG”), Thomas Dunlap (“Dunlap”), Nicholas Kurtz (“Kurtz”), and Guardaley, Limited (“Guardaley”)—misrepresented its rights to the Copyright Office, federal courts, and Class members. Achte cannot sustain its burden on its MTD, which seeks to deny Plaintiff’s injury and the well-pleaded claims in Plaintiff’s Second Amended Class Action Complaint and Jury Demand (ECF No. 26; “Second Amended Complaint” or “SAC”).

Most of Moving Defendant’s arguments parrot arguments presented in motions to dismiss the SAC brought by its co-defendants DGW, USCG, Dunlap, and Kurtz (ECF No. 29, “DGW Motion”) and by Guardaley (ECF No. 44), elsewhere refuted by Plaintiff. To avoid further duplication, Plaintiff will adopt arguments made in its opposition to the DGW Motion (ECF No. 32, “Opposition”).

STATEMENT OF FACTS

Achte is a German film production and distribution company that claims to own the copyright for the motion picture *Far Cry*. SAC ¶ 91, MTD p. 1. It is owned, in whole or in part, by Uwe Boll (“Boll”), *Far Cry*’s director and producer. *See* SAC ¶ 92. Boll has made dozens of films

through Achte and/or other production companies that typically bear his name.² Boll's film copyrights have generally been registered with the U.S. Copyright Office prior to their release dates. *Id.* ¶ 91.³ But it failed to timely register *Far Cry*. *Id.* ¶¶ 93, 95-96. Achte released *Far Cry* in German theaters on October 2, 2008, and in United States theaters on December 17, 2008. *Id.* ¶¶ 99-100. *Far Cry* was released on DVD in the Netherlands on April 14, 2009; in the United Kingdom on September 7, 2009; and in Italy on October 14, 2009. *Id.* ¶¶ 101-103. The United States DVD release was on November 24, 2009. *Id.* ¶ 104. Achte's copyright registration application for *Far Cry* followed the film's first release by more than three months, so Achte cannot seek statutory damages or attorney's fees for any act of infringement that commenced before that date, pursuant to Section 412 of the Copyright Act (17 U.S.C. § 412).⁴ *Id.* ¶¶ 9, 45, 95-96, 114, 128-129. But it has falsely persisted in doing just that. SAC ¶¶ 134, 141-143, 145-147, 154-160, 169-171, 179, 185, 187, 189-194 & Exhs. L, M, N, & P.

Achte's January 19, 2010 registration application falsely claimed that *Far Cry* was first published on November 24, 2009 in the United States⁵—giving the false impression that it was

² Boll's pre-*Far Cry* oeuvre included *Sanctimony* (copyright registered Sept. 8, 2000 to Boll Kino Beteiligungs, GmbH & Company KG); *Heart of America* (registered Feb. 13, 2002 to Dritte Boll Kino-Beteiligungs, GmbH & Co. KG); *House of the Dead* (registered July 7, 2003 to 3 Boll KINO Beteiligungs, GmbH und Co., KG); *Alone in the Dark* (registered March 19, 2004 by Dritte Boll Kino Beteiligungs, GmbH & Co. KG); *Bloodrayne* (registered April 11, 2005 to Vierte Boll Kino Beteiligungs, GmbH & Co. KG); *Postal* (registered July 5, 2007 to Achte Boll Kino Beteiligungs, GmbH und Co., KG and Neunte Boll Kino Beteiligungs, GmbH und Co., KG); *Seed* (registered July 5, 2007 to Achte Boll Kino Beteiligungs, GmbH und Co., KG and Neunte Boll Kino Beteiligungs, GmbH und Co., KG); *In the Name of the King: A Dungeon Siege Tale* (registered Aug. 13, 2007 to Fuenfte Boll Kino Beteiligungs GmbH & Co. KG on basis of assignment from claimed author Vierte Boll Kino Beteiligungs GmbH & Co. KG).

³ See also footnote 2 supra.

⁴ Achte may pursue any actual damages suffered, not statutory damages or attorney's fees. 17 U.S.C. §§ 412, 504(a); SAC ¶¶ 107, 227.

⁵ Boll's pre-*Far Cry* copyright registration applications typically made mention of the pre-existing source material that served as the basis of the film applied for. For example, the copyright registration for Boll's motion picture *Sanctimony* states the pre-existing registration of its screenplay. Likewise, pre-existing copyright registration information can be found in the following Boll motion picture registrations: *Postal*, *In the Name of the King: A Dungeon Siege Tale*, *Seed*, *Alone in the Dark*, and *House of the Dead*. The *Far Cry* application omitted such references to its prior history.

registered within Section 412's three-month savings clause. *Id.* ¶¶ 11, 105, 109. The application was filed on Achte's behalf by its counsel, Thomas Dunlap, a DGW managing partner. *Id.* ¶¶ 10, 36, 94, 111. The registration certificate issued by the Copyright Office reflected that materially false information. *Id.* ¶¶ 112, 124-125 & Exh. J. Pursuant to Section 412, the registration certificate would not have appeared to support claims for statutory damages or attorney's fees if it had stated the true publication history. *Id.* ¶¶ 109, 125-126

USCG, DGW's partnership with Guardaley, advertises itself as providing the film industry a means to collect copyright infringement claim settlements far in excess of any actual damages suffered, while avoiding trials on the merits. SAC ¶¶ 75-82. Achte employs DGW to provide the USCG settlement business model. SAC ¶¶ 39, 91. Through DGW, USCG, and the other defendants, Achte has falsely persisted in pressing claims against Class members for remedies that it knows have no merit. Achte, and/or other defendants acting at its direction, retained GuardiaLey to identify alleged infringers of the *Far Cry* copyright. SAC ¶¶ 133, 198. Acting through its co-defendants, Achte has alleged that 4,577 individuals (the Class), including Plaintiff, have infringed its copyright by downloading and/or uploading *Far Cry* without permission. *Id.* ¶ 143 & Exh. M.

Achte initiated a lawsuit (the "Achte action") in the United States District Court for the District of Columbia by filing a complaint on March 18, 2010, alleging copyright infringement by 2,094 Class members, including Plaintiff, listing their IP addresses and alleged dates and times of infringement. *Id.* ¶¶ 134, 138-139. Achte's counsel DGW sought subpoenas from that court, which they then issued to the Class members' Internet Service Providers ("ISPs"). SAC ¶ 135-136. On behalf of Achte, DGW sent a letter signed by Kurtz to Plaintiff and to each other Class member whose address was provided by the ISPs, describing the copyright infringement lawsuit against them and claiming an intention to seek remedies, including statutory damages of up to \$150,000 and attorney's fees, if the claim was not settled. *Id.* ¶¶ 136-137, 158-184 & Exh. N. On May 12,

2010, Achte filed an amended complaint in the Achte action against all 4,577 members of the Class. *Id.* ¶ 142 & Exh. M.

Almost none of the Class members were subject to jurisdiction in the District of Columbia, where the Achte action was filed. SAC ¶¶ 199-201, 213. Many Class members informed the Court in the Achte action that they lived in remote locations and/or moved to dismiss on jurisdictional grounds, and the Court ordered Achte to show cause why those outside its jurisdiction should not be dismissed. *Id.* ¶ 204. On November 19, 2010 the Court, noting the jurisdictional issues, ordered Achte to file a second amended complaint against only those Class members “over whom [Achte] reasonably believes the Court has personal jurisdiction and whom it wants to sue” or otherwise continued to claim as subject to that Court’s jurisdiction. *Id.* ¶ 208. On November 24, 2010, Plaintiff filed his proposed class action against Achte and its co-defendants, seeking redress for their fraudulent pursuit of remedies barred by the Copyright Act. *Id.* ¶ 210. On December 6, 2010, Achte, by and through the Moving Defendants, filed a second amended complaint making a single Class member a named defendant and alleging infringement by 139 unnamed others, and filed a notice of dismissal of its claims against all other 4,437 members of the Class, including Defendant. *Id.* ¶ 209. Since those claims were dismissed, and after Plaintiff filed this class action, Achte has filed an additional sixteen lawsuits against select Class members individually.⁶ *Id.* ¶¶ 212, 214. Achte filed four of those lawsuits in the United States District Court for the District of Massachusetts⁷ on February 16, 2011, and another four the next day in the United States District Court for the Middle District of Florida.⁸

⁶ Achte had filed eight such individual infringement suits as of February 9, 2011, when Plaintiff’s Second Amended Complaint was being prepared.

⁷ *Achte v. Hennessy*, Case No. 1:11-cv-10266; *Achte v. Peatfield*, Case No. 1:11-cv-10267; *Achte v. Plebaniak*, Case No. 1:11-cv-10268; *Achte v. Ross*, Case No. 1:11-cv-10269 (each D. Mass. Feb. 16, 2011).

⁸ *Achte v. Canales*, Case No. 1:11-cv-00069; *Achte v. Palmer*, Case No. 1:11-cv-00070; *Achte v. Zimmerman*, Case No. 1:11-cv-00071; *Achte v. Felix*, Case No. 1:11-cv-00072 (each M.D. Fla. Feb. 17, 2011).

Achte has been on notice that its claims for heightened damages are without merit since, at latest, its first notice of the complaint in this action. But it has continued to pursue them. In the Achte action (as originally filed in March 2010, and as amended in May and December) and in its sixteen more recent lawsuits, and in its agents' communications with the Class, Achte claims entitlement to, and prays for relief including, statutory damages and attorney's fees. *Id.* ¶¶ 216-217.

STANDARD OF REVIEW

“A motion to dismiss tests the legal sufficiency of the complaint, not the plaintiff's likelihood of ultimate success.” *Canney v. City of Chelsea*, 925 F. Supp. 58, 63 (D. Mass. 1996) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)); *Sheridan v. Int'l Bhd. of Elec. Workers, Local 455*, 940 F. Supp. 368, 372 (D. Mass. 1996). In evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court “must assume the truth of all well-plead[ed] facts and give the plaintiff the benefit of all reasonable inferences therefrom.” *Vernet v. Serrano-Torres*, 566 F.3d 254, 258 (1st Cir. 2009) (quoting *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F. 3d 1, 5 (1st Cir. 2007)). “While a defendant may seek dismissal under Rule 12(b)(6) for failing to state a claim upon which relief can be granted, a complaint only requires ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’” *Krasnor v. Spaulding Law Office*, 675 F. Supp. 2d 208, 209 (D. Mass. 2009) (quoting Fed. R. Civ. P. 8(a)(2)). “According to the Supreme Court, this means that a plaintiff must allege enough facts so that the claim is ‘plausible on its face.’” *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)). That is, “the factual content pled should ‘allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” *Id.* at 209-10 (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)). “At bottom, a complaint will survive a Rule 12(b)(6) dismissal if ‘the facts, evaluated in [the required] plaintiff-friendly manner, contain enough meat to support a reasonable expectation that an actionable claim may exist.’” *Id.* at 210 (quoting *Andrew Robinson Int'l, Inc. v. Hartford Fire Ins. Co.*, 547 F. 3d 48, 51 (1st Cir. 2008)).

A party alleging fraud “must state with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). Despite the particularity requirement, a plaintiff “need not plead all of the evidence or facts supporting his claim.” *United Air Lines v. Gregory*, 716 F. Supp. 2d 79, 85 (D. Mass. 2010). “Rule 9 requires a specification of the time, place, and content of an alleged false representation, but not the circumstances or evidence from which fraudulent intent could be inferred.” *McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226, 228 (1st Cir. 1996).

ARGUMENT

I. The *Noerr-Pennington* Doctrine Does Not Affect Plaintiff’s Claims.

Despite Moving Defendant’s pleas, no court has read *Noerr-Pennington* so broadly as to protect a party’s enforcement of an unlawful scheme consciously designed to defraud. None of the cases cited by the Movant contain factual allegations similar to those asserted by Plaintiff. In fact, Moving Defendant’s analysis ignores altogether the express allegations of the Complaint and the issue of the fraudulently obtained registration—the bedrock for Movant’s “petitioning” activities for which it now seeks immunity. *Noerr-Pennington* does not apply for several reasons.

First, *Noerr-Pennington* applies to antitrust liability. The Complaint does not make any claim of antitrust violations. In the absence of such a claim, no such defense applies.⁹

Second, Movant confuses *Noerr-Pennington* with the First Amendment. *Noerr-Pennington* derives from a statute-specific analysis of the interaction between the Sherman Act *and* the First Amendment and such an analysis will, of necessity, **vary when applied to another statute**.¹⁰ As

⁹ Moving Defendant argues Plaintiff “alludes” to antitrust in a single paragraph within the SAC. *See* MTD p.11. First, Plaintiff would remind Movant that even if there is an “allusion” to antitrust law in the SAC, *it was not pled*. Second, Movant is reading into what is a factual statement. The Copyright Office grants registrations (or monopolies) and the Movant attempted to enforce one beyond the true scope of its rights.

¹⁰ *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 526-29, 531 (2002).

such, the Supreme Court applies *Noerr-Pennington* as an exception only to Sherman Act liability,¹¹ employing the same analysis in all its post-*Noerr* jurisprudence.¹²

The Supreme Court reaffirmed this approach in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002). Summarizing the *Noerr* line of cases, the Court stated that “[t]his case raises the same underlying issue of when litigation may be found to violate federal law, but this time with respect to the NLRA rather than the Sherman Act,” and rendered its decision based on its earlier statute-specific analysis of the interaction between the NLRA and the First Amendment in *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (noting that while the Court in *California Motor Transport Co., v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) construed the right to petition in terms of antitrust laws, they “should be sensitive to these *First Amendment values in construing the NLRA*.”)¹³ Similarly, Defendant’s own numerous lower court citations support Plaintiff’s interpretation as controlling. *See* MTD pp. 9-10. *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1407 (10th Cir. 1992) (applying the First Amendment to the Fair Labor Standards Act); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 717, n.7 (8th Cir. 1986) (though poorly worded, “the defendant’s exercise of its first amendment rights” is what the Court finds applicable outside of antitrust, not *Noerr-Pennington*.); *Tomaiolo v. Mallinoff*, 281 F.3d 1, 11 (1st Cir. 2002) (discussing the application of the First Amendment,

¹¹ *See FTC v. SCTL*, 493 U.S. 411, 424 (1990) (stating that in *Noerr* the Court conducted a statute-specific analysis of the Sherman Act in the light of the First Amendment’s Petition Clause); *Cardtoons v. Major League Baseball Players Ass’n*, 208 F. 3d 885, 889-90 (10th Cir. 2000); *Coastal States Mktg., Inc. v. Hunt*, 694 F. 2d 1358, 1364-65 (5th Cir. 1983) (“*Noerr* was based on a construction of the Sherman Act. It was not a First Amendment decision.”).

¹² *See, e.g., United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 660-61, 670 (1965); *California Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 513-14 (1972); *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 499-500 (1988); *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 52 (1993) (“PRE”).

¹³ *BE&K Constr. Co.* at 526.

not as Movant alleges *Noerr-Pennington*, to 42 U.S.C. § 1983). Moving Defendant's reliance on *Sosa v. DirectTV*, 437 F. 3d 923 (9th Cir. 2006) and *Atlantic Recording Corp. v. Raleigh*, No. 4:06-CV-1708, 2008 U.S. Dist. LEXIS 62977, *4-5 (E.D. Mo. Aug. 18, 2008) (both cases argue for the expansion of *Noerr-Pennington* outside of antitrust) is likewise misplaced. As noted above, the Supreme Court has repeatedly ruled against such doctrinal creep.¹⁴

Third, contrary to Movant's hyperbole, no onerous deconstruction of the governmental process is required in this case. Neither the doctrine nor the First Amendment applies because the Plaintiffs' remedy neither seeks to alter or burden any government regulation nor to restrain any challenged communication. As reflected in the Supreme Court's decision in *Walker Process*,¹⁵ immunity does not extend to conduct that—like the conduct in this case—can be fully remedied without enjoining communications to government and without disrupting or burdening any government program. Plaintiff only asks that the Movant not reap the benefits of its fraud.¹⁶

Fourth, under the First Amendment, the proper doctrine for assessing Movant's conduct, “the knowingly false statement, and the false statement made with reckless disregard of the truth,

¹⁴ See also *Warnock v. State Farm Mut. Auto. Ins. Co.*, 2008 U.S. Dist. LEXIS 81507, *25 (S.D. Miss. Oct. 14, 2008) (“This Court can find no other circuit that has followed the Ninth Circuit's lead, and it declines to do so without direction from the Fifth Circuit Court of Appeals.”); *Buck's Inc. v. Buc-ee's, Ltd.*, 2009 U.S. Dist. LEXIS 53861, *24 (D. Neb. June 25, 2009); see also *Cardtoons*, 208 F. 3d at 889-90.

¹⁵ *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965). There is no principled reason why *Walker Process* should be limited solely to the patent context. See *Knickerbocker Toy Co., Inc., v. Winterbrook Corp.*, in which the First Circuit stated that “[f]raudulent procurement of a copyright by means of knowing and willful misrepresentations to the Copyright Office may strip a copyright holder of its exemption from the antitrust laws.”³⁰

¹⁶ See MTD p. 11 n.2: 1) Movant confuses possessing a copyright with a valid copyright registration. A valid registration entitles one to seek relief in federal court as well as move for statutory damages and attorney's fees. A copyright by itself does not. (17 U.S.C. § 412); 2) Plaintiff need not deny anything.; and 3) A *prima facie* registration is neither conclusive nor irrefutable.

do not enjoy constitutional protection.”¹⁷ “There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body.” *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982); see also *Walker Process*, 382 U.S. at 174.

One cannot cleanse unlawful conduct by conducting the unlawful conduct through a lawful medium. [...] The right to petition a court does not include the right to file a false or frivolous claim. “First Amendment rights may not be used as the means or the pretext for achieving ‘substantive evils.’”

“The First Amendment interests involved in private litigation [...] are not advanced when litigation is based on intentional falsehoods or on knowingly frivolous claims ... [j]ust as false statements are not immunized by the First Amendment right to freedom of speech ... baseless litigation is not immunized by the First Amendment right to petition.”¹⁸

Fifth, even if *Noerr-Pennington* applied, Moving Defendant’s deceptive conduct does not amount to the type the doctrine intends to shield from liability. “[A] party that petitions the government in *good faith* for redress is *generally* immune from antitrust liability under the *Noerr-Pennington* doctrine, which protects the right to petition to governmental bodies.” *Amgen v. F. Hoffman-La Roche, Ltd.*, 480 F.Supp.2d 462, 469 (D. Mass.2007) (antitrust case recognizing exceptions to *Noerr-Pennington*.)¹⁹ Plaintiff hereby adopts and incorporates by reference its argument in opposition and the exceptions to *Noerr-Pennington* (ECF No. 32 at pp. 16-20).

¹⁷ *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). See also *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 611 (2003) (“[T]he First Amendment does not shield fraud.”); *BE&K Constr.*, 536 U.S. at 530-31 (“false statements are not immunized by the First Amendment right to freedom of speech”) (citation omitted).

¹⁸ *Morrison v. Amway Corp. (In re Morrison)*, 2009 Bankr. LEXIS 1795, *22-23 (S.D. Tex. 2009) (quoting *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) and *Bill Johnson’s*.)

¹⁹ See MTD p. 11 n.3: Though Movant itself notes this case was not brought in state court, it nonetheless attempts to raise the specter of the Massachusetts anti-SLAPP statute. The statute however, as Movant acknowledges, is inapplicable to the case at hand and need not be discussed further.

In short, *Noerr-Pennington* does not apply because this is not an antitrust case. Even if it were applied, its many applicable exceptions would provide Moving Defendant no shelter.

II. Plaintiff Sufficiently Pleaded Claims of Conspiracy and Aiding and Abetting.

“Massachusetts recognizes two types of civil conspiracy, so-called ‘true conspiracy’ and conspiracy based on section 876 of the Restatement (Second) of Torts.” *Taylor v. Am. Chem. Council*, 576 F.3d 16, 34 (1st Cir. 2009) (citing *Kurker v. Hill*, 44 Mass. App. Ct. 184, 188 (1998)). “The first type requires proof of coercion; the second requires proof of a common plan to commit a tortious act.” *Smith v. Jenkins*, 718 F. Supp. 2d 155, 171 (D. Mass. 2010) (citing *Kurker*). Plaintiff properly pleaded both. SAC ¶¶ 384-390.

The elements of the first type (“true conspiracy”) are:

(1) some or all of the defendants[] acted in concert with others to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means; (2) as a result of their acting together the defendants had some peculiar power of coercion over [Plaintiff] they would not have had they each acted alone; and (3) the defendant's actions proximately caused [Plaintiff's] damages.

Fahey v. R.J. Reynolds Tobacco Co., 4 Mass. L. Rep. 21, 24 (Mass. Super. Ct. 1995) (denying defendant motion for summary judgment on count of conspiracy for fraudulent concealment or misrepresentation). True conspiracy lies “where the wrong was in the particular combination of the defendants rather than in the tortious nature of the underlying conduct.” *Kurker v. Hill*, 44 Mass. App. Ct. 184, 188 (1998). Achte's sole defense to Plaintiff's allegations of “true conspiracy” is to cite a single case that describes the cause of action as “very limited” and requires a showing of coercion. *Aetna Casualty Sur. Co. v. P& B Autobody*, 43 F. 3d 1546, 1563 (1st Cir. 1994). Plaintiff has met this standard by showing Defendants collectively exhibited a coercive power by playing their discrete roles in the conspiracy, as Plaintiff noted in its arguments in its prior Opposition concerning true conspiracy (ECF No. 32 at p. 25), each of which Plaintiff hereby adopts and incorporates by reference. See *Aetna Casualty* at 1564 (allegations that automobile body shops and

claims adjusters engaged in a scheme to submit fraudulent insurance claims, “if proved, might constitute such a ‘peculiar power of coercion’” over the plaintiff insurer); *Kurker*, 44 Mass. App. at 188 (“The element of coercion has been required only if there was no independent basis for imposing tort liability”).

Massachusetts also recognizes conspiracy liability based on the joint liability of defendants. See Plaintiff’s prior arguments regarding the “concerted action”/“common design” and “substantial assistance”/“aiding and abetting” grounds for conspiracy claims (Dkt No. 32 at pp. 25-26), each of which Plaintiff hereby adopts and incorporates by reference. Achte recognizes the existence of a conspiracy among its co-defendants but claims innocence (MTD p. 17: “the only conclusions that can be drawn from the plaintiff’s own pleading is that DGW and others devised a ‘Copyright Scheme’ and that Achte Niente [*sic*], which had enforceable copyright protection in *Far Cry*, was an unwitting participant in the purported scheme.”), arguing that the SAC does not sufficiently allege Achte’s knowledge or intent.

Claims for conspiracy, like claims for fraud, need only satisfy the requirements of Fed. R. Civ. P. (9)(b), under which “[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally.” See *Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985) (applying Rule 9(b) to “actions alleging conspiracy to defraud or conceal”); *Educadores Puertorriquenos v. Hernandez*, 367 F.3d 61, 68 (1st Cir. 2004) (at the notice pleading stage, “the actor’s state of mind [] can be averred generally”). “Rule 9 requires a specification of the time, place, and content of an alleged false representation, but not the circumstances or evidence from which fraudulent intent could be inferred.” *McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226, 228 (1st Cir. 1996). “The characterization of a state of mind, after all, does not lend itself to detailed pleading.” *United States ex rel Karvelas v. Melrose-Wakefield Hosp.*, 360 F.2d 220, 228 (1st Cir. 2004).

Plaintiff properly alleged that Achte and each of its co-defendants were co-conspirators. “Each Defendant knew about the Copyright Scheme, and actively participated in it by knowingly

providing encouragement and substantial assistance in perpetration of the fraud, as described in this Complaint.” SAC ¶ 294; see also *id.* ¶¶ 303-304 & 385-386. Plaintiff more than satisfied the “averred generally” requirement for stating Defendants’ mental state. “Defendants intentionally and fraudulently failed to submit the proper date of first publication in the application for copyright registration for the motion picture *Far Cry*.” SAC ¶ 367. “By submitting an incorrect date of first publication, Defendants knowingly made a misrepresentation of a material fact in the application.” SAC ¶ 369.

Moreover, the SAC specifically provides a basis for inferring Achte’s knowledge or intent: its extensive prior experience with copyright filings on its many prior films. See SAC ¶¶ 91-92, 303(b), & 317(b) (“Achte had previously filed or caused to be filed copyright registrations for other films in accordance with U.S. copyright law”). Despite this experience, Achte failed to register its copyright in time to qualify for the remedies that would make its mass claims worthwhile, and nonetheless retained DGW, USCG and Guardaley. SAC ¶ 93. Plaintiff alleged, as Achte concedes, that “Achte/Neunte would have had standing to bring claims for copyright registration even absent a registration.” MTD p. 6 (quoting SAC ¶ 107 in part). Achte’s awareness that copyright registration was not a necessary stage in the Achte action begs the question of why it had counsel file a registration anyway. The obvious conclusion is that it did so to justify trumped-up claims for damages whose lack of support would otherwise have been transparent. See SAC ¶ 107 (“But such claims would be limited to actual damages.”).

Achte’s intent has been sufficiently averred in, and may be clearly inferred from, the SAC. The MTD does not withstand scrutiny on these claims.

III. Achte Is Not Entitled to the Massachusetts Litigation Privilege.

Achte has used the federal courts, including this Court, as a vehicle of fraud. It has no privilege to do so, but like its co-defendants, Achte seeks shelter in the Massachusetts litigation privilege, which applies to communications by parties and their counsel “preliminary to a proposed

judicial proceeding, or in the institution of, or during the course and as a part of a judicial proceeding in which he participates as counsel, if it has some relation thereto.” *Sriberg v. Raymond*, 370 Mass. 105, 108 (1976) (quoting Restatement of Torts § 586 (1938)). In effect Achte argues that a fraud committed through the courts is immune from suit *precisely because* the court was its forum. But the MTD fails to establish that the acts by Achte and its agents that injured Plaintiff are subject to the privilege. *Meltzer v. Grant*, 193 F. Supp. 2d 373, 381 (D. Mass. 2002) (“one asserting a privilege has the burden of establishing the entitlement to the privilege. Thus, a motion to dismiss on the grounds that the acts complained of were privileged will only succeed when the entitlement to the privilege is demonstrated by the complaint itself, taking all allegations of the complaint as true and drawing all reasonable inferences in favor of the plaintiffs”).

Achte’s MTD studiously avoids stating the pertinence requirement that has long been at the heart of the litigation privilege. See ECF No. 32 at pp. 12; *Hoar v. Wood*, 3 Met. (44 Mass.) 193, 198 (1841); *Rice v. Coolidge*, 121 Mass. 393, 394 (1876); *McLaughlin v. Cowley*, 127 Mass. 316, 319 (1879); *Wright v. Lothrop*, 149 Mass. 385, 389 (1889). “The requirement of pertinence eliminates protection for statements made needlessly and wholly in bad faith.” *McGranahan v. Dahar*, 119 N.H. 758, 763 (1979) (citing *McLaughlin*, 127 Mass. at 319). As articulated by then-Judge Breyer in *Blanchette v. Cataldo*, 734 F.2d 869 (1st Cir. 1984), Massachusetts applies this requirement through a functional test, focused on a communication’s pertinence to the legal interest of the person to whom it is made. Achte’s threats to the Class intimated forms of liability barred by statute, and therefore irrelevant to their interests. Such communications do not merit the privilege. Achte would have the Court apply the privilege to “any actions related to [DGW’s] representation of Achte/Neunte in the copyright infringement action,” MTD p. 16, or “made in connection with the initiation and prosecution of a lawsuit,” *Id.* at p. 15. Elsewhere they read the requirement out of the law altogether, claiming the privilege applies to all statements “made by an attorney engaged in the function of an attorney.” *Id.* It does not stretch nearly so far. “Litigation privilege does not

apply when mere content of the communication is related to litigation subject matter.” *Neuralstem, Inc. v. Stemcells, Inc.*, 2009 U.S. Dist. LEXIS 67587 (D. Md. Aug. 24, 2009). The privilege applies not to all statements “related to” a lawsuit, nor all statements made by counsel regardless of pertinence, but only those material to the interest of the party addressed. Achte’s proposed “related to” standard would encompass fraudulent pleadings and threats (such as Achte’s) whose sole “relation” to the Achte action is to illustrate rights Achte did not have. Plaintiff hereby adopts and incorporates by reference its argument concerning the litigation privilege’s pertinence requirement (ECF No. 32 at pp. 12-14).

Achte does not claim that its fraudulent copyright registration was in any way pertinent to the Achte action or subsequent litigation. Rather, it concedes that “Achte/Neunte would have had standing to bring claims for copyright registration even absent a registration.” MTD p. 6 (citing SAC ¶ 107).” Because the copyright registration was not a necessary stage in the Achte action, it was not privileged. Plaintiff hereby adopts and incorporates by reference its argument concerning the litigation privilege’s inapplicability to the registration (ECF No. 32 at pp. 8-9).

Achte does not contend that the privilege applies to statements by non-lawyers, such as the communications with the class made on its behalf by USCG, which is managed by Guardaley’s Benjamin Perino, who is not an attorney. SAC ¶ 73 n. 33. Nor do they contend that non-litigation work sustains the privilege, such as work Achte’s agents performed in the guise of USCG, which expressly marketed itself as providing a business model that would *avoid* litigation. SAC ¶¶ 77-80. The privilege “would not appear to encompass the defendant attorneys’ conduct in counseling and assisting their clients in business matters generally.” *Kurker v. Hill*, 44 Mass. App. Ct. 184, 192 (1998). It does not warrant dismissal of claims against lawyers who are not acting as litigators and are implicated in a larger scheme than a legal proceeding. *Id.* at n. 8 (denying motion to dismiss where “the complaint implicated [attorney] in the larger scheme of the assets purchase and freeze-out, and did not confine his involvement solely to statements or communications made in

connection with the preliminary injunction proceedings”). Plaintiff hereby adopts and incorporates by reference its argument concerning the litigation privilege’s inapplicability to communications by non-lawyers and lawyers acting outside the litigation context (ECF No. 32 at pp. 9-11).

The privilege does not protect statements made when litigation was not “contemplated in good faith and under serious consideration.” *Meltzer v. Grant*, 193 F. Supp. 2d 373, 381 (D. Mass. 2000). Even filing a complaint will not suffice unless “the process was instituted under a probable belief that the matter alleged was true, and with the intention of pursuing it according to the course of the court.” *Kidder v. Parkhurst*, 3 Allen 393, 396 (Mass. 1862) (quotation omitted). The SAC sufficiently pleads that Achte lacked this intention when it engaged in USCG’s business model to pursue settlements for thousands of dollars on infringement claims whose remedy in actual damages would be limited to some fraction of \$26.99 apiece. See SAC ¶¶ 152-153, 157, & 218-222. Communications prior to any litigation on the merits is not privileged. As sufficiently pleaded in the SAC, the Achte action was only a discovery suit, with no serious consideration given to pursuing the defendants beyond settlements. SAC ¶¶ 24, 351, & 363. Achte’s lack of faith in the Achte action’s merits was evidenced by its dismissal of all claims against 4,437 defendants when pressed by the Court. SAC ¶¶ 208-212. The privilege does not protect statements made in merely investigatory proceedings. See *Stern v. Haddad Dealership of the Berkshires*, 477 F. Supp. 2d 318, 326 (D. Mass. 2006). Plaintiff hereby adopts and incorporates by reference its argument concerning the litigation privilege’s inapplicability to such pre-litigation communications (ECF No. 32 at pp. 11-12).

Due to the supremacy of federal law, the Massachusetts litigation privilege does not defeat Plaintiff’s federal causes of action or pendent state causes of action. Achte does not argue otherwise. Plaintiff hereby adopts and incorporates by reference its argument concerning the litigation privilege’s inapplicability to such causes of action (ECF No. 32 at pp. 14-15), which includes each cause of action in Plaintiff’s complaint.

IV. Plaintiff has sufficiently pleaded all remaining counts.

Movant raises no grounds for dismissal that were not already discussed and refuted in Plaintiff's Opposition, which Movant has access to. Nonetheless, content with relying almost wholly on the DGW Motion in its motion to dismiss, Movant fails to distinguish or otherwise raise a colorable argument as to law or fact that would subvert Plaintiff's previously stated arguments in support of the following claims.

1. Plaintiff Suffered an Injury-in-Fact and Has Standing to Bring His Claims.

Because Movant's grounds for dismissal adopts the argument made in the DGW Motion, Plaintiff hereby adopts and incorporates by reference its argument in support of its standing to sue (ECF No. 32 at pp. 5-7). In addition, Plaintiff hereby adopts and incorporates by reference its standing argument to be presented in its forthcoming Memorandum of Law in Opposition to Defendant Guardaley Limited's Motion to Dismiss the Second Amended Class Action Complaint. Accordingly, Movant's motion to dismiss must be denied.

2. Plaintiff Sufficiently Pleaded a Claim Under the Computer Fraud and Abuse Act.

Moving Defendant's contention that the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 ("CFAA") does not apply to them is premised upon their misreading of the statute. It is not premised upon case law (they cite only two cases on the issue of damages, not loss), nor on any secondary sources. In addition, it attempts to re-write Plaintiff's claim to apply to "damage" only. *See* MTD pp. 18-20. Because Movant's grounds for dismissal otherwise adopts the argument made in the DGW Motion, Plaintiff hereby adopts and incorporates by reference its argument in support of its CFAA claim (ECF No. 32 at pp. 20-23). Accordingly, Movant's motion to dismiss must be denied.

3. *Copyright Misuse and Fraud on the Copyright Office are Recognized Causes of Action for which Moving Defendant's Liability Is Well-Founded.*

Because Movant's grounds for dismissal adopts the argument made in the DGW Motion, Plaintiff hereby adopts and incorporates by reference its argument in support of its Copyright Misuse and Fraud on the Copyright Office claims (ECF No. 32 at pp. 28-30). Accordingly, Movant's motion to dismiss must be denied.

4. *Plaintiff Sufficiently Pleaded a Claim for Fraud on the Court, Abuse of Process and Malicious Prosecution.*

Because Movant's grounds for dismissal adopts the argument made in the DGW Motion, Plaintiff hereby adopts and incorporates by reference its arguments concerning Fraud on the Court (ECF No. 32 at p. 28); Abuse of Process (ECF No. 32 at pp. 31-32); and Malicious Prosecution (ECF No. 32 at pp. 32-33). Accordingly, Movant's motion to dismiss must be denied.

5. *Plaintiff Sufficiently Pleaded a Claim for Negligent Representations and Omissions by Moving Defendants.*

Because Movant's grounds for dismissal adopts the argument made in the DGW Motion, Plaintiff hereby adopts and incorporates by reference its argument in support of its claims related to Negligent Misrepresentations and Omissions (ECF No. 32 at p. 26). Accordingly, Movant's motion to dismiss must be denied.

6. *Plaintiff Has Standing to Bring Claims, including Unjust Enrichment, Money Had and Received, Conversion and Constructive Trust, on Behalf of Other Members of the Class.*

Because Movant's grounds for dismissal adopts the argument made in the DGW Motion, Plaintiff hereby adopts and incorporates by reference its argument concerning its claims related to the unlawful retention of money (ECF No. 32 at pp. 7-8). Accordingly, Movant's motion to dismiss must be denied.

7. *Plaintiff Properly Stated RICO Claims Including Injury Caused by Defendant's Racketeering Activity.*

Because Movant's grounds for dismissal adopts the argument made in the DGW Motion, Plaintiff hereby adopts and incorporates by reference its argument concerning its standing under RICO (ECF No. 32 at pp. 23-24). Accordingly, Movant's motion to dismiss must be denied.

8. *Plaintiff Sufficiently Pleaded a Claim for Violations of Chapter 93A.*

Because Movant's grounds for dismissal adopts the argument made in the DGW Motion, Plaintiff hereby adopts and incorporates by reference its argument concerning its Chapter 93A claim (ECF No. 32 at pp. 33-35). Accordingly, Movant's motion to dismiss must be denied.

CONCLUSION

For all the above reasons, Plaintiff respectfully requests that the Court deny Moving Defendant's motion to dismiss in its entirety, and award attorney's fees and expenses to Plaintiff, and such other further relief that the Court deems just and proper.

Respectfully submitted,

Dmitriy Shirokov

/s/ Jason E. Sweet

Jason E. Sweet (BBO# 668596)

BOOTH SWEET LLP

32R Essex Street, Suite 1A

Cambridge, MA 02139

Telephone: (617) 250-8602

Facsimile: (617) 250-8883

Co-Counsel for Plaintiff and Proposed Class

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2011, I electronically filed the foregoing Plaintiff's Opposition to Defendant Achte/Neunte Boll Kino Beteiligungs GMBH & Co. KG's Motion to Dismiss Second Amended Class Action Complaint by using the ECF system.

I hereby certify that a true copy of the aforementioned document will be served upon counsel of record for Defendants Achte/Neunte Boll Kino Beteiligungs GMBH & Co. KG; Guardaley, Limited; and Dunlap, Grubb & Weaver, PLLC, US Copyright Group, Thomas Dunlap, and Nicholas Kurtz by Notice of Electronic Filing through the ECF system.

/s/ Jason E. Sweet
Jason E. Sweet (BBO# 668596)
BOOTH SWEET LLP
32R Essex Street, Suite 1A
Cambridge, MA 02139
Telephone: (617) 250-8602
Facsimile: (617) 250-8883