UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DMITRIY SHIROKOV, on behalf of himself and all others similarly situated the plaintiff, v. DUNLAP, GRUBB & WEAVER, PLLC; US COPYRIGHT GROUP; THOMAS DUNLAP; NICHOLAS KURTZ; GUARDALEY, LIMITED; and ACHTE/NEUNTE Boll Kino Beteiligungs Gmbh & Co KG, Defendants.	)	Case: 1:10-cv-12043-GAO

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DUNLAP, GRUBB & WEAVER, PLLC, THOMAS DUNLAP, AND NICHOLAS KURTZ'S MOTION FOR SANCTIONS PURSUANT TO FED. R. CIV. P. 11

Defendants Dunlap, Grubb & Weaver, PLLC, Thomas Dunlap, and Nicholas Kurtz submit this memorandum of law in support of their motion for sanctions against Plaintiff, Dmitriy Shirokov, and his counsel, Booth Sweet LLP, Daniel G. Booth, and Jason E. Sweet pursuant to Fed. R. Civ. P. 11.

I. INTRODUCTION

A. Background – Underlying Litigation: Achte/Nuente Boll Kino Beteiligungs BMBH & Co KG v. Does 1-4,577

Defendant Dunlap Grubb & Weaver, PLLC ("DGW") is a law firm. Defendants Thomas Dunlap ("Dunlap") and Nicholas Kurtz ("Kurtz") are attorneys employed by DGW. DGW and its attorneys represent Defendant Achte/Neunte Boll Kino Beteiligungs Gmbh & Co KG ("Achte"). In connection with its representation of Achte, DGW filed a lawsuit on behalf of Boll

alleging copyright infringement against 4,577 Doe Defendants in Achte/Nuente Boll Kino Beteiligungs BMBH & Co KG v. Does 1-4,577, currently pending in the United States District Court for the District of Columbia (Case Number 1:10-cv-00453-RMC) (the "Achte lawsuit", the Complaint and First Amended Complaint without exhibits are attached hereto as **Exhibit A**).

At the time the Achte lawsuit was filed in the United States District Court for the District of Columbia the true names of the Doe Defendants were unknown to DGW and its client as the Defendants were subject to identification only by the Internet Protocol ("IP") address assigned to that Defendant by his or her Internet Service Provider ("ISP") on the date and at the time at which the infringing activity of each Defendant was observed. Defendant Guardaley, Limited ("Guardaley"), through a proprietary software, observed the infringing activity and provided DGW with available data concerning the IP addresses of the infringing Doe Defendants to be used for purposes of identifying those Defendants. In accordance with the Achte Court's Order dated March 22, 2010 (attached as **Exhibit B**) DGW issued subpoenas to the various ISP's associated with the Doe Defendants' infringement of Achte's copyrighted work. After receiving names and addresses for several of the alleged Doe Defendants from ISP's pursuant to subpoena, DGW, in the course of representing Achte's interests in connection with the lawsuit, issued letters ("demand letters") (the demand letter to Plaintiff is attached as **Exhibit C**) to various of the Doe Defendants advising them that they had been identified among the infringers of Achte's copyrighted work, and further offering to settle the dispute for a sum certain in exchange for full release of Achte's claims.

B. Class Action Lawsuit Against DGW And Its Attorneys, Client And Data Provider

On November 11, 2010, the plaintiff's counsel, Daniel G. Booth and Jason E. Sweet,[1] filed a ninety-six page Complaint alleging twenty-five separate causes of action against Defendants on behalf of their client, Dmitriy Shirokov ("Shirokov") and a putative class comprised of those allegedly "similarly situated." The Complaint alleges, among other things, that Defendants herein "have sought to coerce settlements from the proposed Class members through Letters and other communications on the basis of [claims that are] expressly barred." Complaint ¶ 17. Each of the plaintiff's claims is premised upon the assertion that Defendants have made baseless "threats" in the demand letters DGW issued on behalf of its clients in connection with the litigation.[2] *See id.*, ¶¶ 6, 14, 17, 18.

The plaintiff's factual claims, even if accepted as true, are insufficient as a matter of law to establish a viable claim against DGW, Dunlap, Kurtz, or Achte because the action complained of, i.e., DGW's issuance of purportedly improper demand letters, occurred while DGW was representing Achte in the course of a judicial proceeding. As such, the plaintiff's allegations place the actions of DGW, Dunlap, Kurtz, and Achte well within the ambit of the litigation privilege recognized under Massachusetts law, as applied by the United States District Court for the District of Massachusetts. *See*, e.g., *Taylor v. Swartwout*, 445 F. Supp. 2d 98, 103 (D. Mass. 2006). Moreover, the various causes of action asserted by the plaintiff's counsel are not

[1] It is interesting to note that the plaintiff's law firm's top "services" as identified on their website is "Far Cry," which is the name of the motion picture at issue in the underlying Achte case. Furthermore, the website (http://boothsweet.com/services/fight-far-cry/) seemingly appeared at or near the time the lawsuit was filed. This is especially noteworthy since Jason Sweet is listed on the Electronic Frontier Foundation's website as an approved attorney for offering litigation defense services in such online motion picture copyright infringement cases. Given the nature of the claims brought herein and their lack of merit, it appears that the plaintiff's counsel is utilizing the lawsuit as a mechanism to obtain clients and notoriety.

[2] The predicate for each of the plaintiff's claims is that the demand letters contain misstatements of material information in an effort to "extort" settlements. *See* Complaint ¶ 14.

warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or creating new law.

II. ARGUMENT

A. Legal Standard

Rule 11(b) of the Federal Rules of Civil Procedure is designed to ensure that factual contentions presented to the court are warranted by the evidence and that legal contentions are warranted by existing law or a nonfrivolous extension of existing law. *See* Fed. R. Civ. P. 11(b). Rule 11(c) authorizes sanctions against any party and/or counsel responsible for any violation of Rule 11(b). *See* Fed. R. Civ. P. 11(c).

In pertinent part, Rule 11 of the Federal Rules of Civil Procedure provides:

> By presenting to the court a pleading, written motion, or other paper – whether by signing, filing, submitting, or later advocating it – an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .

Fed. R. Civ. P. 11(b). Rule 11 further provides:

> If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

Fed. R. Civ. P. 11(c).

Under the law of this circuit, the standard for determining whether a violation of Rule 11 has occurred is whether a competent attorney (or party), after appropriate investigation, would have reasonably believed that the claim was well grounded in fact and law. *See Kale v. Combined Ins. Co. of N. Am.*, 861 F.2d 746, 758 (1st Cir. 1988); *accord* Fed. R. Civ. P. 11 Advisory Committee Notes.

Rule 11 provides a 21-day "safe harbor," which requires a party seeking sanctions under that Rule to serve its motion and allow the opposing party 21 days to withdraw or correct the challenged statements before it files its motion. Fed. R. Civ. P. 11(c)(1)(A). If the opposing party refuses to do so, then the party seeking sanctions may file its motion. The Advisory Committee Notes to the 1993 Rule Amendments explain that this "safe harbor" provision requires the accused party to "*withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation*" in order to avoid sanctions. Fed. R. Civ. P. 11(c)(1), Advisory Committee Note (1993) (subdivisions (b) and (c)).

In the instant case, "an inquiry reasonable under the circumstances" would have made it patently clear that the claims brought by the plaintiff are not "warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law." *See Nyer v. Winterthur Int'l*, 290 F.3d 456, 461 (1st Cir. 2002) quoting Fed. R.Civ. P. 11(b)(2)-(3)). In cases such as this, when an attorney files a baseless complaint for an improper purpose without reasonable inquiry, sanctions are appropriate. Fed. R. Civ. P. 11(c).

B. The Litigation Privilege Bars the Claims Against DGW, Dunlap, Kurtz, and Achte

The absolute litigation privilege bars claims against attorneys and their clients that are predicated upon statements made in connection with the initiation and prosecution of a lawsuit.

See Blanchette v. Cataldo, 734 F.2d 869 (1984). The absolute privilege protects the maker from any civil liability based thereon. *Id.* at 877 (stating that "Massachusetts courts have applied the privilege, not only in defamation cases, but as a general bar to civil liability based on the attorney's statements."); *U.S. v. Rockland Trust Co.*, 860 F. Supp. 895, 902-903 (D. Mass. 1994) (stating that the privilege provides a complete defense to any civil liability flowing from the statement); *Doe v. Nutter, McClennan & Fish*, 41 Mass. App. Ct. 137, 140, 668 N.E.2d 1329, 1332-33 (1996) (stating "[t]he privilege is absolute" and finding that attorney's statements in written response to plaintiff's thirty-day demand letter were absolutely privileged); *Sullivan v. Birmingham*, 11 Mass. App. Ct. 359, 368, 416 N.E.2d 528, 533 (1980) (stating that the public policy supporting the privilege "would be severely undercut if the absolute privilege were to be regarded as less than a bar to all actions arising out of the conduct of the parties and/or witnesses in connection with a judicial proceeding."). "To rule otherwise would make the privilege valueless if an individual would then be subject to litigation under a different theory." *Doe v. Nutter, McClennan & Fish*, 41 Mass. App. Ct. at 141, 668 N.E.2d at 1333.

Statements must be "'pertinent to the proceedings' to come within the privilege, but this requirement is to be broadly construed." *Blanchette v. Cataldo*, 734 F.2d at 877 (citing *Sullivan v. Birmingham*, 11 Mass. App. Ct. at 362, 416 N.E.2d at 531). There can be no doubt that the alleged false statements made in DGW's demand letters were pertinent to the Achte lawsuit. Reasonable inquire or research into the law would have revealed that there was no valid basis upon which to file a lawsuit against DGW, Dunlap or Kurtz as their conduct was immunized by the litigation privilege.

Although the rule providing absolute privilege frequently is applied to shield defamatory statements made in the course of judicial proceedings, "in Massachusetts the rule has been

extended to provide an absolute immunity for many other torts because the policy behind the absolute privilege would be severely undercut if the absolute privilege were to be regarded as less than a bar to *all actions* arising out of the conduct of parties and/or witnesses in connection with a judicial proceeding." *Meltzer v. Grant*, 193 F. Supp. 2d 373, 377 (D. Mass 2002) (citing *Lucas v. Newton-Wellesley Hosp.*, No. Civ. A. 01-0635, 2001 WL 834681, at *2 (Mass. Super. July 20, 2001) (emphasis in original); *see also Hugel v. Milberg, Weiss, Bershad, Hynes & Learch, LLP*, 175 F.3d 14, 16 (1st Cir. 1999) (applying New Hampshire law in concluding that "[a] statement falls outside the privilege only if it is so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety." (internal quotations omitted)). "If the policy . . . really is to mean anything then we must not permit its circumvention by affording an almost equally unrestricted action under a different label." *Meltzer*, 193 F. Supp. 2d at 377-78 (internal quotations omitted).

Accordingly, ***the litigation privilege bars all civil claims, including those involving fraud and deceit***, based on statements made during the course of legal proceedings. *See Lucas v. Newton-Wellesley Hosp.*, No. Civ. A. 01-0635, 2001 WL 834681, at *4 (Mass. Super. July 20, 2001) (stating "this court finds that the absolute privilege bars the [plaintiffs'] fraud claim against [the defendants]."). The case of *Doe v. Nutter, McClennan & Fish*, 41 Mass. App. Ct. 137, 140, 668 N.E.2d 1329, 1332-33 (1996) is particularly instructive. In that case a law firm sent a letter in response to a demand letter in which the firm threatened to bring a lawsuit against the claimant. The *Nutter* Court held that ***even a response to a demand letter*** was covered by the absolute privilege, and thus the response letter could not form the basis of liability for violation of the Massachusetts Civil Rights Act, invasion of privacy or intentional infliction of emotional distress. *Id.* at 140, 668 N.E.2d 1329, 1332-33.

The absolute litigation privilege also provides a complete defense *even if* the alleged conduct is malicious or done in bad faith. *Blanchette v. Cataldo*, 734 F.2d at 877 (malicious and unlawful phone call privileged if pertinent to litigation); *Doe v. Nutter, McClennan & Fish*, 41 Mass. App. Ct. at 140, 668 N.E.2d at 1332; *Mezullo v. Maletz*, 331 Mass. 233, 236, 118 N.E.2d 356, 358 (1954) (witness' remarks are absolutely privileged "even if uttered maliciously or in bad faith").

The law is crystal clear that statements communicated, either verbally or in writing, by attorneys or parties in the context of or preliminary to litigation are absolutely privileged, even if the statements are made maliciously or in bad faith. It is also crystal clear that even a cursory inquiry by the plaintiff's counsel would have revealed that the conduct complained of in the plaintiff's Complaint cannot support liability as that conduct is absolutely privileged. No matter what the plaintiff attempts to call his claims – and he attempts to call them many things, many of which are not even recognized by the law as civil causes of action – all of the plaintiff's purported claims arise from the same facts and are barred as a matter of law. *See id.*

Here, there can be no doubt that the litigation privilege applies as the plaintiff's claims are premised entirely upon the alleged false statements made in the demand letters DGW issued to Doe Defendants such as the plaintiff. Any reasonable inquiry by the plaintiff's counsel would have led to this obvious conclusion. Accordingly, sanctions pursuant to Federal Rule of Civil Procedure 11 should be awarded.

C. The Plaintiff Lacks Standing and His Claims do Not State Recognized Causes of Action.

1. The plaintiff's lack of injury deprives him of standing to sue.

If a plaintiff lacks standing to bring a matter before a court, the court lacks jurisdiction to decide the merits of the underlying case. *United States v. AVX Corp.*, 962 F.2d 108, 113 (1st Cir.

1992). Thus, standing is a threshold issue, determining whether the court has the power to hear the case, and whether the putative plaintiff is entitled to have the court decide the merits of the case. *Id.* The inquiry into a plaintiff's standing "involves a blend of constitutional requirements and prudential considerations." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). Article III jurisprudence has established three basic elements of constitutional standing: (1) the plaintiff must suffer an injury in fact; (2) that is "fairly traceable" to the defendant's conduct; and (3) redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); "Article III standing imposes three fairly strict requirements." *People to End Homelessness, Inc. v. Develco Singles Apartments Assocs.*, 339 F.3d 1, 8 (1st Cir. 2003). The party invoking federal jurisdiction bears the burden of showing that the elements of Article III standing are present. *Lujan*, 504 U.S. at 561.

Here, the plaintiff has not alleged that he has suffered any damages – he could not have been defrauded by Defendants because he did not pay Defendants anything. *See* Compl. ¶ 225 ("the plaintiff has not acceded to Defendants' demands and has not paid to settle the claims.").[3] In other words, it is undisputed that the plaintiff did not suffer *an injury in fact*. *See Lujan*, 504 U.S. at 561. Accordingly, the plaintiff has no standing.

[3] There is no support for any contention that the plaintiff may make that his attorney's fees (the only damages in the Complaint) constitute damages. *See, e.g., Cordeco Dev. Corp. v. Santiago Vasquez*, 539 F.2d 256, 262 (1st Cir. 1976) ([A]ttorney's fees are not compensable damages."). Moreover, it should be noted that since the plaintiff has suffered no damages, he has no standing to represent a class. *See O'Shea*, 414 U.S. at 494; *see also Warth v. Seldin*, 422 U.S. 490, 502 (1975); *In re Pharm. Indus. Average Wholesale Price Litig.*, 263 F. Supp. 2d 172, 193 (D. Mass. 2003).

2. The plaintiff's claims for extortion under the Hobbs Act, common law extortion and conspiracy to commit the extortion – Counts One, Two and Three of the plaintiff's Complaint – have no basis in law or fact.

The plaintiff has not alleged facts sufficient to bring a claim of extortion under the Hobbs Act, 18 U.S.C. § 1951, as set forth in Count One of the plaintiff's Complaint. The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951 (2000). Although "fear" may include economic fear, *see United States v. Hathaway*, 534 F.2d 386, 395-96 (1st Cir.1976), "there is nothing inherently wrongful about the use of economic fear to obtain property," *United States v. Sturm*, 870 F.2d 769, 773 (1st Cir. 1989). Indeed, "the fear of economic loss is a driving force of our economy that plays an important role in many legitimate business transactions." *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 523 (3d Cir. 1998). Rather, economic fear is wrongful under the Hobbs Act only if the plaintiff had a pre-existing statutory right to be free from the defendant's demand. *See id.* at 525-26 (holding that plaintiff failed to state an extortionate predicate act because plaintiff had no pre-existing right to be an approved provider, and thus free of economic fear); *Viacom Int'l Inc. v. Icahn*, 747 F.Supp. 205, 213 (S.D.N.Y.1990), *aff'd* on other grounds, 946 F.2d 998 (2d Cir.1991) (distinguishing between "hard bargaining" and extortion based on the plaintiff's "pre-existing entitlement to pursue his business interests free of the [economic] fear he is quelling"); *see also George Lussier Enters.*, 393 F.3d at 50; *see also United States v. Cruzado-Laureano*, 404 F.3d 470, 481 (1st Cir.2005).

Defendants have credible evidence supporting Achte's claims that the recipients of demand letters issued by DGW and its attorneys illegally downloaded and distributed Achte's copyrighted work. The plaintiff has no statutory right to be free from receiving a demand letter

that offers to settle a legitimate legal dispute. In fact such settlement efforts are generally favored as an efficient means of resolving disputes. *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) ("it is the policy of the law to encourage settlements"); *Petition of Mal de Mer Fisheries, Inc.*, 884 F. Supp. 635, 637 (D. Mass. 1995) ("Prudential concerns favor settlement as a preferred alternative to litigation."). Accordingly, the necessary predicate upon which to base a cause of action for extortion pursuant to the Hobbs Act simply does not exist, and it was improper for the plaintiff's counsel to bring this cause of action.

There is no common law cause of action for extortion in Massachusetts; yet the plaintiff asserts this baseless cause of action in Count Two of his Complaint. "The counts described as being for 'extortion' and for 'coercion and duress' do not state facts supporting any recognized civil cause of action in this Commonwealth." *Leventhal v. Dockser*, 361 Mass. 894, 894, 282 N.E.2d 680, 681 (1972); *see also Mathon v. Feldstein*, 303 F.Supp.2d 317, 325 (E.D.N.Y. February 17, 2004) (citing *Schwartz v. Adler*, 1985 WL 2188 (S.D.N.Y. July 29, 1985)) ("there is no federal statute creating a private civil cause of action for extortion").

Similarly, there can be no cause of action for conspiracy to commit extortion as there is no underlying recognized civil cause of action. *See, e.g., Massachusetts Laborers Health & Welfare Fund v. Philip Morris, Inc.*, 62 F. Supp. 2d 236, 244 (D. Mass. 1999) ("there can be no joint liability for a tort [under a claim for conspiracy] unless there has been a tort").[4]

[4] Massachusetts recognizes two types of civil conspiracy, (1) "true conspiracy," which involves a group of individuals acting on concert to coerce action from another person and does not require an underlying tort, and (2) the "concerted action" conspiracy, which involves individuals acting in concert to commit a tort and requires an underlying tort. *Mass. Laborers Health & Welfare Fund*, 62 F. Supp. 2d at 244. As pled in the Complaint, the plaintiff's claims (styled as "Conspiracy to Commit [Tort]") plainly fall in the second category.

3. Mail fraud, wire fraud and conspiracy to commit the same – Counts Six, Seven, Eight and Nine of the plaintiff's Complaint – are not civil causes of action.

With Counts Six, Seven, Eight and Nine of the Complaint, the plaintiff's counsel has improperly filed additional claims for which no civil causes of action exist. "It is well established that there is no private cause of action under the mail fraud statute which is 'a bare criminal statute with no indication of any intent to create a private cause of action, in either the section in question or any other section.'" *Gibbs v. SLM Corp.*, 336 F. Supp. 2d 1, 17 (D. Mass. 2004) (quoting *Ryan v. Ohio Edison Co.*, 611 F.2d 1170, 1178-79 (6th Cir.1979)); *see also Swartz v. Schering-Plough Corp.*, 53 F. Supp. 2d 95, 105 (D. Mass. 1999) ("[w]hile mail fraud can be the predicate of a civil RICO action," there is no separate private right of action for mail fraud).

Not only does no civil cause of action exist for mail fraud, none exists for wire fraud. *See Wisdom v. First Midwest Bank, of Poplar Bluff*, 167 F.3d 402 (8th Cir. 1999) (holding that no private cause of action existed for mail or wire fraud).[5] Of course, there can be no cause of action for conspiracy to commit mail fraud or wire fraud since there is no underlying recognized civil cause of action. *See, e.g.*, *Massachusetts Laborers Health & Welfare Fund*, 62 F. Supp. 2d at 244 ("there can be no joint liability for a tort [under a claim for conspiracy] unless there has been a tort"); *see also* footnote 4, *supra*.

[5] To prove mail and wire fraud in a criminal case, the government must prove, beyond reasonable doubt: (1) defendants knowing and willing participation in scheme or artifice to defraud with specific intent to defraud, and (2) use of the mails or interstate wire communications in furtherance of scheme. *U.S. v. Sawyer*, 85 F.3d 713, 723 (1st Cir. 1996). While mail and wire fraud may be considered as a predicate offense for a civil RICO claim, neither provide for a private civil cause of action in their own accord. *See Swartz,* 53 F. Supp. 2d at 105.

4. The plaintiff has not stated a claim under the Computer Fraud and Abuse Act – Count Eleven of the plaintiff's Complaint.

Civil actions brought for violation of Computer Fraud and Abuse Act ("CFAA") may only be based on alleged violations of the CFAA provision prohibiting the knowing transmission of a program, information, code, or command *that intentionally causes damage without authorization to a protected computer*. *Cenveo Corp. v. CelumSolutions Software GMBH & Co KG*, 504 F. Supp. 2d 574, 580 (D. Minn. 2007). Damages are limited to compensatory damages that correspond with damage to the plaintiff's computer. 18 U.S.C. § 1030(g) (providing that "[a]ny person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief."). Here, as in the *Cenveo* case, the plaintiff has not and cannot plead that he has incurred any damage to his computer. The *Cenveo* court explained:

> [t]he Amended Complaint alleges that [Defendant] damaged [the plaintiff] by wrongfully and intentionally accessing its computer system. Notably, however, the Amended Complaint is devoid of allegations that [Defendant's] access caused an interruption in service or that [the plaintiff] incurred costs associated with responding and conducting damage assessment. As such, the Amended Complaint fails to adequately plead 'loss' as defined by the CFAA. Consequently, the claim fails as a matter of law.

Id. The same situation exists here as the plaintiff has not alleged and cannot claim that he suffered any damage to his computer. *See generally* Compl. Moreover, a reasonable investigation by the plaintiff's counsel would have revealed that a claim under the CFAA under the facts of this case has no support in the law. Accordingly, sanctions should be awarded.

5. The plaintiff's civil RICO claims – Counts Thirteen, Fourteen and Fifteen of the plaintiff's Complaint – are baseless.

Under the civil Racketeer Influenced and Corrupt Organizations Act ("RICO") statute, 18 U.S.C. §§ 1961 – 1968, it is unlawful to participate in the conduct of an enterprise's affairs

through a pattern of racketeering or to conspire to violate any of the substantive provisions of Section 1962. *See* 18 U.S.C. § 1962(c) & (d). 18 U.S.C. § 1964 creates a private right of action for individuals to enforce the RICO statute. Under this section, a plaintiff must prove an injury resulting from "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 491 (1985); *see also Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 242 (2d Cir.1999). Here, the plaintiff has not – and perhaps more significantly cannot – properly plead a civil RICO claim.

As a fundamental matter, a plaintiff must demonstrate that he has standing to bring his RICO-based causes of action. *See Sedima*, 473 U.S. at 496. In addition, predicate acts in support of a civil RICO claim must be plead with particularity, *Ahmed v. Rosenblatt*, 118 F.3d 886, 889 (1st Cir.1997), and must be shown to have caused an injury to "business or property." *Libertad v. Welch*, 53 F.3d 428, 436 (1st Cir. 1995); *see also* 18 U.S.C. § 1964(c) (stating that a plaintiff must allege that he has been "injured in his business or property by reason of" the claimed RICO violation). To have standing to bring a civil RICO claim, a plaintiff must plead, and ultimately prove, that he/she suffered an injury to business or property as a result of the defendants' racketeering activities. *See* 18 U.S.C. § 1962(c); *Sedima*, 473 U.S. at 495-97; *Camelio*, 137 F.3d at 669-70. Moreover, "if the pleadings do not state a substantive RICO claim upon which relief may be granted, then the conspiracy claim also fails." *Efron v. Embassy Suites (Puerto Rico), Inc.*, 223 F.3d 12, 21 (1st Cir.2000). Here, the plaintiff has not claimed that he suffered any injury whatsoever. *See* Section II.C.2, *supra*.

If any proposition under RICO is well-established, it is that a RICO damages claim may not be based on mere speculation. *See DeMauro v. DeMauro*, 115 F.3d 94, 97 (1st Cir. 1997) (a claimed civil RICO injury based on a "hypothetical inability to recover" in a pending lawsuit

was too speculative to confer standing); *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 768 (2d Cir. 1994) ("[A]s a general rule, a cause of action does not accrue under RICO until the amount of damages becomes clear and definite."). To succeed on a RICO claim, the plaintiff must not only show that the racketeering activity occurred, but the plaintiff must also show that he/she "suffered a direct injury as a result of [it]." *George Lussier Enters.*, 393 F.3d at 51 (finding that the plaintiffs, in order to succeed on their RICO claim based on the alleged Hobbs Act violations, had to have actually suffered direct injury). In short, ***the plaintiff cannot press a RICO claim based on attempts at extortion that did not succeed in harming him***. *See Camelio v. Am. Fed'n*, 137 F.3d 666, 670-71 (1st Cir. 1998) (discussing the statutory definition of "extortion" and concluding that, because the plaintiff claimed his injuries resulted exclusively from defendants' unilateral actions, plaintiff's civil RICO claim must fail because defendants did not extort property (i.e., take it from him *with his consent* through the use or threat to use force: "As Camelio concedes that these attempts did not succeed, they could not have caused his injuries.")).

According to the Supreme Court, a RICO "plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *See Sedima*, 473 U.S. at 496 (citations omitted); *see also Willis v. Lipton*, 947 F.2d 998, 1000 (1st Cir. 1991) ("A plaintiff enjoys standing under section 1964(c) only if he can demonstrate (1) a violation of section 1962, and (2) harm 'by reason of' the violation." (quoting *Sedima*, 473 U.S. 479, 495-96)); *In re Actimmune Mktg. Litig.*, 614 F. Supp. 2d 1037, 1053 (N. D. Cal. 2009) (holding that a plaintiff is required to plead "an ascertainable loss that is in direct relation to the alleged fraudulent conduct."). In addition, "[m]ere 'cause in fact' is insufficient to confer RICO standing . . . since section 1964(c) establishes a proximate

cause requirement as well." *Willis*, 947 F.2d at 1000. And, "[a]lthough the pleadings should generally be construed liberally, a greater level of specificity [has always been] required in RICO cases." *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 443 (1st Cir. 2000) (citing, *inter alia*, *Garita Hotel Ltd. Pshp. v. Ponce Fed. Bank, F.S.B.*, 958 F.2d 15, 17 n.1 (1st Cir. 1992)).

At most, the plaintiff might have alleged "attempted extortion"; however, attempted extortion is not a basis for a civil RICO claim. *See Dermesropian v. Dental Experts, LLC*, 718 F. Supp. 2d 143, 154 (D. Mass. 2010) (holding that plaintiff had no standing under to bring claim under RICO for attempted); *see also Libertad v. Welch*, 53 F.3d 428, 437 (1st Cir. 1995) ("Although we acknowledge that both women reasonably felt intimidated and harassed, neither woman suffered any injury to business or property, as is required for standing to sue under RICO.").

6. There is no private right of action for fraud on the court.

Count Seventeen of the plaintiff's Complaint asserts a cause of action for "fraud upon the court." However, this is not a cognizable civil cause of action. "[F]raud on the court is not recognized as an independent cause of action in Massachusetts." *Davidson v. Cao*, 211 F.Supp.2d 264, 276 (D. Mass. 2002) (citing *National Eng'g Serv. v. Galello*, No. CA9205303, 1995 WL 859241 at * 2 (Mass. Super. May 9, 1995)).

7. The plaintiff has not pled facts which would establish an abuse of process claim.

The plaintiff's claim for abuse of process, asserted at Count Eighteen, alleges that issuance of the subpoenas to the various internet service providers ("ISP's") of the Defendants in the underlying litigation was an abuse of process. However, this claim is without merit as issuance of subpoenas is not a "process" upon which such a claim can be predicated. To sustain an abuse of process claim, a plaintiff must establish that process was used "to accomplish some

ulterior purpose for which it was not designed or intended, or which was not the legitimate purpose of the particular process employed." *Quaranto v. Silverman*, 345 Mass. 423, 426, 187 N.E.2d 859 (1963) (quoting *Gabriel v. Borowy*, 324 Mass. 231, 236, 85 N.E.2d 435 (1949)).

Under Massachusetts law,

> cases on abuse of process have been limited to three types of process: writs of attachment; the process used to institute a civil action; and the process related to the bringing of criminal charges. Thus, under the law of Massachusetts, in the context of abuse of process, 'process' refers to the papers issued by a court to bring a party or property within its jurisdiction.

Jones v. Brockton Pub. Mkts., Inc., 369 Mass. 387, 389-390 (1975) (internal citations omitted); *see also Alphas Co., Inc. v. Kilduff*, 72 Mass. App. Ct. 104, 115, 888 N.E.2d 1003, 1013 (2008) ("We also note that, traditionally, discovery activities have not provided grounds for abuse of process actions in Massachusetts.").

Here, the plaintiff's abuse of process claim is based solely on the subpoenas issued to the ISPs in the underlying action. Complaint ¶ 400 ("Defendants willfully misused and/or misapplied the subpoena process for an end other than that which it was designed to accomplish"). Further, the plaintiffs have identified no misuse of the subpoenas.

8. There is no private right of action for fraud on the United States Copyright Office.

Similar to many of the plaintiff's other claims, Count Nineteen asserts a claim –"Fraud on the Copyright Office" – that is not recognized by law. There is no private right of action for fraud based on misrepresentations in a copyright application submitted to the United States Copyright Office. *See Donald Frederick Evans & Assoc. v. Cont'l Homes, Inc.*, 785 F.2d 897, 913 (11th Cir. 1986); *Ashton-Tate Corp. v. Ross*, 728 F.Supp. 597, 602 (N.D. Cal. 1989), *aff'd*, 916 F.2d 516 (9th Cir. 1990).

9. Copyright misuse is not an independent cause of action.

The plaintiff's counsel brings yet another baseless claim on behalf of its client at Count Twenty of the Complaint. There is no independent cause of action for copyright misuse, which is only an affirmative defense that may be raised in a copyright infringement action. *See Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1090 (9th Cir. 2005) (copyright misuse not an independent claim when there has been no allegation of copyright infringement); *Ticketmaster, L.L.C. v. RMG Technologies*, 536 F. Supp. 2d 1191, 1198-99 (C.D. Cal. 2008) (holding that copyright misuse is only an affirmative defense to a claim for copyright infringement, and does not support an independent claim for damages); *Arista Records, Inc. v. Flea World, Inc.*, 356 F. Supp. 2d 411, 428 (D.N.J. 2005) ("copyright misuse is not a claim but a defense"); *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1198 n.4 (N.D. Cal. 2004) ("the plaintiffs cite no legal authority, and the Court is aware of none, that allows an affirmative claim for damages for copyright misuse."); *see also Metro-Goldwyn-Mayer Studios, Inc.*, 269 F.Supp.2d at 1226 (noting that misuse is not even properly alleged as a declaratory judgment claim: "Separately litigating [the copyright misuse defense] in a declaratory posture would not serve the purposes of declaratory relief, such as clarifying and settling the legal relations of the parties, or affording a declaratory plaintiff relief from the 'uncertainty, insecurity, and controversy giving rise to the proceeding.'").

10. The plaintiffs have not complied with the statutory perquisites necessary for bringing a Massachusetts Consumer Protection Claim and have not alleged sufficient facts to support such a claim.

A plaintiff bringing a claim under § 9 of M.G.L. c. 93A, the Massachusetts Consumer Protection Act, must allege the sending of a demand letter as a prerequisite to suit. *Boston v. Aetna Life Ins. Co.*, 399 Mass. 569, 574 (1987) ("The failure of the City to allege the sending of

a demand letter is fatal to its Section 9 claim"); *Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc.*, 14 Mass. App. Ct. 396, 432 n.42 (1982); *accord Entrialgo v. Twin City Dodge, Inc.*, 368 Mass. 812, 813 (1975) ("A demand letter listing the specific deceptive practices claimed is a prerequisite to suit and as a special element must be alleged and proved"). Specifically, M.G.L. 93A § 9(3) requires a written demand for relief at least 30 days before filing suit. There was no demand in this case prior to the time the plaintiff's counsel filed suit, and the plaintiff's have not asserted that such a demand was made.

Additionally, the plaintiff cannot bring a claim under the Massachusetts consumer protection law because he claims no actual damages. *See Rule v. Fort Dodge Animal Health, Inc.*, 607 F.3d 250 (1st Cir. Mass. 2010) (holding that chapter 93A claim requires claim of actual damages). Such an action would constitute "a purely vicarious suit by self-appointed attorneys general, which the statute does not allow." *Fine v. Sovereign Bank*, 2010 U.S. Dist. LEXIS 76449 (D.Mass. July 28, 2010) (citing *Leardi v. Brown*, 394 Mass. 151, 474 N.E.2d 1094, 1102 (Mass. 1985)).

III. CONCLUSION

For the foregoing reasons, the defendants respectfully request that this Court impose appropriate sanctions pursuant to Federal Rule of Civil Procedure 11 against Plaintiff, Dmitriy Shirokov, and his counsel, Booth Sweet LLP, Daniel G. Booth, and Jason E. Sweet, including but not limited to the striking of the plaintiff's claims in their entirety or alternatively against Defendants Dunlap Grubb & Weaver, PLLC, Thomas Dunlap and Nicholas Kurtz, as well as reimbursement of the attorneys' fees and expenses moving Defendants have incurred, and for such other further relief that the Court deems just and proper.

The Defendants,
Dunlap, Grubb & Weaver, PLLC,
Thomas Dunlap, and Nicholas Kurtz
By their counsel,

/s/ George C. Rockas

George C. Rockas BBO# 544009
Kara Thorvaldsen BBO# 660723
WILSON ELSER MOSKOWITZ
EDELMAN & DICKER LLP
260 Franklin Street
Boston, MA 02110
(617) 422-5300

Certificate of Service

I, Kara Thorvaldsen, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF). I am not aware of any party who is a not a registered participant, and therefore electronic filing is the sole means of service of this document.

/s/ Kara Thorvaldsen