

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

**OBJECTIONS OF DEFENDANTS DUNLAP, GRUBB & WEAVER, PLLC, US
COPYRIGHT GROUP, THOMAS DUNLAP, AND NICHOLAS KURTZ TO REPORT
AND RECOMMENDATION ON DEFENDANTS' MOTIONS TO DISMISS THE
SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 72**

Defendants Dunlap, Grubb & Weaver, PLLC, US Copyright Group, Thomas Dunlap, and Nicholas Kurtz (“the defendants”) respectfully submit the following objections to the Report and Recommendation on the defendants’ Motions to Dismiss the Second Amended Complaint Pursuant to Fed. R. Civ. P. 72 (“Report”).

I. INTRODUCTION

The plaintiff is Dmitriy Shirokov (“Shirokov”), and he is believed to have infringed the intellectual property rights of co-defendant Achte/Neunte Boll Kino Beteiligungs Gmbh & Co KG (“Achte”) by illegally downloading and file sharing a copy of Achte’s film “Far Cry.” To address widespread illegal downloading of Far Cry, Achte retained defendant law firm Dunlap, Grubb & Weaver, PLLC (“DGW”), to protect Achte’s intellectual property rights in Far Cry. Defendants Thomas Dunlap (“Dunlap”) and Nicholas Kurtz (“Kurtz”) are attorneys associated with DGW.

With the aim of protecting Achte’s intellectual property rights, defendants DGW, Dunlap and Kurtz, instituted a lawsuit in the U.S. District Court for the District of Columbia captioned *Achte/Neunte Boll Kino Beteligungs & Co., KG v. Does 1 -4,577*, Civil Action No. 10-453 (the “Far Cry Lawsuit”). Within the context of the Far Cry Lawsuit, Shirokov was identified by his internet service provider (“ISP”), as a suspected infringer of the movie. Upon obtaining this information, DGW, on behalf of Achte, served a settlement offer letter upon Shirokov indicating that: (a) Shirokov had been identified as a suspected infringer, (b) Achte had brought the Far Cry Lawsuit to seek redress against suspected infringers such as he; and, (c) as such, he could be named as a defendant in the lawsuit. The letter also included: a settlement offer and information regarding the basis for Achte’s claims; where additional information, including a copy of the complaint could be found; and a caveat that DGW’s attorneys did not represent Shirokov, and that he should consider “consult[ing] with an attorney to review your rights and risk exposure in connection with this matter.” There is no false statement or misrepresentation in the demand letter – only statements as to the legal positions taken by Achte, qualified statements as to what remedies “might be available,” and projections as to what relief Achte “might seek.”

At no time has Shirokov claimed that he did not illegally share a copy of the film Far Cry. Likewise, although he disputes the remedies that might be available to Achte against him for his alleged infringement, he concedes that Achte has enforceable rights in the copyright of Far Cry. ¹

The Magistrate Judge has recommended that all but the following counts against the defendants be dismissed:

¹ Although the publication of the United States version of the DVD is arguably a derivative work, which would permit a separate copyright registration than an earlier version, regardless of whether the Far Cry copyright registration is valid, plaintiff concedes that Achte was entitled to bring suit against suspected infringers in the United States at least for actual damages “even absent a registration.” *See* Second Amended Complaint, Doc. No. 26 (“SAC”) ¶ 107.

- Count 1: Fraudulent Misrepresentation
- Count 2: Fraudulent Omission/Nondisclosure
- Count 3: Conspiracy to Commit Fraud
- Count 5: Aiding and Abetting Fraud
- Count 8: Negligent Misrepresentations and Omissions
- Count 11: Fraud on the Copyright Office (for declaratory relief only)
- Count 13: Civil Conspiracy
- Count 18: Violation of the Massachusetts Consumer Protection Act

II. ARGUMENT

A. **Standard of Review of Report and Recommendation Pursuant to Fed. R.Civ. P. 72(b).**

Pursuant to Fed. R. Civ. P. 72(b), where a party timely objects to a Magistrate Judge’s recommendation regarding a dispositive motion, “[t]he district judge must determine de novo any part of the magistrate judge’s disposition that has been properly objected to,” and “may accept, reject or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.”

B. **Conclusions of Law Couched as Factual Allegations Need Not Be Accepted as True in Reviewing a Motion to Dismiss for Failure to State a Claim.**

A plaintiff must set forth the grounds for his entitlement to relief with “more than labels and conclusions, and a formulaic recitation of the elements.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). In reviewing the sufficiency of a complaint, courts should not accept legal conclusions couched as factual allegations as true. *Id.*; *see also Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1216 (1st Cir. 1996) (“a court must take all well-pleaded facts as true, but it need not credit a complaint’s ‘bald assertions’ or legal conclusions. Likewise, “[c]onclusions that are not supported by the facts that are alleged in the complaint ‘deserve no deference.’” *Mass. Laborers’ Health & Welfare Fund, by and Through its Trustees v. Philip Morris, Inc.*, 62 F. Supp. 2d 236, 240-241 (D.Mass. 1999) (citations omitted).

Shirokov's claim that the settlement demand letter contained materially false or inaccurate statements is centered on his contention that Achte's copyright registration is invalid and that Achte was therefore never entitled to seek statutory damages or attorney's fees in the Far Cry Lawsuit. Shirokov further alleges that Achte sells the Far Cry DVD for \$26.99 or less and thus Shirokov could only have been liable to Achte for a fraction of that amount. These allegations, while couched as facts, are actually legal conclusions relating to the merits of, and potential damages available in, the Far Cry Lawsuit. As such, they are not binding upon this Honorable Court in determining the sufficiency of the SAC under Federal Rule 12(b)(6).²

Likewise, although Shirokov alleges that the challenged settlement demand letter contains false statements of fact that are actionable under theories of fraudulent or negligent misrepresentation or omission, this Court is not bound to accept his characterization of those statements as "factual statements," when on their face, they are legal opinions or positions asserted on behalf of Achte. "It is ... well settled, as a general rule, that fraud cannot be predicated upon misrepresentations of law or misrepresentations as to matters of law." *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 621 (9th Cir. 2004) (citing Am.Jur.2d of Fraud and Deceit § 97 (2001)). As a general rule, "false statements of opinion, of conditions to exist in the future, or of matters promissory in nature are not actionable." *Pepsi-Cola Metro. Bottling Co. v. Pleasure Island, Inc.*, 345 F.2d 617, 622 (1st Cir. 1965) (citation omitted); *see also Hogan v. Eastern Enterprises/Boston Gas*, 165 F.Supp.2d 55, 64 (D. Mass. 2001) (holding that plaintiff was not justified in relying upon statements about future actions of company). Here, the alleged

² The Report and Recommendation states that the "Dunlap Defendants did not move to dismiss the fraud and fraudulent omissions/nondisclosure claims (Counts 1 and 2) on the basis that they fail to state a claim." *See* Report at 44-45 n. 14. However, the defendants' motion to dismiss did assert that "each of the plaintiff's nineteen counts fails to state a claim on which relief can be granted," and defendants' motion in support thereof stated that "even taking the plaintiff's allegations as true for purposes of this motion to dismiss, each of the nineteen counts of the Second Amended Complaint fails to state a claim upon which relief can be granted and must be dismissed against the defendant attorneys." *See* Doc. No. 28 at 1; Doc. No. 29 at 9.

false statements about the damages recoverable under the Copyright Act and that defendants might pursue individuals in litigation after sending out the settlement letters cannot form the basis of a fraud or negligence claim against defendants. That Shirokov characterizes these as actionable statements of fact does not make it so.

When the actual language of the letter sent to plaintiff, as opposed to plaintiff's characterization of the letter, is examined, it becomes clear that there are no statements of fact justifying any claim for misrepresentation, whether fraudulent or negligent. The alleged objectable statements include:

- The law provides protection for copyright owners through the Federal copyright statute found at 17 U.S.C. §§ 501-506, which allows the copyright owner to impound your material, recover their attorneys' fees, and seek damages of \$750 - \$150,000 per work, depending on the circumstances surrounding the infringement.
- If forced to do so, our client will be seeking to recover the maximum amount of damages provided under the Copyright Act for copyright infringement, which is up to \$30,000 per illegally downloaded film, plus attorneys' fees and costs of litigation. Because torrent file-sharing requires deliberate action by the uploader or downloader of a movie, we may be able to prove that your actions were intentional, rather than just negligent. In the event we are able to prove that the infringement was intentional, our client will be seeking the maximum statutory damages allowed by the Copyright Act in the amount of \$150,000 per infringement, attorneys' fees and costs.

See Doc. No. 1-15.

The first statement is purely a recital of the Copyright Act. The second statement puts forth Achte's legal position and statement as to future legal filings. Such a statement likewise cannot be a representation of present fact, regardless of how Shirokov couches his allegations.

Further, Shirokov's conclusory allegation that the defendants had superior knowledge to plaintiff, giving rise to a duty of disclosure is directly contradicted by the specific factual allegations contained in the SAC. As Shirokov's own pleadings show, information regarding Far Cry, its registered copyright, and its theatrical and DVD releases were all public information at the time defendants sent the settlement letter to plaintiff.

The conclusory allegations reciting the elements of Shirokov's fraud and negligence claims are refuted by other, more specific allegations in his own pleadings. For example, some of the primary bases for plaintiff's fraudulent and negligent misrepresentation claims are that defendants never intended to name individuals to infringement lawsuits. However, plaintiff concedes that Achte named an individual in the underlying Achte case in D.C. and has brought additional suits against individual infringers. Doc. No. 26 at 51, ¶¶ 209, 214. Therefore, plaintiff's own allegations refute his fraud and negligence claims. To the extent that conclusory allegations are contradicted by specific factual averments and exhibits attached to the SAC, they should not be presumed true, and are entitled to no deference under the Rule 12(b)(6) standard.

Similarly, Shirokov's legal conclusions, couched as factual allegations, are entitled to no deference. Shirokov alleges, as if it were a fact, that Achte's damages against him in the Far Cry Lawsuit would be limited to some portion of the sale price of Far Cry, i.e. profits, for each infringement. See SAC ¶ 220.

However, even assuming Achte's registration were invalid, the Copyright Act does not have such a limitation on actual damages. "The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages." 17 U.S.C. § 504(b).

File sharing in the manner alleged requires that the infringer make his copy available to other users of the network, meaning that one user's participation could lead to numerous instances of infringement. As the United States District Court for the First Circuit has noted, peer-to-peer file sharing has led to rampant copyright infringement and significant diminished revenues for copyright owners:

Peer-to-peer networks enable individuals both to make digital files stored on their own

computers available to other network users and to download such files from the computers of others. Files shared between users of these networks do not pass through a central computer, but are instead exchanged directly from one user's computer to another. Through the use of these peer-to-peer networks, the unauthorized and illegal downloading and distribution of copyrighted materials--especially music recordings--became commonplace. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919-20, 923, 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005) (describing operation of peer-to-peer networks and noting that their advent has likely resulted in copyright infringement on a "staggering" scale). Because music recordings are loaded onto peer-to-peer networks in digital form, recordings downloaded from peer-to-peer networks are virtually indistinguishable from recordings purchased through lawful means, making enforcement difficult.

The proliferation of these networks from 1999 onward and the piracy they enable has had a significant negative impact on the recording industry. Between 1999 and 2008, the recording industry as a whole suffered a fifty percent drop in both sales and revenues, a figure plaintiffs attribute to the rise of illegal downloading. This reduction in revenues has, in turn, diminished recording companies' capacities to pursue, develop and market new recording artists. It also affected the companies' employees. The loss in revenues has resulted in a significant loss of industry jobs. Sony BMG Music Entertainment and Warner Music Group, for example, each have suffered a fifty percent reduction in workforce since 2000.

Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 491-492 (1st Cir. 2011).

By illegally file sharing the film *Far Cry* (an act he does not deny), Shirokov may have been responsible for multiple other users illegally downloading the film. Thus, actual damages are not necessarily limited to the profit that Achte might have derived from the sale of one DVD to Shirovko.³

Overall, how damages—even actual damages—should be measured against an individual defendant in the *Far Cry* Lawsuit is a question of law for the court hearing that case to decide. Although a jury might ultimately make findings as to the amount of actual damages, they would be constrained by the court's instructions on the law as to how the damages could be calculated. Accordingly, to the extent that the plaintiff's claims are premised on his contention that the

³ Applying the plaintiff's theories of recovery here, because the defendants disagree with Shirokov's opinion as to what damages might be available, the defendants would be entitled to seek damages—in the form of attorneys' fees incurred in retaining counsel to investigate the merits of these statements.

\$1,500 demand was false or misleading because it bore no relation to the amount of damages that Achte could legitimately claim, this allegation is not entitled to any presumption of truth.

Contrary to the premise expressed in the Report and Recommendation, this Honorable Court is not bound to accept these allegations as true in ruling upon the legal sufficiency of the plaintiff's SAC. Therefore, the Court should also dismiss claims 1, 2, 3, 5, 8, and 13.⁴

C. The Magistrate Judge Erred in Recommending that Attorneys' Fees Constitute an Injury Sufficient to Convey Standing.

As the Report and Recommendation noted, “[s]ince [the elements of standing] are not mere pleading requirements, but rather an indispensable part of the plaintiffs’ case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.” Report at 28. Moreover, per the First Circuit, “where standing is at issue, heightened specificity is obligatory at the pleading stage.” *Id.* (quoting *United States v. AVX Corp.*, 962 F.2d 108, 113-114 (1st Cir. 1992)). Despite the plaintiff’s vague and conclusory allegations as to the injury he claims to have incurred as a result of the challenged conduct, the Magistrate Judge determined that Shirokov had met this burden by alleging that he had incurred the cost of counsel after his receipt of the demand letter so as to advise him regarding the merits of Achte’s copyright claims.

The defendants object to this conclusion on three grounds: first, because of Shirokov’s vague allegation that he consulted with an attorney—particularly in light of the highly detailed pleadings that he has filed—does not meet the “heightened specificity” contemplated by the First Circuit; second, because such a conclusion is contrary to the “American Rule,” whereby each party is responsible for his own attorneys’ fees, even pre-litigation fees, win or lose; and third,

because the Magistrate Judge appeared to conclude that the cost of consulting with an attorney, alleged by Shirokov, could constitute an injury in fact for purposes of standing as, according to the Judge Boal those fees could be an element of damages in an abuse of process claim; even though Judge Boal's Report subsequently recommended dismissing that very claim from this action.

It is well settled that parties are responsible for their own attorneys' fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). The Magistrate Judge reasoned that “[t]he natural and probable consequences of the defendants’ alleged actions include the costs incurred in defending the copyright claims,” and that as such, “fees incurred in connection with the Letter would be considered compensatory damages, not attorneys’ fees.”⁵ Report at 31 (citing *Millenium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. 627, 645 (2010)). The defendants respectfully object.

The *Millenium* case cited in the Report presents a wholly different scenario from this case. There, an attorney for the wife in a divorce suit was sued by the husband on several theories relating to the filing of an attachment on the husband's property. The attorney was ultimately successful in defending the lawsuit, with the court holding that his conduct in the litigation had been privileged, and he was successful on his abuse of process counterclaim. The case was litigated over several years and was ultimately decided in the SJC. Notably, the court did not award the attorney the fees he incurred in prosecuting his abuse of process and other counterclaims. *Id.* at 646.

In contrast, here, Shirokov did not defend or respond to the copyright claim and thus did not incur costs “in defending the copyright claims” as stated in the Report. *See* Report at 30. The

⁵ The settlement letter indicated that the recipient should consider consulting with counsel. However, had it not included such a caveat, the defendants would have been excoriated for not recommending that the recipient seek an independent opinion.

Millenium case states: “[t]he ‘natural and probable’ consequences of an abuse of process lawsuit include the costs incurred in successfully defending the charge. As such, fees incurred for defending such a lawsuit are considered compensatory damages, not attorney’s fees.” Report at 31 (quoting *Millenium*, 456 Mass. at 645). This principle is simply inapplicable here, where, as the Report acknowledges, Shirokov never defended the copyright claims. Report at 58-59.

At most, it can be inferred that Shirokov was advised that the infringement claim did not pose a risk of large exposure to him, and that no defense was therefore warranted. It is equally fair to infer that Shirokov received advice related to the commencement of the instant lawsuit.⁶

To hold that these consultations are sufficient to convey standing on a party would give rise to an ability to “purchase” standing to sue in an opponent and his attorney in federal court for the price of an initial consultation with an attorney anytime that opponent and his attorney asserts a legal position with which it does not agree or which ultimately is not successful. *Cf.* Report at 30 (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 107 (1998) (“[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit.”)). Moreover, the Magistrate Judge’s reliance on a case holding that attorney’s fees can constitute compensatory damages in an abuse of process claim, to show that the incursion of fees can constitute an “injury,” while holding that Shirokov did not state a claim for abuse of process, cannot be reconciled. *See* Report at 57-59.

D. Noerr-Pennington Immunity Is Appropriately Applied to Settlement Demand Letters Relating to Intellectual Property Disputes.

The defendants object to the Report regarding the application of the Noerr-Pennington doctrine to Shirokov’s claims for two reasons: (1) the Report improperly limited the Noerr-

⁶ Presumably Shirokov’s counsel is representing him on a contingent fee basis or are being paid by interested third parties. Indeed, the ultimate goal for plaintiff and/or his counsel seems to be class certification, as within hours of issuance of the Report, Shirokov’s counsel had posted notice on their website declaring: “Short version: class action survives.” This representation is interesting in as much as a class has yet to be certified, this Court has not made a final ruling on the motions to dismiss, and the Report recommends dismissing a majority of plaintiff’s claims.

Pennington doctrine; and (2) the Report improperly found that Achte's claims of copyright infringement constituted sham litigation.

First, the Report and Recommendation improperly limited the Noerr-Pennington doctrine. Noerr-Pennington immunity has been held to bar claims outside of the anti-trust context. In a case similar to the one at bar, *Atlantic Recording Corp. v. Raleigh*, 2008 U.S. Dist. LEXIS 62977 (E.D. Mo. Aug. 18, 2008), a defendant in a copyright infringement suit brought counterclaims for racketeering and conspiracy pursuant to RICO, along with fraudulent misrepresentation, prima facie tort, and conspiracy. The District Court for the Eastern District of Missouri dismissed the counterclaims pursuant to the Noerr-Pennington doctrine. The Report and Recommendation completely failed to address this decision, which is directly analogous.

The Federal Circuit has also recognized the doctrine's applicability to settlement communications, citing the policy of encouraging settlement and noting that "the same First Amendment policy reasons that justify the extension of *Noerr* immunity to pre-litigation conduct in the context of federal antitrust law apply equally in the context of state-law tort claims." *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 362 F.3d 1367 (Fed. Cir. 2004); accord *Ocean Spray Cranberries, Inc. v. Decas Cranberry Prods.*, NO. 08-11738-RWZ, 2011 U.S. Dist. LEXIS 38399 (D. Mass. Apr. 8, 2011); see also *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Ltd.*, 2006 U.S. Dist. LEXIS 43690 (D. Mass. June 28, 2006) (holding that *Noerr-Pennington* doctrine applied to settlement communications warning of imminent litigation).

The dissenting opinion in the Tenth Circuit's decision in the *Cardtoons* case cited by the Magistrate Judge is also persuasive on this point. The dissenting justices noted that the "there can be little doubt that Noerr-Pennington immunity, as amplified by *California Motor Transport*, is mandated by the First Amendment's right to petition, irrespective of any independent statutory

basis it might also have, and ‘Noerr-Pennington immunity’ has evolved into an umbrella term for First Amendment petitioning immunity.” *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 895 (10th Cir. 2000) (Lucero, C.J., dissenting). Moreover, with respect to statements made in a letter threatening litigation, the dissent reasoned:

I cannot agree with the majority's proposition that the First Amendment protects an owner of intellectual property rights who blindsides an adversary with a lawsuit claiming infringement of those rights, but fails to shield that same owner when a more civilized notice and demand letter is sent in advance. Put another way, there is no sound basis for the conclusion that a complaint will be afforded immunity while a “cease-and-desist” letter will not, when both documents contain identical allegations. The majority's ruling encourages, nay demands, more litigation; it requires intellectual property owners to bypass the post office on the way to the court house and avoid the letter carrier in a rush to get to the process server.

Today's decision ignores the reality of intellectual property law, in which the enforcement of legal rights, and thus the invocation of the litigation process, is customarily commenced by a cease-and-desist letter. Consequently, the practical result of the majority's holding will be to force parties seeking to prevent the wrongful infringement of their intellectual property rights to ambush infringers with lawsuits or risk having to defend against retaliatory tort claims. Noerr-Pennington, as that body of jurisprudence has come to be known, has been applied to immunize from state tort claims objectively reasonable petitioning activity invoking the courts. In furtherance of the First Amendment interest in the vindication of legal rights and the constitutional requirement that the right to petition be given the breathing space necessary to survive, the same immunity should be afforded to objectively reasonable allegations of infringement and threats of litigation contained in cease-and-desist letters.

Id. at 893-894; *see also DirecTV, Inc. v. Lewis*, 2005 U.S. Dist. LEXIS 8187 (W.D.N.Y. Apr. 29, 2005).

Here, the “scheme” alleged by Plaintiff is that defendants utilized settlement offer letters instead of running to the courthouse and filing litigation against the infringers. Apparently plaintiff is suggesting defendants should have engaged in the very conduct warned of by the dissent in *Cardtoons* - ambushing infringers with lawsuits rather than attempting out of court settlements. Such a position distorts the reasoning behind the Noerr-Pennington doctrine and

ignores the practical realities of intellectual property litigation.

The defendants further object to the Report insofar as it suggests that Shirokov adequately pled the “sham litigation” exception to the Noerr-Pennington doctrine. *See* Report at 35-36 (“Shirokov has alleged sufficient facts that, if proven, would establish that the Achte Lawsuit was a sham.”) However, this conclusion is based on an incorrect premise that Achte would only have the right to bring an infringement lawsuit if its copyright registration were valid. *See* Report at 35. The Report does not distinguish between the underlying copyright and the copyright registration. As the Report correctly notes, “Achte is the holder of copyright of ‘Far Cry,’ a fact that Shirokov does not dispute.” *Id.* The validity of Achte’s copyright in “Far Cry” has never been in dispute, only the copyright registration.

The Report failed to acknowledge that, as pled by plaintiff, Achte was entitled to bring suit against suspected infringers in the United States at least for actual damages “even absent a registration.” SAC ¶ 107. Therefore, because the Magistrate Judge’s premise for finding that Shirokov adequately pled the sham litigation exception is flawed, it should not be adopted.

Further, the Report did not state how the Far Cry Lawsuit could be ultimately found to have been a “sham.” According to the Report, “the ‘sham exception’ may apply in three circumstances: (1) where the lawsuit is objectively baseless and the defendant’s motive in bringing it was unlawful; (2) where the conduct involves a series of lawsuits brought pursuant to a policy of starting legal proceedings without regard to the merits and for an unlawful purpose; and (3) if the allegedly unlawful conduct consists of making intentional misrepresentations to the court, litigation can be deemed a sham if a party’s knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.” Report at 35 (citing *Sosa v. DirecTV*, 437 F.3d 923, 939 (9th Cir. 2006)).

Based on the analysis in the Report, it appears the Magistrate Judge concluded that

Shirokov had properly pled the sham litigation exception because he alleged that the Far Cry copyright registration was invalid, and that therefore, the Far Cry Lawsuit was objectively baseless. However, the underlying lawsuit cannot be said to be objectively baseless. In the Far Cry Lawsuit, the U.S. District Court for the District of Columbia determined that the defendant attorneys had demonstrated probable cause to believe that the John Doe defendants had infringed their client's copyright and permitted it to go forward with discovery against the John Doe defendants, including the plaintiff. *Achte/Neunte Boll Kino Beteiligungs GmbH & Co. KG, v. Does 1 -4,577*, 736 F. Supp.2d 212, 216, n.2 (D.D.C. 2010) ("Plaintiff has made a *prima facie* case of copyright infringement in this case, and Plaintiff's need for disclosure outweighs the First Amendment privacy interests here"). Thus, the underlying litigation has an objectively reasonable basis was. In order properly plead the sham litigation exception, "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993). Again, based upon his own allegations, Shirokov could have been found liable to Achte in the Far Cry Lawsuit, even if a recovery were limited to damages.

"The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation." *See Professional Real Estate Investors, Inc.*, 508 U.S. at 62. Because probable case existed here, there is no basis for applying the sham litigation exception here, on the facts as pled by Shirokov.

E. The Massachusetts Litigation Privilege Immunizes the Defendants' Conduct and Statements.

These Defendants object to the Report and Recommendation insofar as it concludes that the Massachusetts litigation privilege should not bar, at this time, any of Shirokov's claims. As the Report acknowledges, "an attorney's statements are absolutely privileged whether in the

institution or conduct of litigation or in conferences and other communications preliminary to litigation.” Report at 36 (quoting *Blanchette v. Cataldo*, 734 F.2d 869, 877 (1st Cir. 1984). As the Report further acknowledges, where litigation is already underway, as was the case with regard to the Far Cry Lawsuit, “the privilege applies if the statements are ‘pertinent’ to the litigation.” *Id.* (citing *Meltzer v. Grant*, 193 F.Supp. 2d 373, 377 (D. Mass. 2002). A settlement offer letter, indicating that a lawsuit has been filed and that the recipient of the letter may be named as a defendant and served with process is indisputably “pertinent” to the litigation.

The litigation at issue was not only contemplated at the time that the settlement letter was sent to Shirokov, it was underway.⁷ Further, Shirokov’s allegation that the litigation was brought for the purpose of obtaining settlements from suspected infringers is irrelevant, as this is the purpose of most litigation given that a scant fraction of lawsuits are ever prosecuted through trial. The case is thus distinguishable from *Int’l Floor Crafts, Inc. v. Adams*, 477 F. Supp. 2d 336 (D. Mass. 2007), in which it was claimed that the challenged litigation was brought for the purpose of interfering with a business relationship. Bringing a lawsuit for an ulterior purpose, unrelated to the claims made in the lawsuit itself, is distinguishable from bringing a lawsuit for the purpose of advocating for a client’s legal rights with a goal of settling it.

“A pre-suit demand letter. . . cannot form the basis of a claim, since it is absolutely privileged under the common law.” *Rubin v. Murray*, 25 Mass. L. Rep. 429 (Mass. Super. Ct. 2008) (citing *Giuffrida v. High Country Investor, Inc.*, 73 Mass. App. Ct. 225, 2008 WL 4951595 at *11 (2008); *Sriberg v. Raymond*, 370 Mass. 105, 109 (1976) (where communication to prospective defendant relates to proceeding contemplated in good faith, privilege should

⁷ The Report only analyzes the “good faith” and “serious consideration” elements related to the litigation privilege when applied to communications made preliminary to proposed judicial proceedings. The Report never analyzed whether the communications were “pertinent” to the litigation when judicial proceedings are already underway. As shown herein, this is plain error, as judicial proceedings were already underway when the letter was sent to plaintiff; therefore, the Court only has to determine that the letter was pertinent to the judicial proceedings to determine if the claims are barred by the litigation privilege.

attach); *Sullivan v. Birmingham*, 11 Mass.App.Ct. 359, 361-62 (1981); Fisher, 69 Mass.App.Ct at 369-70; *Blanchette v. Cataldo*, 734 F.2d 869, 877 (1st Cir. 1984)).

F. The Claims for Conspiracy and Aiding and Abetting are Insufficient.

The Report and Recommendation correctly found that no allegations existed against Guardaley to support a claim for conspiracy or aiding and abetting, leaving just Achte and its attorneys for these claims. However, the allegations are insufficient to support such claims between a client and its attorneys.

“Conspiracy requires proof that the attorney’s participation involved more than legal representation.” *Gael-Greco Ltd. Partnership v. Bagshaw Mills Condominium Trust*, 60 Mass.App.Ct. 1109, 800 N.E.2d 727, 2003 WL 23018208, *2 (Mass.App.Ct. 2003) (unpublished). Here, there are no allegations that the Dunlap defendants’ work was more than in a legal capacity.⁸ Therefore, the Court should dismiss the conspiracy and aiding and abetting claims.

G. The Report and Recommendation Improperly Transformed Plaintiff’s Claim for Fraud on the Copyright Office into one for Declaratory Judgment.

The Report correctly noted that, ordinarily, fraud on the Copyright Office is an affirmative defense to copyright infringement, not a cause of action. However, the Report transformed Shirokov’s claim for fraud on the Copyright Office into one for declaratory judgment. The Court should not follow suit.

According to Shirokov’s allegations, the defendants have no intent to pursue him for copyright infringement.⁹ The Report states that “any potential threat of litigation against

⁸ Plaintiff generally alleges that the Dunlap defendants participated in the “scheme” with Achte by receiving a portion of the settlements. However, such a relationship does not take the Dunlap defendants out of their legal representation of Achte. Otherwise, any attorney who worked on a contingency basis would potentially be liable for civil conspiracy with the client.

⁹ Achte’s present intent regarding naming Shirokov as a defendant in the Far Cry Lawsuit is obviously a separate issue from its intent at the time that the suit was filed and the settlement letter transmitted to Shirokov.

Shirokov is speculative and too remote to support a finding of standing,” Noting that Shirokov has not been named as a defendant in the Far Cry Lawsuit, which was filed approximately two years ago. Report at 29. Therefore, based on the facts alleged by Shirokov, there is no present, actual controversy whereby the validity of Achte’s copyright registration is at issue. As such, the plaintiff lacks standing to seek declaratory relief, even had the remedy been properly invoked in the pleadings. Moreover, insofar as this Court does not dismiss the count to the extent it seeks declaratory relief as to Achte, it should dismiss the count as to the defendant attorneys, as any declaration as to the validity of the copyright would affect the rights only of the copyright holder, not its attorneys.

H. The Plaintiff has not Alleged that he was Engaged in Trade or Commerce with the Defendants and has not Alleged the Elements of Causation and Injury Necessary to State a Claim Under the Massachusetts Consumer Protection Statute.

The defendants object to the Magistrate Judge’s conclusion that Shirokov has properly alleged facts showing that he is a “consumer” for purposes of the Massachusetts Consumer Protection Statute, and that the defendants were engaged in “trade or commerce” with him. On the facts pled by Shirokov, he is not a “consumer,” as he was not engaged in any commercial transaction with these Defendants. Indeed, Shirokov is not even a “consumer” with respect to the Defendants’ client—he is alleged, in effect, to have stolen from Achte, by infringing its copyright. “Although whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact, the boundaries of what may qualify for consideration as a c. 93A violation is a question of law.” *Chervin v. Travelers Ins. Co.*, 448 Mass. 95, 112 (2006) (holding that insurance company filing subrogation claim against doctor did not constitute “business transaction” which could serve as a predicate for liability under chapter 93A).

Far from the parties being involved in a commercial transaction with one another, it is clear on the face of the pleadings that Shirokov was adverse to Achte, and vice versa – indeed,

that is the nature of a civil lawsuit.¹⁰ Within that civil action – the Far Cry Lawsuit – these defendants represented Achte and acted on its behalf. It is well established that chapter 93A “has never been read to broadly as to establish an independent remedy for unfair or deceptive dealing in the context of litigation.” *Morrison v. Toys “R” Us, Inc.*, 441 Mass. 451, 457 (2004) (citing *Framingham Auto Sales, Inc. v. Workers’ Credit Union*, 41 Mass. App. Ct. 416, 418 (1996); *Gath v. M/A-Com, Inc.*, 440 Mass. 482, 497-98 (2003); *Cady v. Marcella*, 49 Mass. App. Ct. 334, 343 (2000); *Arthur D. Little, Inc. v. East Cambridge Sav. Bank*, 35 Mass. App. Ct. 734, 743 (1994)). The Magistrate Judge’s recommendation cannot be reconciled with this clear line of authority.

The case of *St. Paul Fire & Marine Ins. Co. v. Ellis & Ellis*, 262 F.3d 53, 56 (1st Cir. Mass. 2001) is distinguishable. In *Ellis*, a worker’s compensation insurer sued an attorney and law firm for common law fraud and violations of chapter 93A. The attorney had represented one individual who had two identities, two employers, two injuries, and two workers’ compensation claims on both of those workers compensation claims. After a trial, the district court judge entered judgment as a matter of law for the defendant attorney on the chapter 93A claim, on the grounds that the attorney was not engaging in a business transaction with respect to his representation in the workers compensation matters, but rather was litigating the workers compensation claims.

The First Circuit vacated the judgment and remanded the claim, holding that a jury could find that the attorney was engaged in a business transaction with the insurer. The relationship alleged between Shirokov and the defendants here is qualitatively different. Whereas in *Ellis*, there was a commercial relationship between the plaintiff insurer and the attorney’s client—a

¹⁰ In reality, Achte does trade or commerce as a creator and distributor of motion pictures, and the Dunlap defendants do trade or commerce in legal services. Rather than acknowledge either of these trades or commerce, the Report and Recommendation seemingly adopted plaintiff’s theory that the copyright “scheme” was its own trade or commerce. However, there is no legal or factual basis for doing so.

contractually based workers' compensation insurance arrangement—there was no commercial relationship between Shirokov and Achte. Thus, the interactions between Shirokov and the defendants, and their client Achte, were outside of the context of “trade or commerce” as contemplated by the Consumer Protection Statute.

The cases cited in the *Ellis* decision are similarly distinguishable. *See id.* (citing *Coggins v. Mooney*, 1998 Mass. Super. LEXIS 320, *13, 1998 WL 156998 at *5 (Mass. Super. Ct. April 3, 1998), *aff'd sub non Miller v. Mooney*, 431 Mass. 57 (Mass. 2000) (holding that lawyer can be liable under ch. 93A “to a nonclient or to an adversary of its client, if it joins its client in marketplace communications to the adversary rather than merely relays its client's positions; and if those marketplace communications knowingly or carelessly turn out to be false, misleading, and harmful”); *JRJ Constr. Co. v. R.W. Granger & Sons, Inc.*, 1999 Mass. Super. LEXIS 322, *36, 1999 WL 706717 at *14 (Mass. Super. Ct. July 29, 1999) (finding that architect had engaged in trade or commerce when it allegedly made bad faith decision when resolving disputes over the scope of a subcontractor's obligations under building contract). In each of those cases, there was an existing commercial relationship between the plaintiff and the defendant's client such that when the defendant became involved in the conduct, it affected the commercial relationship between them. Again, here, the only relationship between Shirokov and Achte is that Shirokov is alleged to have illegally shared a copy of Achte's film, *Far Cry*.

Even were the parties engaged in trade or commerce vis a vis one another, Shirokov has failed to allege facts supporting the essential elements of causation and injury. *See Hershenow v. Enter. Rent-A-Car Co. of Boston*, 445 Mass. 790, 797 (2006). In cases involving an alleged deception, “the plaintiff must prove reliance as ‘an essential link in the proof of causation.’” *Mass. Laborers' Health & Welfare Fund*, 62 F. Supp. 2d at 242 (O'Toole, J.) (citing *Trifiro v. New York Life Ins. Co.*, 845 F.2d 30, n.1 (1st Cir. 1988)). Here, the plaintiff has not claimed, and

cannot prove, that his receipt of and/or reliance on any statements by the defendant attorneys caused him any legally cognizable injury because he admittedly did not settle the Far Cry Lawsuit; indeed, he did and still has done nothing to refute the legitimacy of that civil action. SAC ¶ 232 (“Plaintiff has not paid to settle the claims.”) Shirokov claims that by making allegedly false or misleading representations, the defendant attorneys caused him a per se injury. Allowing such a claim to go forward would permit “a purely vicarious suit by self-appointed attorneys general, which [chapter 93A] 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 (1985)).

The Magistrate Judge reasoned that Shirokov did suffer an injury that was “casually related” to the alleged deceptive statements in the demand letter, in the form of legal fees incurred in having an attorney review the letter. However, as several courts interpreting chapter 93A have held that in order to state a claim for violation of chapter 93A, where liability is premised on an allegedly false or deceptive statement, evidence of reasonable reliance is required in order to establish a “causal connection” and thus, liability. *See, e.g., Rodi v. Southern New Eng. Sch. of Law*, 532 F.3d 11 (1st Cir. 2008) (applying Massachusetts law); *Rodi v. Southern New Eng. Sch. of Law*, 532 F.3d 11 (1st Cir. 2008); (*Ruggers, Inc. v. United States Rugby Football Union, Ltd.*, 2012 U.S. Dist. LEXIS 10587 (D. Mass. Jan. 30, 2012) (“Because, as discussed above, plaintiff cannot demonstrate reasonable reliance, its Chapter 93A claim fails as a matter of law”); *Mass. Laborers’ Health & Welfare Fund*, 62 F. Supp. 2d at 242.

The SJC, in the *Iannacchino* case cited by the Magistrate Judge, has hypothesized¹¹ that a deceptive statement could cause a loss absent a showing that the consumer relied on it. However, this reasoning was discussed (and not applied) in connection with a particular set of

¹¹ The discussion is dicta, as the court concluded that the plaintiffs had not adequately alleged that the vehicles at issue were non-compliant with safety regulations, and dismissed the chapter 93A claim on that ground. *Iannacchino*, 451 Mass. at 631.

allegations: that a vehicle manufacturer falsely certified to regulators that a particular model complied with relevant safety standards. The court reasoned that the fact that the consumers may never have been aware of the misrepresentation did not preclude them from showing that their injury (not receiving what they believed they were paying for, to wit, a compliant vehicle) was causally related to the unfair act or practice that was alleged. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 631 (2008).

Here, the allegedly deceptive statement or statements consisted of legal positions asserted by these defendants on behalf of their client, Achte. It is manifest that Shirokov did receive them and was not “misled” or “deceived” by the statements, because, according to him, he allegedly obtained an independent opinion as to their legal correctness, or lack thereof. Obtaining the opinion of legal counsel is not an injury “caused by” the statements in the settlement letter. If attorneys’ fees incurred in the course of obtaining an opinion as to whether an act or practice is unfair or deceptive constitutes “actual injury” for chapter 93A purposes, this would render the fee award provision meaningless—attorneys’ fees incurred would simply be another element of damages. Moreover, the question of whether an actual injury is a required element of a chapter 93A claim (as opposed to merely the invasion of a legally protected right) would be essentially mooted, as any person who believed that they had been the subject of an unfair or deceptive act, but who was not harmed by it, could satisfy the injury element simply by consulting with an attorney.

III. CONCLUSION

Wherefore, the defendants respectfully request that the Court reject or modify the portions of the Report and Recommendation on Defendants’ Motions to Dismiss the Second Amended Complaint Pursuant to Fed. R. Civ. P. 72 to which they respectfully object, and enter

an order dismissing the plaintiff's claims in their entirety against defendants Dunlap Grubb & Weaver, PLLC, US Copyright Group, Thomas Dunlap and Nicholas Kurtz, along with the putative class claims, with prejudice, and award attorneys' fees and expenses and such other further relief that the Court deems just and proper.

The Defendants,
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US Copyright Group,
Thomas Dunlap, and Nicholas Kurtz
By their counsel,

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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 not a registered participant, and therefore electronic filing is the sole means of service of this document.

/s/ Kara Thorvaldsen _____