

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 1

ARGUMENT 4

 I. Several of Counterclaim Plaintiffs’ Claims are Repackaged Defamation Claims, and They
 Should be Dismissed as a Group4

 A. No Claim for Tortious Interference with Contractual Relations Is or Can be Adequately Pled
 5

 B. No Claim for Tortious Interference with Potential Business Relations Is or Can be
 Adequately Pled.....8

 C. Counterclaim Plaintiffs’ Allegation of Unfair Competition is Literally Based on Alleged
 Defamatory Statements and is Otherwise Fatally Flawed.....9

 D. Counterclaim Plaintiffs’ Claim of Defamation is Fatally Flawed10

 1. Counterclaim Defendants’ Statements Concerning Copyright Infringement are True and Cannot
 be Defamatory11

 2. The Allegedly Defamatory Statements are Protected by the First Amendment Because They
 Were Not Negligently Made12

 3. Many of Counterclaim Plaintiffs’ Allegations Are Facially False or Directly Contradicted by
 Evidence Contained in the Complaint.....13

 II. Counterclaim Plaintiffs Inaccurately Describe Copyright Law and, Even Taking Facts that are
 Not Well Pled as True, These Counterclaims Should be Dismissed.....14

 III. Counterclaim Plaintiffs Fail to Assert Anything But a Threadbare Recitation of the Elements
 for an Invasion of Privacy Under South Dakota Law14

 IV. New York Civil Rights Law §§ 50 – 51 is Akin to Right of Publicity, not Privacy15

 V. Counterclaim Plaintiffs’ Claim for Cybersquatting Under 15 U.S.C. § 8131 Fails16

 VI. Counterclaim Plaintiffs’ Failed to State a Claim for Cybersquatting Pursuant to 15 U.S.C. §
 1125(d)18

 VII. Counterclaim Plaintiffs Failed to State a Claim for a Violation of the Computer Fraud and
 Abuse Act Pursuant to 18 U.S.C. § 1030 and for Trespass to Chattels.....20

 VIII. Counterclaim Plaintiffs’ Failed to State a Claim for Violation of the Sherman Act.....22

 IX. Counterclaim Plaintiffs Failed to State a Claim for Intentional Infliction of Emotional Distress
 24

CONCLUSION..... 25

TABLE OF AUTHORITIES

CASES

815 Tonawanda St. Corp. v. Fay's Drug Co., Inc., 842 F.2d 643, 648 (2d Cir.1988).....	19
<i>Ace Arts, LLC v. Sony/ATV Music Pub., LLC</i> , 56 F. Supp. 3d 436, 450 (S.D.N.Y. 2014).....	6, 7
<i>Adventure Outdoors, Inc. v. Bloomberg</i> , 552 F.3d 1290 (11th Cir. 2008).....	12
<i>Aschroft v. Iqbal</i> , 556 U.S. 662, 678 (2009).....	4, 21
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544, 555, 557 (2007).....	4
<i>Bender v. City of New York</i> , 78 F.3d 787, 790 (2d Cir.1996).....	24
<i>Berman v. Sugo LLC</i> , 580 F. Supp. 2d 191, 208 (S.D.N.Y. 2008).....	5, 9
<i>Boule v. Hutton</i> , 328 F.3d 84, 91 (2d Cir. 2003).....	12
<i>Boykin v. KeyCorp</i> , 521 F.3d 202, 215 (2d Cir.2008).....	21
<i>Carl v. Bernardjcarl.com</i> , 662 F.Supp.2d 487, 498 (E.D. Va. 2009).....	17
<i>Cookware Co. (USA), LLC v. Austin</i> , 2016 WL 7378762, *6-7 (S.D.N.Y. 2016).....	4
<i>Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.</i> , 604 F.2d 200, 203 n.5 (2d Cir.1979).....	19
<i>DiFolco v. MSNBC Cable L.L.C.</i> , 622 F.3d 104, 111 (2d Cir. 2010).....	4
<i>Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.</i> , 837 F. Supp. 2d 162, 189 (S.D.N.Y. 2011).....	6
<i>Envirosource, Inc. v. Horsehead Res. Dev. Co.</i> , No. 95 CIV. 5106(AGS), 1996 WL 363091, *14 (S.D.N.Y. July 1, 1996).....	9
<i>Flamm v. Am. Ass'n of Univ. Women</i> , 201 F.3d 144, 149 (2d Cir. 2000).....	12
<i>FTA Mkt. Inc. v. Vevi, Inc.</i> , No 11 Civ. 4789 (VB), 2012 WL 383945, *6 (S.D.N.Y. Feb. 1, 2012).....	11
<i>Gates v. Black Hills Health Care Systems (BHHCS)</i> , 997 F. Supp. 2d 1024, 1032 (D.S.D. 2014).....	15
<i>Genesee Brewing Co., Inc. v. Stroh Brewing Co.</i> , 124 F.3d 137, 149 (2d Cir. 1997).....	10
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323, 340 (1974).....	12
<i>Girl Scouts v. Bantam Doubleday Dell Publishing Group, Inc.</i> , 808 F. Supp. 1112, 1131 (S.D.N.Y. 1992), <i>aff'd</i> , 996 F.2d 1477 (2d Cir. 1993).....	10
<i>Graham ex rel. Graham v. Guilderland Cent. School Dist.</i> , 256 A.D.2d 863, 863-64 (N.Y.App.Div.1998).....	25
<i>Grayson v. Ressler & Ressler</i> , 15 CIV. 8740 (ER), 2017 WL 4180018, *11 (S.D.N.Y. Sept. 19, 2017).....	5, 8, 11
<i>Gucci America, Inc. v. Duty Free Apparel, Ltd.</i> , 277 F. Supp. 2d 269, 275 (S.D.N.Y. 2003).....	10
<i>Harris v Mills</i> , 572 F.3d 66, 72 (2d Cir 2009).....	21
<i>Hengjun Chao v. Mount Sinai Hosp.</i> , 476 Fed. Appx. 892, 895 (2d Cir. 2012), <i>aff'g</i> No. 10 CV 2869(HB), 2010 WL 5222118 (S.D.N.Y. Dec. 17, 2010).....	5
<i>In re Aluminum Warehousing Antitrust Litig.</i> , 95 F.Supp.3d 419, 454 (S.D.N.Y. 2015).....	22
<i>In re Thelen LLP</i> , 736 F.3d 213, 219 (2d Cir.2013).....	20
<i>Keeling v. Hars</i> , 809 F.3d 43, 50 (2d Cir. 2015), <i>cert. denied</i> , 136 S. Ct. 2519 (2016).....	14
<i>Kjerstad v. Ravellette Publications, Inc.</i> , 517 N.W.2d 419, 424 (S.D. 1994).....	15
<i>L-7 Designs, Inc. v Old Navy, LLC</i> , 647 F.3d 419, 430 (2d Cir. 2011).....	21
<i>La Duke v. Lyons</i> , 250 A.D.2d 969, 972-73 (N.Y.App.Div.1998).....	25
<i>Linzer Prod. Corp. v. Sekar</i> , 499 F.Supp.2d 540, 553 (S.D.N.Y. 2007).....	22
<i>Marchon Eyewear, Inc v. Tura LP</i> , No. 98 CV 1932 (SJ), 2002 WL 31253199, at *7 (E.D.N.Y. Sept. 30, 2002).....	23
<i>Montgomery Ward v. Shope</i> , 286 N.W.2d 806, 808 (S.D. 1979).....	15
<i>Murphy v. Am. Home Prods. Corp.</i> , 58 N.Y.2d 293, 461 N.Y.S.2d 232, 236, 448 N.E.2d 86 (1983).....	24
<i>Myskina v. Conde Nast Publications, Inc.</i> , 386 F. Supp. 2d 409, 414 (S.D.N.Y. 2005).....	16
<i>New York Stock Exch., Inc. v. Gahary</i> , 196 F.Supp.2d 401, 408 (S.D.N.Y. 2002).....	19
<i>Obsidian Finance Group, LLC v. Cox</i> , 740 F.3d 1284, 1291 (9th Cir. 2014).....	12
<i>Owen v. Leventritt</i> , 174 A.D.2d 471, 571 N.Y.S.2d 25, 26 (1st Dep't 1991).....	25
<i>Plasticware, LLC v. Flint Hills Res., LP</i> , 852 F. Supp. 2d 398, 404 (S.D.N.Y. 2012).....	5, 6, 8, 9
<i>Professional Real Estate Investors v. Columbia Pictures Indus.</i> , 508 U.S. 49, 60 (1993).....	23
<i>RFP LLC v. SCVNGR, Inc.</i> , 788 F. Supp. 2d 191, 197 (S.D.N.Y. 2011).....	6
<i>Spinelli v. Nat'l Football League</i> , 96 F.Supp.3d 81, 111 (S.D.N.Y. 2015).....	23
<i>Stephano v. News Group Publ'ns, Inc.</i> , 64 N.Y.2d 174, 183, 485 N.Y.S.2d 220, 474 N.E.2d 580 (1984).....	16
<i>Stuto v. Fleishman</i> , 164 F.3d 820, 827 (2d Cir.1999).....	24
<i>Thai v Cayre Group, Ltd.</i> , 726 F. Supp. 2d 323, 331 (S.D.N.Y. 2010).....	25

Todd v. Exxon Corp, 275 F.3d 191, 200 (2d Cir. 2001) 23
Tucker v. Wycoff Heights Med. Ctr., 52 F. Supp. 3d 583, 597 (S.D.N.Y. 2014) 11
UPS Store, Inc. v. Hagan, 99 F.Supp. 3d 426, 437 (S.D.N.Y. 2015) 5

FEDERAL STATUTES

§ 503 2
 § 8131 16, 17, 18
 15 U.S.C. § 1125 1, 10, 18
 17 U.S.C. § 512(f) 1
 18 U.S.C. § 1030(g) 1

STATE STATUTES

N.Y. Civ. Rights L. § 50 15
 N.Y. Civ. Rights L. § 51 16
 New York Gen. Bus. Law § 349 1

RULES

652
 Rule 11 3
 Rule 12(b)(6) 1, 4
 Rules 64 2

PRELIMINARY STATEMENT

Plaintiff BMaddox Enterprises LLC (“BMaddox”) and Counterclaim Defendants, Bmaddox with Brandon Maddox (“Brandon”) (referred to collectively herein as “Maddox”), by and through their attorneys, Revision Legal, PLLC, move this Court to dismiss Counterclaim Plaintiffs, Milad Oskouie (“Oskouie”) and Platinum Avenue Holdings Pty, Ltd (“Platinum”), counterclaims with prejudice pursuant to Rule 12(b)(6) of the Fed. R. Civ. P. for failure to state any claims upon which relief can be granted.

STATEMENT OF FACTS

The facts of this case have been retold in many filings before the Court. Judge Cote granted BMaddox’s request to initiate this lawsuit under seal on March 15, 2017. (Order, ECF No. 5.) BMaddox then filed a Verified Complaint alleging three counts of copyright infringement and one claim for each of the following: abusing the DMCA notice and takedown procedure pursuant to 17 U.S.C. § 512(f); falsely advertising in violation of 15 U.S.C. § 1125; violating of the Computer Fraud and Abuse Act under 18 U.S.C. § 1030(g); appropriating BMaddox’s trade secrets according to New York common law; and using deceptive trade practices as described in New York Gen. Bus. Law § 349. (Pl.’s Compl. ¶¶ 63 – 140, ECF No. 6.) Brandon signed a sworn statement attesting to the truth of the factual allegations shown in the Verified Complaint and its many exhibits based on his personal knowledge and review of those documents. (Pl.’s Compl. 29, ECF No. 6.) A truncated summary of Plaintiff’s theory of the case is that Defendants surreptitiously accessed accounts with several internet service providers Plaintiff used to manage its e-commerce business. While enjoying this unauthorized access, Plaintiff alleges Defendants sabotaged its e-commerce website, stole trade secrets, and made a virtually identical copy of Plaintiff’s website to profit from the pilfered trade secrets.

BMaddox's Verified Complaint contains numerous examples of actual copying from Plaintiff's website, including the appearance of a federal firearms license on Defendants' infringing website that still included Plaintiff's small but unmistakable name. (Pl.'s Compl. ¶ 114, ECF No. 6.)

Immediately after initiating this proceeding under seal, BMaddox moved *ex parte* for a temporary restraining order. (Mot. for TRO, ECF No. 22.) On May 30, 2017, Judge Abrams signed a then-sealed temporary restraining order that protected BMaddox's rights, required Plaintiff to post a \$10,000 bond, and ordered Defendants to appear and show cause on June 6, 2017 or as soon thereafter as Defendants' counsel could be heard why an Order pursuant to Rules 64 and 65 of the Federal Rules of Civil Procedure and § 503 of the Copyright Act should not be entered granting BMaddox a preliminary injunction as described therein. (TRO, ECF No. 15.) Defendants failed to appear at the June 6, 2017 hearing, but when they had a representative from Australia call both the Court and Plaintiff's counsel, the Court allowed Defendants time to collect themselves and ordered Defendants once more to show cause on June 29, 2017 why a preliminary judgment, as requested by BMaddox and described in the Court's previous order, should not issue. (Order 1, ECF No. 18.)

On June 28, 2017, Defendants filed a memorandum in opposition to BMaddox's application for a preliminary injunction, ECF No. 25, and have vigorously pursued this case from a new angle, namely, that Counterclaim Defendants launched a hateful campaign against the foreign Defendants and their website, which focuses on byzantine government regulations in the United States, to maintain its "monopoly power in both the relevant market and submarket" (Countercl. ¶ 217, ECF No. 32.) Defendants point to two websites containing unflattering but truthful information about Defendant Milad Oskouie as well as surprisingly innocuous appeals to Defendant Oskouie's parents as evidence that Brandon is a xenophobic monopolist willing to

post a ten thousand dollar bond with the Southern District of New York to harass a young man in Australia, now in London, to maintain his grip on the narrowly defined “FFL guidebook market and the online FFL guidebook submarket” (Countercl. ¶ 209, ECF No. 32.) Defendants present their theory of the case without mentioning the harassment Brandon and his family have suffered at the hands of Defendant Oskouie since at least as early as January 4, 2017. (Decl. of Brandon Maddox ¶ 2, ECF No. 57.) Plaintiff does not want this case to devolve into a name calling match, so much so that Brandon waited until he felt Defendants had given him no choice before filing a declaration describing some of the ways in which Defendant Oskouie has harassed Brandon and his family since well before this case was filed under seal.

BMaddox has continuously sought to move this case forward to a speedy resolution. It has promptly responded to filings from Defendants and has remained open to settlement discussions even after a small portion of an initial, comprehensive settlement proposal was put before the Court out of context to support a meritless counterclaim for cybersquatting. Defendants, on the other hand, have done nothing but expand the scope of this litigation. Since, in BMaddox’s estimation, each new filing from Defendants contained frivolous legal arguments based on misrepresentations of fact from Defendant Oskouie, Plaintiff, perhaps naively and certainly hesitantly, served and then filed a motion for sanctions under Rule 11 of the Fed. R. Civ. P. thinking that the motion might go served but unfiled after Defendants corrected Oskouie’s factual misrepresentations and narrowed the scope of their frivolous counterclaims. (Pl.’s Br. in Supp. of Mot. for Rule 11 Sanction, ECF No. 56.) Instead, four days after receiving Plaintiff’s Rule 11 motion and after agreeing to combine a hearing on Plaintiff’s application for a preliminary injunction with a trial on the merits, Defendants filed a motion with Judge Pitman requesting dissolution of the TRO. (Defs.’ Mot. to Dissolve TRO, ECF No. 47.) The resulting

Report and Recommendation, to which Plaintiff has objected, is now before Judge Abrams as is this motion to dismiss the counterclaims with prejudice under Rule 12(b)(6).

ARGUMENT

The legal standard used to evaluate a Rule 12(b)(6) motion to dismiss claims in a complaint is the same used to evaluate counterclaims. *Cookware Co. (USA), LLC v. Austin*, 2016 WL 7378762, *6-7 (S.D.N.Y. 2016). When reviewing a motion to dismiss counterclaims, a court may begin “by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Id.* at *3 (quoting *Aschroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Even good legal conclusions must be supported by well-pled factual allegations. *Id.* (citing *Iqbal*, 556 U.S. at 678). While a court considering a motion to dismiss for failure to state a claim should assume the veracity of well-pled factual allegations, those allegations must provide more than “a formulaic recitation of the elements of a cause of action” or “naked assertion[s]” devoid of “further factual enhancement.” *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)). “In resolving a 12(b)(6) motion, a district court may consider facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint.” *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010); *Cookware*, 2016 WL 7378762 at *3. Applying these standards to Counterclaim Plaintiffs’ sixteen counterclaims, BMaddox respectfully submits that each counterclaim should be dismissed with prejudice.

I. Several of Counterclaim Plaintiffs’ Claims are Repackaged Defamation Claims, and They Should be Dismissed as a Group

“New York law considers claims sounding in tort to be defamation claims . . . where those causes of action seek damages only for injury to reputation, [or] where the entire injury complained of by [the party] flows from the effect on his [or her] reputation.” *Hengjun Chao v.*

Mount Sinai Hosp., 476 Fed. Appx. 892, 895 (2d Cir. 2012), *aff'g* No. 10 CV 2869(HB), 2010 WL 5222118 (S.D.N.Y. Dec. 17, 2010) (dismissing claim of tortious interference with contract as too duplicative of a defamation claim); *Grayson v. Ressler & Ressler*, 15 CIV. 8740 (ER), 2017 WL 4180018, *11 (S.D.N.Y. Sept. 19, 2017). Because all of the alleged harm suffered by Defendants from the claims discussed in this section flows from the alleged defamation's effect on Oskouie's reputation, all of these counterclaims should be dismissed.

A. No Claim for Tortious Interference with Contractual Relations Is or Can be Adequately Pled

Counterclaim Plaintiffs' sixth cause of action is actually two separate but related causes of action. In New York, a party pleading *tortious interference with a contract* must allege: (1) an existing and valid contract between itself and a third party; (2) the offending party's knowledge of the contract; (3) the offending party's intentional inducement of the third party to breach its contract or otherwise render performance impossible; (4) actual breach of that contract; and (5) damages suffered by the party asserting the claim. *Grayson*, 2017 WL 4180018 at *11; *UPS Store, Inc. v. Hagan*, 99 F.Supp. 3d 426, 437 (S.D.N.Y. 2015); *Plasticware, LLC v. Flint Hills Res., LP*, 852 F. Supp. 2d 398, 404 (S.D.N.Y. 2012). Generally alleging agreements with customers is insufficient to support a claim for tortious interference with contractual relations. *Plasticware*, 852 F. Supp. 2d at 404. Merely alleging the existence of a contractual relationship with an identified party but setting forth no facts to allege what type of contract existed in favor of vague and conclusory allegations is insufficient to support tortious interference with a contract. *Berman v. Sugo LLC*, 580 F. Supp. 2d 191, 208 (S.D.N.Y. 2008) (dismissing a counterclaim that "simply allege[d] that a contractual relationship existed between [two parties], but set[] forth no facts to allege what kind of contract [existed between those parties], whether it was nonexclusive, and whether it was valid."). A party must also show that

“the third party would not have breached the contract ‘but for the activities of the defendant’” and that the offending party “‘used ‘wrongful means’ to induce the third party to breach the contract.’” *Ace Arts, LLC v. Sony/ATV Music Pub., LLC*, 56 F. Supp. 3d 436, 450 (S.D.N.Y. 2014) (citations omitted). Asserting in “a conclusory manner that an agreement was breached” is not enough to survive a motion to dismiss.” *Id.* (quoting *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 189 (S.D.N.Y. 2011) (citation omitted)). “While . . . litigation activity can sometimes satisfy the ‘wrongful means’ element . . . this is true only when (1) ‘the offending party has no belief in the merit of the litigation,’ or (2) the [offending party] otherwise ‘institutes or threatens to institute litigation in bad faith, intending only to harass the third parties and not to bring [its] claim to definitive adjudication.’” *Ace Arts*, 56 F. Supp. 3d at 451 (quoting *RFP LLC v. SCVNGR, Inc.*, 788 F. Supp. 2d 191, 197 (S.D.N.Y. 2011) (citation omitted)). “[A] plaintiff must [also] identify what provisions of the contract were breached as a result of the acts at issue.” *Ellington Credit Fund*, 837 F. Supp. 2d at 189. A party must also allege facts showing that a defendant had knowledge of the specific contracts at issue. *Plasticware*, 852 F. Supp. 2d at 404 (citation omitted).

The only relevant references to contracts in the counterclaims appear under the sixth cause of action. (Countercl. ¶¶ 183-189, ECF No. 32.) These allegations do not allege a breach of any contract. The allegations instead state that Plaintiff’s alleged “interference caused Counterclaimants’ customers and hosting providers to cease doing business with” them. (Countercl. ¶ 186, ECF No. 32.) Only vague contracts with “hosting providers” and Counterclaim Plaintiffs’ “customers” are alleged, and they are only described in conclusory statements. (Countercl. ¶ 183, ECF No. 32.) Taking this in a light most favorable to Counterclaim Plaintiffs, the allegations do not plausibly state that Brandon or his company

caused any third party to breach a contract or render performance of any contract impossible. No contract with a customer is identified. It is still unclear what contract, if any, existed with any of Counterclaim Plaintiffs' customers. Assuming such contracts do exist, there are no facts alleged supporting the conclusory allegation that Brandon or BMaddox knew of those contracts. This is fatal for the sixth counterclaim as to Counterclaim Plaintiffs' customers.

Similarly, although the counterclaims include references to DMCA takedown notices sent to identified hosting providers, no contracts with those providers are identified or described in any manner other than the conclusory statements alleging they exist. In *Ace Arts*, the Southern District of New York dismissed a claim for tortious interference with a contract in part because the plaintiff did not identify portions of a specifically identified contract with a specifically identified third party that were breached as a result of the other party's actions. 56 F. Supp. 3d at 451. Counterclaim Plaintiffs' fail to identify specific contracts with their hosting providers and do not come close to identifying specific provisions in a contract to support their claim. It bears repeating that the counterclaims *do not* assert *any* breach of any contract.

Even if Counterclaim Plaintiffs met the standards discussed above, no allegations in the counterclaims support a finding that Brandon or BMaddox used wrongful means to induce any third party to breach a contract. In *Ace Arts* the wrongful means alleged consisted of an allegedly false notification that one party infringed on another's copyrights and a demand that a third party refrain from exhibiting a film containing protected works. 56 F. Supp. 3d at 451. The only interference with vaguely identified contracts between Counterclaim Plaintiffs and any third party is described as Counterclaim Plaintiffs' DMCA takedown notices and the allegedly defamatory statements mischaracterized in the counterclaims. Allowing Counterclaim Plaintiffs to rely on the DMCA takedown notices as factual allegations showing wrongful means is a

generous reading of the counterclaims especially when the damage complained of in the sixth counterclaim is “harm in the form of damage to [Oskouie’s] reputation[]” (Countercl. ¶ 188, ECF No. 32.) When the harm complained of by a party is damage to its reputation, New York courts are loathe to allow alleged defamation to divide itself and become multiple claims.

Because Counterclaim Plaintiffs do not allege any facts plausibly identifying any specific contract with a third party, Counterclaim Defendants’ knowledge of such specific contracts, breach of any contract, or any wrongful conduct that caused any unalleged breach, this counterclaim is frivolous and should be dismissed with prejudice. Counterclaim Plaintiffs’ attempt to parlay its failed allegations of defamation into a claim for tortious interference with a contract is abusive and a waste of judicial resources.

B. No Claim for Tortious Interference with Potential Business Relations Is or Can be Adequately Pled

The elements for tortious interference with a prospective economic advantage that a party asserting the claim must adequately plead are: (1) a business relationship with a third party; (2) the offending party’s knowledge and intentional interference with that relationship; (3) that the offending party acted solely out of malice or accomplished the disruption of the third party relationship using dishonest, unfair, or improper means; and (4) injury to the business relationship. *Grayson*, 2017 WL 4180018 at *11.

Assuming the counterclaims adequately plead facts showing harm other than that flowing from the alleged defamation, Counterclaim Plaintiffs must still show that Brandon or BMaddox “committed a ‘crime or an independent tort,’ or applied economic pressure ‘for the sole purpose of inflicting intentional harm on’” Counterclaim Plaintiffs. *Plasticware*, 852 F. Supp. 2d at 403 (citations omitted). No such showing is made. The counterclaims do not sufficiently allege facts showing that Brandon or BMaddox took *any* action for the sole purpose of inflicting intentional

harm on Counterclaim Plaintiffs. Brandon’s alleged defamatory statements were a warning to third parties and are not uncommon in the digital age. The DMCA takedown notices were sent with a genuine belief in their veracity as evidenced by this lawsuit and the \$10,000 bond posted by Plaintiff. BMaddox and Brandon were motivated by legitimate economic self interest in any of their actions related to the counterclaims. No cause of action for tortious interference with business relations may survive where the party accused was “motivated by legitimate economic self-interest” *Plasticware*, 852 F. Supp. 2d at 403 (citation omitted). Failure to identify a specific business relationship that has allegedly been disrupted is also a fatal flaw in this counterclaim. *Envirosource, Inc. v. Horsehead Res. Dev. Co.*, No. 95 CIV. 5106(AGS), 1996 WL 363091, *14 (S.D.N.Y. July 1, 1996). “A ‘general allegation of interference with customers without any sufficiently particular allegation of interference with a *specific . . . business relationship*’ will not withstand a motion to dismiss.” *Id.* (emphasis in original) (citation omitted). Even if such specific business relationships were shown in facts adequately alleged, the counterclaims fail to show that Counterclaim Defendants were aware of such relationships.

C. Counterclaim Plaintiffs’ Allegation of Unfair Competition is Literally Based on Alleged Defamatory Statements and is Otherwise Fatally Flawed

The fifth counterclaim summarily asserts “unfair competition.” “The essence of an unfair competition claim under New York law is that the defendant has misappropriated the labors and expenditures of another.” *Berman*, 580 F. Supp. 2d at 208 (citation omitted). Although the Lanham Act was not invoked, it is relevant to defining unfair competition under New York law.

The Lanham Act states:

Any person who, on or in connection with any goods or services, . . . uses in commerce any . . . false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of . . . another person’s goods, services, or commercial activities shall be liable in

a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1). Under New York common law, a claim for unfair competition closely resembles a Lanham Act claim except it requires bad faith or intent. *Genesee Brewing Co., Inc. v. Stroh Brewing Co.*, 124 F.3d 137, 149 (2d Cir. 1997); *Girl Scouts v. Bantam Doubleday Dell Publishing Group, Inc.*, 808 F. Supp. 1112, 1131 (S.D.N.Y. 1992), *aff'd*, 996 F.2d 1477 (2d Cir. 1993). New York law does not permit parties to use common law unfair competition as a “boundless . . . remedy for unfair trade practices” *Gucci America, Inc. v. Duty Free Apparel, Ltd.*, 277 F. Supp. 2d 269, 275 (S.D.N.Y. 2003) (citation omitted). “[T]he primary concern in unfair competition is the protection of a business from another’s misappropriation of the business’ organization or its expenditure of labor, skill, and money.” *Id.* (citations omitted).

Counterclaim Plaintiffs state in a conclusory fashion that “Counterdefendants registered and are using domain names and the [allegedly] Defamatory Website to divert users searching for Platinum’s Website to Counterdefendants[’] [sic] competing business and website.” (Countercl. ¶ 178, ECF No. 32.) Not only have Counterclaim Plaintiffs failed to allege facts showing that anyone finding the allegedly defamatory websites would be directed to BMaddox’s website, they base their claim for unfair competition entirely on harm flowing from the allegedly defamatory statements. This claim is also duplicative of the defamation claim. This counterclaim should be dismissed with prejudice.

D. Counterclaim Plaintiffs’ Claim of Defamation is Fatally Flawed

Counterclaim Plaintiffs’ third cause of action asserts “defamation per se and trade libel.” To properly plead a claim of defamation under New York law, a plaintiff must allege facts sufficient to show “(1) a defamatory statement of fact; (2) that is false; (3) published to a third party; (4) ‘of and concerning’ the plaintiff; (5) made with the applicable level of fault on the part

of the speaker; (6) either causing special harm or constituting slander per se; and (7) not protected by privilege.” *FTA Mkt. Inc. v. Vevi, Inc.*, No 11 Civ. 4789 (VB), 2012 WL 383945, *6 (S.D.N.Y. Feb. 1, 2012) (citation omitted). “Defamation *per se* absolves a plaintiff of the requirement to plead special damages.” *Grayson*, 2017 WL 4180018 at *10. Statements of opinion cannot be defamatory and receive “absolute protection” under the New York Constitution. *Tucker v. Wycoff Heights Med. Ctr.*, 52 F. Supp. 3d 583, 597 (S.D.N.Y. 2014) (citation omitted). Statements that are true, even if the “gist or substance of the challenged statements” are true, are also not defamatory. *Tucker*, 52 F. Supp. 3d at 597.

1. Counterclaim Defendants’ Statements Concerning Copyright Infringement are True and Cannot be Defamatory

Counterclaim Plaintiffs base their defamation claim on several statements. First, they repeatedly allege that Brandon’s statements to various parties through DMCA takedown requests and otherwise asserting that Defendants’ website infringed on his copyrights were false. (Countercl. ¶¶ 50-55, 57-59, 74-78, 81, 98, ECF No. 32.) Assuming that Counterclaim Plaintiffs are correct in stating that the infringing guidebook was not available to Brandon between February 11-13, 2016, Countercl. ¶ 55, ECF No. 32, their argument misses the point. Brandon claims copyright protection in a wide variety of content on his website, *ffl123.com*, and BMaddox’s Verified Complaint provides numerous examples of *actual copying* of BMaddox’s website by Defendants including an altered federal firearms license on Defendants’ website, *ffltrust.com*, that still listed BMaddox Enterprises LLC in its footer. (Compl. ¶ 114, ECF No. 6.) Even when considering a motion to dismiss, the Court is not required to take Counterclaim Plaintiffs’ blanket denial of copying from Plaintiff’s website as true, because the denial runs counter to evidence contained in and attached to the Verified Complaint. Because the statements contained in Brandon’s DMCA takedown notices are true, they cannot be defamatory. The same

can be said of information shown on the allegedly defamatory websites, in emails to BMaddox's customers, and even in Brandon's pleas to Oskouie's parents. Even if some of the allegedly defamatory statements were incomplete, the Supreme Court has long recognized that while "the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

2. The Allegedly Defamatory Statements are Protected by the First Amendment Because They Were Not Negligently Made

Next, Counterclaim Plaintiffs allege that Brandon or BMaddox has referred to Platinum as a "thief" and "hackers." (Countercl. ¶ 50, ECF No. 32.) The First Amendment defamation rules outlined by the Supreme Court in *Gertz* apply in this case. The distinction between members of the media and private individuals has broken down for purposes of analyzing the tension between the First Amendment and defamation. *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000). Statements concerning matters of public concern, even when made about private persons, should therefore be found defamatory only if made negligently. *Gertz*, 418 U.S. at 350. "Public allegations that someone is involved in crime generally are speech on a matter of public concern." *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014); *see, e.g., Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290 (11th Cir. 2008) (finding that accusations of "alleged violations of federal gun laws" by gun stores were speech on a "matter of public concern"); *Boule v. Hutton*, 328 F.3d 84, 91 (2d Cir. 2003).

Counterclaim Plaintiffs do not allege facts sufficient to show that Brandon or BMaddox acted negligently in publishing the allegedly defamatory websites. While the websites refer to Oskouie as a "hacker," it is exactly that claim that, in part, makes the speech complained of a matter of public interest. Defendants' business is also inherently a matter of public interest. If a party is in the business of federal firearms licensing, any claims that they have engaged in

misconduct should be an immediate public concern. In this case, Counterclaim Plaintiffs cannot credibly allege that Brandon or BMaddox acted negligently in making any of the allegedly defamatory statements. Given the evidence of direct copying in the Complaint as well as the timing of unauthorized access to BMaddox's accounts with Microsoft, Benchmark, Wordpress, Google Chrome, Rackspace, Dropbox, and MailChimp from an IP address located in the city in Australia where Defendant Oskouie resided at the time, a reasonable person would reasonably believe that Defendants had gained access to BMaddox's accounts and created the infringing website, *ffltrust.com*. (Compl. ¶¶ 47-57, ECF No. 6.) Once BMaddox's customers started receiving copycat emails from an email address at *ffltrust.com*, it might have been negligent for Brandon *not* to send out periodic emails clarifying that his accounts had been hacked and that he was not affiliated with *ffltrust.com*. The additional information contained in the emails Counterclaim Plaintiffs complain of is either true or not negligently included. For these reasons, the counterclaim for defamation should be dismissed with prejudice. Since the tortious interference claims and the unfair competition claim discussed above are both premised on the same alleged injury, those claims should be dismissed with prejudice as well.

3. Many of Counterclaim Plaintiffs' Allegations Are Facially False or Directly Contradicted by Evidence Contained in the Complaint

Counterclaim Plaintiffs assert that the websites attached to their counterclaims show Brandon and BMaddox claiming, among other things, that "Oskouie falsely claimed to be a lawyer" and that Oskouie "criminal[ly]" and "fraud[ulently]" altered official firearms documents. (Countercl. ¶ 109, ECF No. 32.) Neither screenshot shows any assertion that "Oskouie falsely claimed to be a lawyer." The closest the attached exhibit gets is the assertion that there is no proof that Oskouie is a lawyer or went to law school. This distinction is important, and it is worth noting that Counterclaim Plaintiffs included the allegation in

quotations as though it were taken verbatim from the exhibit. As to the second claim, that Oskouie altered official firearms documents, there is an image of the doctored federal firearms license in the Complaint. The Court should give no deference to Counterclaim Plaintiffs' thoughtless dismissal of such evidence especially when the only evidence they provide to support their sixteen counterclaims is the exact same type of evidence.

II. Counterclaim Plaintiffs Inaccurately Describe Copyright Law and, Even Taking Facts that are Not Well Pled as True, These Counterclaims Should be Dismissed

Counterclaim Plaintiffs assert that the website *ffltrust.com* and the content found there cannot infringe upon Counterclaim Defendants' rights because BMaddox's website, *ffl123.com*, appears to be built using standard themes and the content is almost entirely non-copyrightable factual information. This is a mis-statement of the law because the Second Circuit recognizes that "copyright law protects not only the individual elements themselves, but the creative choices made in selecting and arranging even uncopyrightable elements." *Keeling v. Hars*, 809 F.3d 43, 50 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2519 (2016). Counterclaim Plaintiffs' eighth, ninth, and tenth counterclaims are all fundamentally flawed because they ask for relief under the theory that BMaddox's website, *ffl123.com*, and its educational materials are not deserving of copyright protection because they lack the requisite creativity and merely consist of a combination of known elements that are in the public domain. (Countercl. ¶¶ 195-207, ECF No. 32.)

Counterclaim Plaintiffs' incorrect conclusions of law are not entitled to any deference. Neither are their conclusory allegations of non-infringement that are plainly contradicted by evidence of *actual* copying shown in the Complaint.

III. Counterclaim Plaintiffs Fail to Assert Anything But a Threadbare Recitation of the Elements for an Invasion of Privacy Under South Dakota Law

To state a claim for invasion of privacy under the law of South Dakota, a party must show an "unreasonable, unwarranted, serious and offensive intrusion upon the seclusion of

another.” *Kjerstad v. Ravellette Publications, Inc.*, 517 N.W.2d 419, 424 (S.D. 1994) (citation omitted). This “invasion must be one which would be offensive and objectionable to a [person] of ordinary sensibilities.” *Montgomery Ward v. Shope*, 286 N.W.2d 806, 808 (S.D. 1979) (citations omitted). In South Dakota, “whether there is an offensive invasion of privacy involves a question of law.” *Gates v. Black Hills Health Care Systems (BHHCS)*, 997 F. Supp. 2d 1024, 1032 (D.S.D. 2014) (citing *Shope*, 286 N.W.2d at 810).

In this case, Counterclaim Plaintiffs ironically claim that Brandon and BMaddox hacked into his private accounts to obtain private information. (Countercl. ¶ 136, ECF No. 32.) The information was publicly available in an Australian police report. Counterclaim Plaintiffs also reproduce the text of a letter sent to Oskouie’s parents from Brandon describing Oskouie’s harassment of Brandon’s wife. (Countercl. ¶ 127, ECF No. 32.) As with almost *all* of the evidence contained in the Complaint, Counterclaim Plaintiffs summarily deny that any of the statements in the letter they reproduce are true. (Countercl. ¶ 128, ECF No. 32.) This is not a case involving an unreasonable, unwarranted, serious, and offensive intrusion upon the seclusion of a private individual. This is a case of a victim attempting to save his business while his family is harassed. Given the circumstances as shown by the evidence in the pleadings, the counterclaim for an invasion of privacy should be dismissed with prejudice.

IV. New York Civil Rights Law §§ 50 – 51 is Akin to Right of Publicity, not Privacy

The first provision states that “[a] person . . . that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, . . . is guilty of a misdemeanor.” N.Y. Civ. Rights L. § 50. The second provision states that “[a]ny person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of [New

York]” N.Y. Civ. Rights L. § 51. The statutes apply to “cases where the plaintiff generally seeks publicity . . . but has not given written consent for a particular use” or where “the defendant has otherwise exceeded the limitations of the consent.” *Myskina v. Conde Nast Publications, Inc.*, 386 F. Supp. 2d 409, 414 (S.D.N.Y. 2005) (quoting *Stephano v. News Group Publ'ns, Inc.*, 64 N.Y.2d 174, 183, 485 N.Y.S.2d 220, 474 N.E.2d 580 (1984)). Although plaintiffs suing under Sections 50 and 51 often couch their claims in a right to privacy, “[t]he right which the statute permits the plaintiff to vindicate [in such circumstances] may, perhaps, more accurately be described as a right of publicity.” *Id.* There are no credible allegations that Brandon or BMaddox are using Oskouie’s name, portrait, or voice in any manner that would impinge on Oskouie’s right of publicity as defined in these statutes. Just as in *Myskina*, Counterclaim Plaintiffs are attempting to assert a privacy-like right when the statute is designed to protect something more closely resembling a right of publicity. Just as in *Myskina*, the Counterclaim Plaintiffs’ claim under this statute should be dismissed.

V. Counterclaim Plaintiffs’ Claim for Cybersquatting Under 15 U.S.C. § 8131 Fails

To prevail under § 8131, Counterclaim Plaintiffs must allege that BME (1) registered the domain at issue; (2) consisting of the name of another living person; (3) without that person’s consent; (4) with the specific intent to profit from such name by selling the domain name for financial gain to that person or any third party. 15 U.S.C. § 8131(1)(A). Counterclaim Plaintiffs failed to state a plausible claim for relief because they have failed to allege sufficient facts regarding the fourth element. In their preliminary injunction motion, Counterclaim Plaintiffs argued BMaddox’s offer to settle, made under FRE 408, was evidence of BMaddox’s specific intent to profit from selling the domain name. (Decl. of David Lin, ECF No. 35.) BMaddox argued in opposite. (Pl.’s Mem. in Opp’n to Mot., ECF No. 37.) The Court ultimately denied Counterclaim Plaintiffs’ preliminary injunction motion. (Order, ECF No. 39.) Apparently, these

were the strongest “facts” to support Counterclaim Plaintiffs’ position. But, *those facts* are not plead in the Counterclaim. As a result, Counterclaim Plaintiffs are left with the sprawling allegations at ¶¶ 87-133 and 140-151. However, out of those 57 allegations, 4 pertain to this cause of action. Countercl. ECF No. 32, ¶¶ 99, 101, 141, and portions of 142. The Counterclaim contains zero allegations regarding BMaddox’s specific intent to profit from selling the domain name. There are simply no allegations that BMaddox ever made an offer to sell the <miladoskouie.com> domain name. The closest possible allegations are devoid of specific facts and wholly conclusory. (Countercl. ¶¶ 142, 148, ECF No. 32.)

Instead, Counterclaim Plaintiffs allege BMaddox’s uses the <miladoskouie.com> domain name to compete against and defame Counterclaim Plaintiffs or simply have nothing to do with this cause of action.¹ Even taking Counterclaim Plaintiffs’ allegations of defamation and attempting to impact competition as true, Counterclaim Plaintiffs still fail to state a claim because these allegations do not implicate the statutory trigger for liability: a specific intent to profit from selling the domain name. 15 U.S.C. § 8131. For example, in *Carl v. BernardJcarl.com*, 662 F.Supp.2d 487, 498 (E.D. Va. 2009), Bernard J. Carl brought suit against a law firm after the law firm registered <bernardjcarl.com> and posted a defamatory message regarding plaintiff’s failure to pay for legal services. The lawyers failed to respond and the plaintiff sought default judgment. But, the Court denied that motion and dismissed the plaintiff’s claims, including his claim for cybersquatting pursuant to 15 U.S.C. § 8131. The Court found the complaint’s allegations showed the defendants intended that plaintiff should pay them to settle a debt, but they did not intend to profit from selling the domain name. *Carl*, 662 F.Supp at 498. This decision was affirmed on appeal (in part). 409 Fed.Appx. 628, 630 (4th. Cir.) (“The

¹ (Countercl. ¶¶ 104, 106, 108, 109, 110, 111, 129, 132, ECF No. 32.)

statute’s language is specific, and while the defendants may have been attempting to profit, they did not do so in the means specified in the statute.”) The same is true here. Taking Counterclaim Plaintiffs’ allegations as true, they show attempts to show what BMaddox believes to be the truth. Even if this impacts competition, it does not show a “specific intent to profit from such name by selling the domain name for financial gain to that person or any third party....” 15 U.S.C. § 8131(1)(A). Counterclaim Plaintiffs’ First Cause of Action must be dismissed.

VI. Counterclaim Plaintiffs’ Failed to State a Claim for Cybersquatting Pursuant to 15 U.S.C. § 1125(d)

To state a claim under the ACPA, Counterclaim Plaintiffs must allege that: (1) BME registered, trafficked in, or used a domain name; (2) that was identical or confusingly similar to MILAD OSKOUIE; (3) that MILAD OSKOUIE was a distinctive trademark at the time BME registered the domain name; and (4) that BME committed these acts with a bad faith intent to profit from MILAD OSKOUIE as a trademark. 15 U.S.C. § 1125(d)(1)(A).

Counterclaim Plaintiffs have failed to plausibly allege MILAD OSKOUIE is a distinctive mark. Counterclaim Plaintiffs contend that Defendant Oskouie has common law trademark rights in his name, MILAD OSKOUIE. (Countercl. ¶ 15, ECF No. 32.) In support, Oskouie states he first used his name “in commerce” in 2013 as a “source identifier in conjunction with a variety of business and web properties.” (Countercl. ¶ 15, ECF No. 32.) First, Oskouie alleges that from “2013 to early 2015,” or not even two years, the website for a business called “Infinite Conversions,” an internet marketing firm, “listed [his] personal name and photograph.” (Countercl. ¶ 16-17, ECF No. 32.) This business earned \$50,000 in 18 months. (Countercl. ¶ 18, ECF No. 32.) Second, Oskouie alleges the MILAD OSKOUIE mark was used in connection with a website located at <theunitutor.com>, that had “gross sales” between “£300,000 – £400,000” since 2012. (Countercl. ¶ 21, ECF No. 32.) Oskouie alleges to have spent \$30,000 “or more” on

advertising these businesses since 2012. (Countercl. ¶ 22, ECF No. 32.) Oskouie alleges that since 2012, his “business ventures earned total revenues of \$1 Million dollars, primarily from the sale of services under the MILAD OSKOUIE mark.” (Countercl. ¶ 25, ECF No. 32.) Finally, Oskouie alleges to have received “unsolicited requests for articles and use of the MILAD OSKOUIE mark.” (Countercl. ¶ 19, ECF No. 32.) However, he merely alleges that his name was “published alongside” a single article. (Countercl. ¶ 20, ECF No. 32.)

These allegations, even if true, are insufficient to allege MILAD OSKOUIE is a distinctive mark. The Second Circuit treats personal names, both surnames and first names, as descriptive terms that require proof of secondary meaning before they are protectable. *815 Tonawanda St. Corp. v. Fay's Drug Co., Inc.*, 842 F.2d 643, 648 (2d Cir.1988). Secondary meaning refers to “the power of a name or other configuration to symbolize a particular business, product or company.” *New York Stock Exch., Inc. v. Gahary*, 196 F.Supp.2d 401, 408 (S.D.N.Y. 2002) (citing *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 203 n.5 (2d Cir.1979)). The focus is on the level of recognition among relevant consumers. *Id.* Counterclaim Plaintiffs’ ability to state a claim is dependent on the use of the MILAD OSKOUIE mark on two websites: <infiniteconversions.com> and <theunitutor.com>. As to <infiniteconversions.com>, the only allegation is that the MILAD OSKOUIE “listed his personal name and picture.”² (Countercl. ¶ 17, ECF No. 32.) All other allegations are merely conclusory. This is nothing more than a website listing the employees working for it. This is similar to an “About Us” page. This is not a trademark use of the name MILAD OSKOUIE. This is a merely descriptive use of his name to explain that he works for Infinite Conversions (which by contrast,

² Defendant Oskouie provided an exhibit of how his personal name was published at Dkt. No. 34-1.

is acting as a trademark). As to <theunitutor.com>, the only allegation is that he “used the MILAD OSKOUIE Mark” in connection with the business starting in 2012. This is not an allegation of trademark use. This is an allegation that he worked for The UniTutor (which by contrast, *is* acting as a trademark).

Further, “[i]n adjudicating a motion to dismiss, a court may consider only the complaint, any written instrument attached to the complaint as an exhibit, any statements or documents incorporated in it by reference, . . . any document upon which the complaint heavily relies,” and any judicially noticeable matters. *In re Thelen LLP*, 736 F.3d 213, 219 (2d Cir.2013).

Counterclaim Plaintiffs’ allegations of widespread use of the MILAD OSKOUIE on <infiniteconversions.com> and <theunitutor.com> are false. While the existence of secondary meaning is traditionally a question of fact, Counterclaim Plaintiffs cannot bypass *Iqbal*. Counterclaim Plaintiffs’ allegations are conclusory and devoid of facts that even if true (which they are not) would create a protectable trademark in MILAD OSKOUIE. Counterclaim Plaintiffs’ Second Cause of Action must be dismissed.

VII. Counterclaim Plaintiffs Failed to State a Claim for a Violation of the Computer Fraud and Abuse Act Pursuant to 18 U.S.C. § 1030 and for Trespass to Chattels

Counterclaim Plaintiffs allege that <FFLtrust.com> was subject to a DDOS attack from March 1, 2016 through March 30, 2016. (Countercl. ¶ 62, ECF No. 32.) Counterclaim Plaintiffs allege that, “[u]pon information and belief, Counterdefendants, or their agents” were responsible. (Countercl. ¶ 65, ECF No. 32.) Counterclaim Plaintiffs then state they received an “anonymous ransom note” that included screenshots “demonstrating Maddox’s attempts to employ hackers” to “take down <FFLTrust.com>.” (Countercl. ¶ 66, ECF No. 32.) Counterclaim Plaintiffs allege the “email claimed that Counterdefendants were responsible for the DDoS attacks on Platinum’s Website.” (Countercl. ¶ 67, ECF No. 32.) However, Counterclaim Plaintiffs only attached the

referenced screenshots, not the email itself. (Countercl., ECF No. 32-1.) In short, Counterclaim Plaintiffs' allegations relating to its CFAA and Trespass to chattels claim are solely based "upon information and belief" that Counterclaim Defendants hired hackers despite the Counterclaim Plaintiffs' claim to have an email they purport confirms that very allegation. What is left are nebulous screenshots of small portions of conversations that do not support Counterclaim Plaintiffs' claims.

The *Twombly* plausibility standard, which applies to all civil actions, *see Iqbal*, 129 S.Ct. at 1953, does not prevent a plaintiff from "pleading facts alleged 'upon information and belief'" where the facts are peculiarly within the possession and control of the defendant, *see, e.g., Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir.2008), or where the belief is based on factual information that makes the inference of culpability plausible, *see Iqbal*, 129 S.Ct. at 1949. But here, as Counterclaim Plaintiffs admit, the fact that would "nudge the claim . . . across the line from conceivable to plausible" *is directly in Counterclaim Plaintiffs' possession*. The decision to omit the most relevant documentary evidence (the ransom email), while simultaneously relying the associated screenshots (from the same ransom email), in light of Counterclaim Plaintiffs' previous actions in this case (Mem. in Supp. of Mot. for Sanctions, ECF No. 58), is striking. Plausibility is context-specific and requires the reviewing court to draw on its "judicial experience and common sense." *Harris v Mills*, 572 F.3d 66, 72 (2d Cir 2009). This depends on "a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render plaintiff's inferences unreasonable." *Id.* (citing *L-7 Designs, Inc. v Old Navy, LLC*, 647 F.3d 419, 430 (2d Cir. 2011)). Without more factual allegations, like those that would have been found in the "several hours over the span of several days with its developers and hosting provider

to investigate the attacks and intrusions” (Countercl. ¶ 73, ECF No. 32), these claims and the rote recitations at ¶¶ 190-194 and 226-228, are short of the required burden to state a claim with facial plausibility. Counterclaim Plaintiffs’ Seventh Cause of Action must be dismissed.

VIII. Counterclaim Plaintiffs’ Failed to State a Claim for Violation of the Sherman Act

Counterclaim Plaintiffs allege, “upon information and belief,” that “BME dominates the [online sale of FFL guide market], controlling 80% or more of it.” (Countercl. ¶ 43, ECF No. 32.) Counterclaim Plaintiffs’ Sherman Act claims are wholly based on the rambling allegation at ¶ 44, which claims Counterclaim Defendants have violated the Sherman Act by bringing judicial proceedings. There are obvious errors. First, Counterclaim Plaintiffs fail to allege facts related to Counterclaim Defendants’ actions against any “other competitors,” the actions “other competitors” have taken to respond to judicial or administrative proceedings, “other competitors” that have challenged Counterclaim Defendants’ misconduct, or how Counterclaim Defendants have engaged in “covert hacking” or litigation against any “other competitors.”

Second, Counterclaim Plaintiffs’ allegation regarding the relevant market is insufficient to state a claim. “In order to survive a motion to dismiss, a claim under Section [] . . . 2 of the Sherman Act must allege a relevant geographic and product market in which trade was unreasonably restrained or monopolized.” *Linzer Prod. Corp. v. Sekar*, 499 F.Supp.2d 540, 553 (S.D.N.Y. 2007) (citation omitted). “A relevant product market consists of ‘products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.’” *In re Aluminum Warehousing Antitrust Litig.*, 95 F.Supp.3d 419, 454 (S.D.N.Y. 2015). “When the proposed relevant market is defined without ‘reference to the rule of reasonable interchangeability and cross-elasticity of demand,’ or ‘clearly does not encompass all interchangeable substitute products . . . the relevant market is legally insufficient and a motion to dismiss may be granted.’” *Spinelli v. Nat’l Football League*, 96 F.Supp.3d 81, 111 (S.D.N.Y.

2015). Further, when a plaintiff fails to “even to attempt a plausible explanation as to why a market should be limited in a particular way,” dismissal is warranted. *Todd v. Exxon Corp*, 275 F.3d 191, 200 (2d Cir. 2001). Counterclaim Plaintiffs have failed to attempt to define a relevant market. Instead, they baldly assert that Counterclaim Defendants’ control “80% or more” of an ill-defined market upon nothing more than “information and belief.” (Countercl. ¶ 43, ECF No. 32.) This is insufficient to state a claim and dismissal is warranted.

Third, Counterclaim Defendants are immune from antitrust liability based on its litigation under the Noerr-Pennington Doctrine. “Borne out of First Amendment principles guaranteeing the right to petition the government, the doctrine thus immunizes legislative, executive and judicial activity from antitrust liability even if the activity is designed to eliminate competition.” *Marchon Eyewear, Inc v. Tura LP*, No. 98 CV 1932 (SJ), 2002 WL 31253199, at *7 (E.D.N.Y. Sept. 30, 2002). However, an exception to the doctrine exists for sham litigation. As explained by the Supreme Court in *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 60 (1993), a two-part test applies to determine whether the exception applies:

First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals “an attempt to interfere directly with the business relationships of a competitor through the use [of] the government process—as opposed to the outcome of that process—as an anticompetitive weapon.”

Furthermore, the Supreme Court has instructed lower courts to remember, “even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.” *Id.* at 59–60. Here, Counterclaim Plaintiffs are unable to

meet the first element of the exception. BMaddox’s pending litigation is not “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” In fact, this Court has already determined that BMaddox has a high likelihood of success on the merits. (Order, ECF No. 15.) In light of that order, Counterclaim Plaintiffs’ allegation asserting the opposite at ¶¶ 215-216 is made in bad faith. This claim should be dismissed.

IX. Counterclaim Plaintiffs Failed to State a Claim for Intentional Infliction of Emotional Distress

In their fourteenth cause of action, Counterclaim Plaintiffs allege that BMaddox’s defamatory statements, posting of private information online, and communications with Counterclaim Plaintiffs’ family and “the public at large” were extreme and outrageous and constitute intentional infliction of emotional distress. (Countercl. ¶¶ 230-232, ECF No. 32.) To prevail on a claim for intentional infliction of emotional distress under New York law, plaintiff must plead: (1) extreme and outrageous conduct; (2) intent to cause severe emotional distress; (3) a causal relationship between the conduct and the resulting injury; and (4) severe emotional distress. *Bender v. City of New York*, 78 F.3d 787, 790 (2d Cir.1996). In analyzing an intentional infliction of emotional distress claim, courts look to the first element—whether the conduct was extreme or outrageous. *Stuto v. Fleishman*, 164 F.3d 820, 827 (2d Cir.1999). To satisfy the first element, the alleged conduct must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232, 236, 448 N.E.2d 86 (1983). Without “sufficiently outrageous” conduct, no claim for intentional infliction of emotional distress can be established. *Howell*, 596 N.Y.S.2d at 353, 612 N.E.2d 699 (“[T]he ‘requirements of the rule are rigorous, and difficult to satisfy.’”) (citation omitted). “Courts are reluctant to allow recovery under the banner of intentional

infliction of emotional distress absent a deliberate and malicious campaign of harassment or intimidation.” *Thai v Cayre Group, Ltd.*, 726 F. Supp. 2d 323, 331 (S.D.N.Y. 2010).

The allegations are simply insufficient to meet the “level of consistently atrocious and outrageous behavior necessary to give rise to a claim for intentional infliction of emotional distress. *See Owen v. Leventritt*, 174 A.D.2d 471, 571 N.Y.S.2d 25, 26 (1st Dep’t 1991) (allegation that defendant threatened to kill the plaintiff—who happened to be pregnant at the time—should she not discontinue a lawsuit, did not support an intentional infliction of emotional distress claim); *Graham ex rel. Graham v. Guilderland Cent. School Dist.*, 256 A.D.2d 863, 863-64 (N.Y.App.Div.1998) (affirming dismissal of intentional infliction cause of action, finding that use of racial epithet directed towards an African American student as part of a classroom discussion is not sufficiently outrageous); *La Duke v. Lyons*, 250 A.D.2d 969, 972-73 (N.Y.App.Div.1998) (same, based upon false accusation of euthanasia against plaintiff resulting in her employment termination). Counterclaim Plaintiffs’ allegations, even if true, do not state the consistently atrocious and outrageous behavior necessary to give rise to a claim for intentional infliction of emotional distress. Counterclaim Plaintiffs’ Fourteenth Cause of Action Must be dismissed.

CONCLUSION

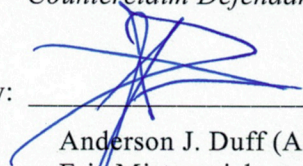
For the foregoing reasons, Counterclaim Defendants respectfully ask that all counterclaims be dismissed with prejudice.

Dated: New York, New York
September 27, 2017

Respectfully submitted,

REVISION LEGAL, PLLC
*Attorneys for Plaintiff and
Counterclaim Defendants*

By: _____



Anderson J. Duff (AD 2029)
Eric Misterovich
John Di Giacomo
244 5th Ave. Ste. 2230
New York, New York 10001
(t) 212.996.4103
(f) 212.996.5863
anderson@revisionlegal.com