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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

BMADDOX ENTERPRISES LLC,

Plaintiff,

v.

MILAD OSKOUIE, OSKO M LTD, and
PLATINUM AVENUE HOLDINGS PTY, LTD,

Defendants.

Case No. 1:17-cv-01889-RA-HBP

MILAD OSKOUIE and PLATINUM AVENUE
HOLDINGS PTY, LTD,

Counterclaimants,

v.

BMADDOX ENTERPRISES LLC and
BRANDON MADDOX,

Counterdefendants.

**COUNTERCLAIMANTS' MEMORANDUM OF LAW IN OPPOSITION TO COUNTER
DEFENDANTS' MOTION TO DISMISS**

October 11, 2017

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Counterclaimants Milad Oskouie (“Mr. Oskouie”), Osko M Ltd (“OML”) and Platinum Avenue Holdings Pty, Ltd. (“Platinum,” collectively with Mr. Oskouie and OML, “Defendants”), by their attorneys, Lewis & Lin LLC, hereby submit this Memorandum of Law in opposition to counter defendants BMaddox Enterprises, LLC (“BME”) and Brandon Lane Maddox’s (“Maddox’s,” and collectively with BME, “Counter Defendants”) Motion to Dismiss the Counterclaims.

PRELIMINARY STATEMENT

This case *should* be a simple copyright infringement suit between two competitors in the business of marketing educational materials for people seeking to get a federal firearms license (“FFL”). However, Counter Defendants turned this matter into a campaign of harassment and bigotry against Counterclaimants, by resorting to self-help, publishing defamatory and disparaging websites, and hiring hackers to takedown Platinum’s website <FFLTrust.com>, with the sole purpose to unfairly stifle competition. Faced with the reality that <FFLTrust.com> was simply a competitor, and not an infringer, Counter Defendants engaged in a host of wrongful conduct including, *inter alia*, hiring hackers to take down Platinum’s Website and registering two domain names in bad faith to publically threaten and humiliate Counterclaimants and chill competition, one identical to Mr. Oskouie’s personal name, <MiladOskouie.com> and another, <AustralianHacker.com>, which redirects to the defamatory website at <MiladOskouie.com> (collectively, the “Domain Names”). After filing this baseless copyright action, Counter Defendants then attempted to ransom the Domain Names (cloaked under the false pretense of a “FRE 408 Settlement Offer”) back to Counterclaimants for \$300,000 and cyber-extort Counterclaimants into shutting down their competing business. Then, on or around July 19, 2017, Maddox again took matters into his own hands by publishing Mr. Oskouie’s passport

number on the defamatory website, along with a host of private contact information of Counterclaimants.

In defense of this outrageous conduct, Counter Defendants first filed a premature and completely meritless motion for Rule 11 sanctions seeking, *inter alia*, to dismiss Counterclaimants' well-pled claims, then filed the instant motion to dismiss raising the same meritless issues. Specifically, Counter Defendants argue that *none* of Counterclaimants claims are adequately pled. However, in most instances, Counter Defendants do not dispute that Counterclaimants have alleged all the necessary elements of each claim¹, rather Counter Defendants claim that either (i) Counterclaimants have not included *enough* documentary evidence to support those well-pled claims or (ii) Counter Defendants own "evidence," in the form of its Verified Complaint, contradicts the factual allegations in the Counterclaim and is superior to Counterclaimants' evidence. In short, Counter Defendants do not believe their own arguments that any of the Counterclaims should be dismissed as pled, but rather than they believe they will succeed at trial. This is no basis to dismiss at this stage of the proceeding.

However, here, the Verified Counterclaims contain detailed allegations, and some cases *evidence*, supporting each of Counterclaimants' legal claims. As explained below, there is more than a sufficient basis to plausibly infer that the Counterclaims are meritorious. For these reasons, Counter Defendants' motion should be denied in its entirety.

FACTUAL BACKGROUND

Counterclaimants respectfully refer the Court to the Counterclaims [ECF No. 32] for a full and accurate statement as to what was alleged in support of each of Counterclaimants' causes of action.

¹ Ironically, Counter Defendants "Statement of Facts" includes *no facts* from the Counterclaims at all. *See* [ECF No. 68].

ARGUMENT

I. The Verified Counterclaims Adequately Allege Each of Their Claims for Relief

A. Legal Standard

Sufficiency of pleadings are governed by Rule 8. *See* Fed. R. Civ. P. 8(a)(2). All a litigant need do to survive a Rule 12(b)(6) motion to dismiss is plead sufficient factual allegations “to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Rule 8 only requires “a short and plain statement of the claim showing that the pleader is entitled to relief” in order to ‘give the defendant fair notice of what the . . . claims is and the grounds on which it rests.” *Twombly*, 550 U.S. at 555.

A claim is facially plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679. The court must accept as true all well-pleaded factual allegations and draws all reasonable inferences in favor of the non-moving party. *See Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 108 (2d Cir. 2010). Further, in assessing whether a pleader has met this standard, the court must “constru[e] the complaint liberally.” *See Goldstein v. Pataki*, 516 F.3d 50, 56 (2d Cir. 2008).

However, the Court, nor the movant, may not consider whether it believes the pleading’s factual allegations to be true, because “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and

unlikely.” *Twombly*, 550 U.S. at 555. In other words, factual disputes are neither considered, nor are to be resolved, on a Rule 12(b)(6) motion.

Given the governing standard, the each of Counterclaims should be sustained because they are well-pled under the applicable law.

B. Counterclaimants’ Violation of Anticybersquatting Consumer Protection Act, 15 U.S.C. § 8131 is well pled.

The ACPA was enacted as a Congressional reaction to the very conduct engaged in by the Counter Defendants in this case.

The Anticybersquatting Consumer Protection Act provides for federal protection against the unauthorized use of personal names as domain names by individuals with a “specific intent” to profit from such name by selling the domain name for financial gain to that person or any third party. In passing this Act, Congress concluded that some form of federal protection was necessary to prevent acts of abusive domain name registration involving personal names.

65 Fed. Reg. 10763, 10764.

Under 15 U.S.C. § 8131, “any person who registers a domain name that consists of the name of another living person, or a name substantially and confusingly similar thereto, without that person’s consent, with the specific intent to profit from such name by selling the domain name for financial gain to that person or any third party, shall be liable in a civil action by such person.” 15 U.S.C. § 8131(1)(A).

The Counterclaim readily alleges each of these factors. Specifically, the Counterclaim states “Maddox registered the domain name <MiladOskouie.com> without Mr. Oskouie’s consent, and did so with the specific intent to profit from such name by selling the domain name for financial gain to Counterclaimants and using the domain name (and others) to cyber-extort Counterclaimants into shutting down FFLTrust.com” *See* Counterclaim at ¶ 142. Further, the

Counterclaim continues by stating Counter Defendants “have used and continue to use the domain name <MiladOskouie.com> in bad faith and with the bad-faith intent to profit from said use.” *See id.* at ¶¶ 100 and 143.

Specifically, after covertly initiating this lawsuit, Counter Defendants attempted to sell the Domain Names to Mr. Oskouie for \$300,000 plus the value of Counterclaimants’ entire business, in exchange for a dismissal of this action. In short, Mr. Maddox bought the domain name for cheap, and offered to sell it to Mr. Oskouie for high. This conduct is more the sufficient to state a claim under 15 U.S.C. § 8131. *See, e.g., Bogoni v. Gomez*, 847 F.Supp. 2d 519, 525-26 (S.D.N.Y. Jan. 6, 2012); *Creuzot v. Green*, 2017 WL 2535858, at *5 (N.D. Tex. May 23, 2017); *Randazza v. Cox*, 2012 WL 6761919, at *5 (D. Nev. Dec. 14, 2012) (“Cox currently uses several of the Domain Names to operate websites where she publishes “articles” with the apparent intent to tarnish Plaintiff Randazza’s online reputation.”); *Salle v. Meadows*, 2007 WL 4463920, at *2 (M.D. Fla. Dec. 17, 2007). Counter Defendants’ email offer, cloaked under the false pretense of a “FRE 408 Settlement Offer,” “amount to a clear offer to exchange the Domain Names for an amount far beyond their actual cost — the type of *quid pro quo* offer indicative of a specific intent to profit.” *Creuzot v. Green*, 2017 WL 2535858, at *5 (N.D. Tex. May 23, 2017) (finding intent to profit in the context of settlement offers where “Defendant's offers were attempts to sell the Domain Names at inflated costs, couched in terms of a legal settlement, as evidenced by the improper requests for [monetary relief that] he was not entitled to recoup.”).

In addition, Counter Defendants also published a website on the subject domain name that defames Mr. Oskouie and his business, <FFLTrust.com>, and while promoting Counter Defendants’ competing business <FFL123.com>—further evidencing their bad faith that existed since the time of registration.

Counter Defendants' claim that their settlement offer was not a demonstration of bad faith and that the websites on the Domain Names contained language that Mr. Maddox "believes to be the truth" such that his registration and use thereof (nor any conduct thereafter), should be not construed as a specific intent to profit under the statute. *See* Motion at 18. While Counterclaimants' dispute Mr. Maddox's self-serving view of the law, this is the exact type of factual dispute that should not be resolved on a Rule 12(b)(6) motion to dismiss.

C. Counterclaimants' Violation of Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) is well pled

A domain name registrant also commits cybersquatting by registering a domain name identical or confusingly similar to a trademark, including a personal name which is protected as a trademark, and uses the domain name with the bad faith intent to profit from mark. 15 U.S.C. § 1125(d)(1). Counter Defendants argue that Counterclaimants have not provided "proof of secondary meaning" showing that the MILAD OSKOUIE Mark is protectable as a trademark. *See* Motion at 19. However, whether "secondary meaning" has been established is a question of fact that is "ill suited" for resolution at the motion to dismiss stage. *See, e.g., A.V.E.L.A., Inc. v. Estate of Marilyn Monroe, LLC*, 131 F. Supp. 3d 196, 213 (S.D.N.Y. 2015); *see also Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.2d 1033, 1039-40 (2d Cir.1992).

Counter Defendants' motion to dismiss this claim merely attempts to weigh the facts supporting secondary meaning of the MILAD OSKOUIE Mark. *See* Motion at 19. While Counterclaimants dispute Counter Defendants' characterizations of the evidence, this is the exact type of factual dispute that should not be resolved on a Rule 12(b)(6) motion to dismiss. *See Rockland Exposition, Inc. v. All. of Auto. Serv. Providers of N.J.*, 894 F.Supp.2d 288, 316 (S.D.N.Y. 2012) ("Whether a mark has acquired secondary meaning is a factual determination, proof of which entails vigorous evidentiary requirements." (internal quotation marks omitted));

Gross v. Bare Escentuals Beauty, Inc., 632 F.Supp.2d 283, 291 (S.D.N.Y. 2008) (“determining secondary meaning is a fact-intensive inquiry”).

D. Counterclaimants’ Defamation *per se* and Trade Libel claim is well pled

In order to establish a claim for libel, a plaintiff must demonstrate “(1) a false and defamatory statement of fact; (2) regarding the plaintiff; (3) which is published to a third party; and which (4) results in injury to plaintiff” *Salim v. Manczur*, 2012 NY Slip Op 32146 (N.Y. Co. Sup. Ct 2012).

“In determining whether a complaint states a cause of action to recover damages for defamation, the dispositive inquiry is whether a reasonable listener or reader could have concluded that the statements were conveying facts about the plaintiff” *Goldberg v. Levine*, 97 A.D.3d 725, 725, 949 N.Y.S.2d 692 (2d Dep’t 2012). Further, “[a] false statement constitutes defamation *per se* when it charges another with a serious crime or tends to injure another in his or her trade, business, or profession” *Geraci v. Probst*, 61 A.D.3d at 718, 877 N.Y.S.2d 386 (2d Dep’t 2009).

Here, the Counterclaim speaks for itself. Further, Counter Defendants simply could not believe their own arguments in their Motion. They do not dispute that Counterclaimants have alleged all the necessary elements of a defamation and trade libel claim under New York or South Dakota law, nor that the alleged statements are actionable, but rather they claim that Mr. Maddox’s statements are either true or, by the mere utterance that Mr. Oskouie’s is “hacker” it transforms his defamatory statements into “a matter of public interest.”

First, truth is a *defense*, and insufficient to defeat a claim at the Rule 12(b)(6) stage. *See Garcia v. Puccio*, 17 A.D.3d 199, 201 (1st Dep’t 2005) (noting that “a claim of truth or substantial truth, like a claim of qualified privilege, is an affirmative defense”).

Second, Counter Defendants are simply wrong on the law that accusing some one of a crime makes the statement “a matter of public interest.” Under New York law, an allegedly defamatory statement may constitute libel *per se* if it charged the defamed person with an indictable crime. *See Klein v. McGauley*, 29 A.D.2d 418, 421 (2d Dep’t 1968). “While slanderous language need not consist of the technical words of a criminal indictment it is necessary that the language be reasonably susceptible to a connotation of criminality.” *Caffee v. Arnold*, 104 A.D.2d 352, 353 (2d Dep’t 1984). Statements regarding serious, as opposed to minor offenses, are actionable as libel *per se*. Serious crimes such as fraud fall within the list of crimes that are actionable as libel *per se*. *See Liberman v. Gelstein*, 80 N.Y.2d 429, 435 (1992). Further, courts have held that serious misdemeanors may form the basis for a claim of libel *per se*. *See, e.g., DeFilippo v. Xerox Corp.*, 223 A.D.2d 846 (3rd Dep’t 1996). Counter Defendants’ theory would create an absurd result where a person could falsely accuse a person of a crime, and them by virtue of the utterance, it becomes non-actionable.

Finally, again, here, as with Counterclaimants’ 1125(d) claim, Counter Defendants attempt to weigh evidence outside of the pleadings to convince the Court ignore its obligation to consider Counterclaimants’ allegations as true. *See Motion at 13-14*. As such, the Court should deny the motion to dismiss the defamation claim in its entirety.

E. Counterclaimants’ False Advertising under the Lanham Act (15 U.S.C. § 1125(a)(1)(B)) is well pled

While Counter Defendants’ Motion appears to ignore the allegations pled in support of this claim, they seek to dismiss this claim, in cursory fashion by, claiming it is duplicative of the defamation claim. *See Motion at 10*. To the extent that Counter Defendants’ false statements that support a defamation claim also constitute “false and misleading statements about Platinum and Platinum’s services is likely to deceive consumers as to the nature and quality of Platinum

and Platinum's services," (*Counterclaim* at ¶ 174), that is more than sufficient to plausibly state a claim under the Lanham Act. *See* 15 U.S.C. § 1125(a)(1)(B). The fact that Counter Defendants' characterize this claim as "duplicative" of the well-pled defamation claim demonstrates the sufficiency of this claim. Therefore, Counter Defendants' motion should be denied as to this claim.

F. Counterclaimants' unfair competition is well pled under any theory

Similarly, here, Counter Defendants inappropriately attempt to characterize the unfair competition claim as "duplicative" of the well-pled defamation. *See* Motion at 10. Counter Defendants attempt to mutilate the allegations in carefully drafted Counterclaims by paraphrasing and creating strawman arguments to attack allegations and legal theories that appear nowhere in the Counterclaims is a waste of time.

First, Counterclaimants' unfair competition claim incorporates by reference the allegations that support false advertising under the Lanham Act. It is well established that false advertising under the Lanham Act and under the circumstances alleged in the Counterclaim may also be pled as an unfair competition claim under New York law. *See Simplex Grinnell LP v. Integrated Sys & Power, Inc.*, 642 F. Supp. 2d 167, 201 n.18 (S.D.N.Y. 2009) ("claims of unfair competition under New York common law mirror the Lanham Act [false advertising] claims"); *Mobius Mgmt Sys, Inc. v. Fourth Dimension Software, Inc.*, 880 F. Supp. 1005, 1023 (S.D.N.Y. 1994) ("The plaintiff also made a claim for common law unfair competition... Because the elements of unfair competition [by false advertising] in this case are satisfied by my analysis under § 43(a), I need not address this claim separately."). To the extent that Counter Defendants claim that bad faith is an additional element under New York law, the Counterclaim adequately alleges bad faith. *See, e.g.*, Counterclaim at ¶¶ 99, 104-108, 215.

Counterclaimants' unfair competition claims survives the motion to dismiss on this theory of liability alone.

Second, Counterclaimants' unfair competition claim sufficiently states a cause of action under South Dakota law, where Counter Defendants reside and from where "Counterdefendants maintained and disseminated communications on the Defamatory Website" (*Counterclaim* at ¶ 238). Mr. Maddox is a resident of South Dakota. BME is a South Dakota limited liability company with a principal place of business in South Dakota. Counterclaimants are foreign residents. The unfair competition that Counterclaimants seek to redress has little to nothing to do with the State of New York, such that New York has absolutely no interest in the resolution of that dispute. Under South Dakota law, "the tort of unfair competition does not have specific elements." *Setliff v. Akins*, 616 N.W.2d 878, 887 (S.D. 2000). "Instead, "[i]t describes a general category of torts which courts recognize for the protection of commercial interests." *Id.* at 88. "Therefore, damages for unfair competition result from satisfying the elements of an underlying tort." *Id.* "For example, tortious interference with contract . . . can serve as the basis for an unfair competition claim." *Sancom, Inc. v. Qwest Commc'ns Corp.*, 2008 WL 2627465, at *8 (D.S.D. June 26, 2008); *see also Setliff*, 616 N.W.2d at 888. As Counterclaimants have also alleged viable tort claims against Counter Defendants, including tortious interference, their unfair competition claim under South Dakota law survives for this alternative reason as well.

G. Counterclaimants' tortious interference claims are well pled

A claim for tortious interference with contractual relations under New York law requires that the aggrieved party show (1) "the existence of its valid contract with a third party," (2) accused party's "knowledge of that contract," (3) accused party's "intentional and improper

procuring of a breach,” and (4) “damages.” *White Plains v. Cintas Corp.*, 8 N.Y.3d 422, 425-26 (2007). South Dakota law is similar. *See Tibke v. McDougall*, 479 N.W.2d 898 (S.D. 1992).

Here, Counter Defendants claims that the Counterclaim fails to identify the contracts with third parties that they were induced to breach. But the Counterclaim identifies several specific contracts, as well as prospective business relationships. First, the Counterclaim alleges that it has contracts with its customers in the form of subscriptions to access the FFL Guide. *Counterclaim* at 35. Next, the Counterclaim alleges that it has contracts with its web hosting providers, and identified each of them by name. *See Counterclaim* at ¶¶ 62-73. Counter Defendants interfered with these relationships by causing hackers to take down Platinum’s website for days at a time—thus, limiting access to the customers’ subscribed-for services with Platinum, as well as causing the hosting providers to *not provide* their hosting services to Platinum. Further, the Counterclaim specifically alleges, that “Counterdefendants’ interference caused Counterclaimants’ customers and hosting providers *to cease doing business with* Counterclaimants.” *See Counterclaim* at ¶ 185. Similarly, the Counterclaim identifies the email services provider, Mail Chimp, which Counter Defendants’ interfered with by, *inter alia*, sending successive false DMCA notices. *See Counterclaim* at ¶¶ 76-77.

Finally, BME’s Complaint admits to engaging with Counterclaimants’ web hosting and email services providers, thus it cannot credibly argue it is not aware of the identity of the third parties which it interfered with Counterclaimants’ contractual relationships. As such, Counter Defendants’ motion to dismiss this claim should be denied.

H. Counterclaimants’ Violation of the Computer Fraud and Abuse Act (18 U.S.C. § 1030(g)) and Trespass to Chattels claims are well pled

Counter Defendants’ argument as to the dismissal of the CFAA and trespass to chattels claims borders on frivolous. Here, as with other claims, they do not dispute that the

Counterclaims alleged all the necessary elements of a claim under the Computer Fraud and Abuse Act (“CFAA”) or trespass to chattels. Counterclaimants’ website and email server were subject to DDoS attacks—copies of emails confirming this are in record. Thereafter, they received an extortion email attaching screenshots confirming Counter Defendants were responsible—copies of the screenshots are attached to the Counterclaims. A DDoS attack is the quintessential category of harm that the CFAA provides relief. *See* 18 U.S.C. § 1030 *et eq.*

Instead, faced with the reality that Counter Defendants were caught red-handed, Counter Defendants claim that Counterclaimants also need to attach the email that contained the screenshots showing Mr. Maddox’s efforts to hire hackers, which were attached to the Counterclaims, to support their claims. *See* Motion at 20-22. This is not only preposterous, as the allegations are well-pled, but it is not what is required under Rule 8, or *Twombly*. In sum, Counter Defendants do not believe their own argument, and in fact their cursory arguments prove that the Counterclaim sufficient states a claim under the CFAA and for trespass to chattels. The motion to dismiss these claims should be denied.

I. Counterclaimants’ Copyright invalidity, non-infringement and false DMCA notices claims are well pled

Counter Defendants’ argument as to the dismissal of the copyright related claims also borders on frivolous. Here, the eighth, ninth, and tenth counterclaims raise the same legal issues and theories that are already before the Court in the Complaint and affirmative defenses. An adjudication of BME’s affirmative claims necessarily involve resolution of the validity of its copyright claims. Counter Defendants do not dispute that all the necessary elements of each claim are pled. In fact, they could not do so, as each of the claims alleges BME’s copyrights are invalid and thus depends on the purported validity of BME’s copyrights.

Further, to demonstrate an “actual controversy” within the meaning of 28 U.S.C. §2201, a plaintiff in a declaratory judgment action must show that it has sustained, or is in immediate danger of sustaining, a direct injury as the result of the defendant’s conduct. There can be no dispute that an actual controversy exists. The Verified Complaint and Verified Counterclaim demonstrate that controversies exist between the parties and that they have adverse legal interests.

To the extent that Counter Defendants’ claim its “theory” of copyrightability of its “works,” most of which constitute material in the public domain, is correct, that is BME’s burden to prove at trial, not avoid the review of its claims by seeking dismissal of Counterclaimants’ theories at the Rule 12(b)(6) stage. Thus, the motion to dismiss these claims should be summarily denied.

J. Counterclaimants’ Sherman Act claims are well pled

“[I]n order to state a claim for monopolization under Section 2 of the Sherman Act, a plaintiff must establish (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002) (internal quotations omitted). To state a claim for attempted monopolization under Section 2 of the Sherman Act, a party must allege that: (1) the defendants engaged in predatory or anticompetitive conduct; (2) with a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993); *see also Alternative Electrodes, LLC v. Empi, Inc.*, 597 F. Supp. 2d 322, 328 (E.D.N.Y. 2009).

Counter Defendants argue that Counterclaimants' monopolization claims must be dismissed because (1) Counterclaimants did not identify specific "actions against any other competitors,"; (2) Counterclaimants failed to plead the relevant market definition adequately; and (3) the *Noerr-Pennington* doctrine makes Counter Defendants "immune from antitrust liability." *See* Motion at 22.

First, the Counterclaim adequately alleges that Counter Defendants' meritless, and public, assertions of copyright infringement harm competition. *See Counterclaim* at ¶ 210. *See Alternative Electrodes*, 597 F. Supp. 2d at 320 ("Showing such an injury requires identifying the practice complained of and the reasons such a practice is or might be anticompetitive. . . Plaintiff need not prove that competition has been harmed; it is sufficient to show a likelihood that competition would be diminished."). In other words, all Counterclaims need allege is that the type of behavior engaged in by Counter Defendants would diminish competition.

Second, the Counterclaim adequately alleges the existence of the relevant market: "BME has unlawfully monopolized the FFL guidebook market and the online FFL guidebook submarket." *See Counterclaim* at ¶ 209. Furthermore, "Courts are reluctant to dismiss antitrust claims for failure to plead the relevant product market because determining the relevant market requires a fact-intensive inquiry that is best served by allowing the parties discovery." *see Alternative Electrodes*, 597 F. Supp. 2d at 334 (*citing Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001)).

Finally, the Counterclaim adequately alleges that Counter Defendants' copyright litigation is sham litigation designed to interfere with a competitor, and therefore is not protected by the *Noerr-Pennington* doctrine. *see Alternative Electrodes*, 597 F. Supp. 2d at 330; *Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961) (antitrust immunity may

not apply to litigation that is “a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor.”). Specifically, the Counterclaim alleges that the copyright litigation is objectively baseless, and Counter Defendants’ have known this since at least as early as May 2016, given that their copyrights are based primarily on public domain material that they do not own, and they have unlawfully threatened litigation, filed false DMCA notices, and engaged in this litigation—knowing their claims had no chance of success. *See* Counterclaim at ¶¶ 209-222. Counter Defendants acknowledge that the exception for sham litigation exists, yet ironically claim that Counterclaims’ Sherman Act claims fail to allege that exception. The fact that the Court issued an *ex parte* order based upon the limited evidence before it at that time, does not make Counter Defendants’ allegations of the existence of a valid copyright any truer. In short, the Sherman Act claims are well pled and the motion to dismiss them should be denied.

K. Counterclaimants’ intentional infliction of emotional distress claim is well pled

“In South Dakota, the elements of intentional infliction of emotional distress are established by showing that the defendant (1) by extreme and outrageous conduct, (2) acted intentionally or recklessly to cause the plaintiff to suffer severe emotional distress, (3) which conduct in fact caused the plaintiff severe distress, and (4) the plaintiff suffered an extreme, disabling emotional response to the defendant's conduct.” *Nichols v. MMIC INS. INC.*, 68 F. Supp. 3d 1067, 1083 (D.S.D. 2014) (*citing Harris v. Jefferson Partners, L.P.*, 653 N.W.2d 496, 500 (S.D. 2002)). New York law is similar. *See Howell v. N.Y. Post Co., Inc.*, 612 N.Y.2d 115, 121 (1993). Threats of physical harm carried out in the court of a malicious campaign of harassment constitute “extreme and outrageous conduct.” *See, e.g., Cavallaro v. Pozzi*, 28 A.D.3d 1075, 1078 (4th Dep’t 2006) (threat to “kill plaintiff and his children” in course of a

“deliberate and malicious campaign of harassment or intimidation” sufficiently outrageous); *see also Dennis v. Napoli*, 148 A.D.3d 446, 446 (1st Dep’t 2017) (affirming denial of motion to dismiss intentional infliction of emotional distress claim where defendants allegedly sent numerous letters, emails, texts and Facebook messages to plaintiff’s family, friends, employers and future employers defaming plaintiff as well as posting vicious and insulting comments on plaintiff’s Facebook pictures).

Mr. Maddox’s conduct, as alleged in the Counterclaim, has been extreme and outrageous. Specifically, has sent a campaign of letters over a course of a year to Mr. Oskouie’s parents and others. In one letter, Mr. Maddox “threatened physical violence by claiming that he was “licensed to buy and sell military grade weapons” and stating that he “[did] not see this ending well [for Mr. Oskouie].” *See* Counterclaim at ¶ 89. After February 17, 2017 until the present, Counterclaimants allege to have received “numerous harassing emails and messages from third parties containing racial and religious slurs, including threats of physical violence, that reference the email blasts sent by Counterdefendants,” that they believe were authored by Mr. Maddox. *See* Counterclaim at ¶¶ 119-123. This pattern of behavior including death threats and threats to wreak more havoc on Counterclaimants’ business is more than sufficiently outrageous behavior to sustain a claim for intentional infliction of emotional distress under either South Dakota or New York law. *See Cavallaro*, 28 A.D.3d at 1078.

L. Counterclaimants’ invasion of privacy claim under South Dakota law is well pled

To recover on an invasion of the right to privacy claim, a claimant 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); *see also Truxes v. Kenco Enterprises, Inc.*, 119 N.W.2d 914, 916 (S.D. 1963)(A violation of the right of privacy

includes “[t]he unwarranted appropriation or exploitation of one's personality, *the publicizing of one's private affairs with which the public has no legitimate concern*, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.”) (emphasis added). Furthermore, “[t]he invasion must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities.” *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 660–61 (S.D. 2003).

Courts in this Circuit have also found the publishing of a passport number to be repugnant. *Daniels v. Kostreva*, 2017 WL 519227, at *1 (E.D.N.Y. Feb. 8, 2017) (“On June 4, 2014, defendant anonymously purchased the domain name www.zakkiyahdaniels.com and built a website dedicated to disparaging plaintiff personally and professionally. . . . Defendant also published a copy of plaintiff's passport, revealing her name, passport number and other identifying information, with the word “FRAUD” superimposed on the photograph”); *Andersen v. N. Shore Long Island Jewish Healthcare Sys.'s Zucker Hillside Hosp.*, 2013 WL 784391, at *4 (E.D.N.Y. Jan. 23, 2013) (“[G]iven the highly sensitive and personal nature of the other information referenced, I recommend that plaintiff's request to seal documents containing her signature, passport number, and/or Social Security number be granted.”).

Publishing of someone's passport number generally is offensive. In this instance, the Counterclaim alleges that Counter Defendants added Mr. Oskouie's passport number to the Defamatory Website to up the ante on their campaign to humiliate and tarnish the reputation of Counterclaimants (while forcing them to settle Counter Defendants' baseless claims). *See* Counterclaim at ¶¶ 135-37. Here, Counter Defendants do not argue that the Counterclaims fails to plead the necessary elements of this claim, rather they assert that Mr. Maddox's behavior was justified because he was “attempting to have his business while his family is harassed.” *See*

Motion at 15. Whatever justification Mr. Maddox purports to have for his wrongful behavior is no reason to dismiss Counterclaimants' well-pled claims. Moreover, Counterclaimants dispute Counter Defendants' claim that Mr. Oskouie's passport number was "publically available." *See* Motion at 15; *compare Counterclaim* at ¶ 135 ("Mr. Oskouie's passport number is not public."). This, at best, is a factual dispute that should not be decided on a Rule 12(b)(6) motion to dismiss.

Indeed, at the hearing on Counterclaimants' request for a temporary restraining order, the Court indicated that the inclusion of Mr. Oskouie's passport number was a "close[] issue" only rendered "moot" at the preliminary injunction stage because Counter Defendants voluntarily removed it. *See* 7/29/2017 Hearing Transcript at 3:19 and 8:1-2. This claim could not warrant dismissal, or be frivolous, if Counter Defendants consented to take down the passport number, seemingly in acknowledgment that publishing it in the first place was offensive. As such, the motion to dismiss this claim should be denied.

M. Counterclaimants' Violation of New York Civil Rights Law § 51 is well pled

Under New York law, it is a misdemeanor for a "person, firm or corporation [to use] 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." N.Y. Civ. Rights Law § 50; *see also* N.Y. Civ. Rights Law § 51 (establishing private right of action). "A use for advertising purposes has been defined as a use in, or as part of, an advertisement or solicitation for patronage" *Leviston v. Jackson*, 43 Misc. 3d 229, 234, 980 N.Y.S.2d 716, 719 (NY Co. Sup. Ct. 2013) (finding use for "trade purposes" under New York Civil Rights Law, include nonconsensual use of plaintiff's likeness, where competitor used plaintiff's image on a it "to generate interest in himself and to attract viewers to his website").

The Counterclaim alleges that Counter Defendants not only use the Defamatory Website to solicit patronage to his competing website, “while simultaneously promoting their own business”, but also use the image of an officer of its competitor, Mr. Oskouie, to support their disparaging and false claims against a competitor. *See* Counterclaim at ¶ 139.

Here, Counter Defendants do not dispute that Counterclaimants have alleged all the necessary elements of a claim under New York Civil Rights Law § 50 or 51, instead they argue that the *manner* in which they are using Mr. Oskouie’s image on the Defamatory Website does not “impinge on [Mr.] Oskouie’s right of publicity as defined in these statutes.” *See* Motion at 16. In support of their proposition that Counter Defendants’ use of Mr. Oskouie’s picture, name and information is nonactionable, the Counter Defendants rely on the case *Myskina v. Conde Nast Publications, Inc.*, 386 F. Supp. 2d 409, 414 (S.D.N.Y. 2005). *Myskina* does not stand for the proposition that Counter Defendants assert. In *Myskina*, the Court dismiss the plaintiff’s N.Y. Civil Rights Law claims because the plaintiff, a famous model, signed a release where she “consented in writing to the unrestricted editorial use of the photographs.” *See Myskina*, 386 F. Supp. 2d at 414 (also find that the photographs were “newsworthy on their own”). Mr. Oskouie has not signed a release, and Counter Defendants’ use does not meet the newsworthy exception. Counter Defendants are simply wrong on the law and ignore the well-pled allegations of the Counterclaim. As such, the motion to dismiss this claim should be denied.

CONCLUSION

Based on the foregoing, Counterclaimants respectfully request that the Court deny the Counter Defendants' motion to dismiss in its entirety.

DATED this 11th day of October 2017,

Respectfully Submitted:

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