

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

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U.S. DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

DIRECTV, Inc,

Plaintiff,

v.

ROBERT SHEA, et al.,

Defendant.

Case No. 5:03-CV-00018

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**COUNTER-DEFENDANT DIRECTV AND THIRD PARTY DEFENDANTS
HUGHES ELECTRONICS, INC., YARMUTH WILSDON CALFO, PLLC
AND END USER RECOVERY PROJECT, LLC'S BRIEF IN SUPPORT OF
MOTION TO DISMISS COUNTER-COMPLAINT AND THIRD PARTY COMPLAINT
OF DEFENDANT ROBERT SHEA PURSUANT TO FED. R. CIV. P. 12(B)(6)**

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I. INTRODUCTION

DIRECTV brought claims against Defendant Shea (“Defendant”) under state and federal law, all based upon Defendant’s purchase, use, and resale of Pirate Access Devices designed to illegally intercept and decrypt DIRECTV’s satellite television transmissions. In response to DIRECTV’s complaint, Defendant has answered and brought five purported counterclaims and third-party claims (hereinafter collectively “counterclaims”). Each of these counterclaims fail as a matter of law and should be dismissed. Defendant's counterclaims fail for the following reasons:

1. Counts 1 and 2 (extortion and conspiracy to commit extortion under 18 U.S.C. § 876): Section 876 is a criminal statute and does not provide for civil remedies.
2. Count 3 (federal RICO Act): Defendant does not plead the requisite predicate acts to state a claim under RICO.
3. Count 4 (Michigan Consumer Protection Act): Defendant’s claims are not brought as a "consumer" for purposes of the statute, cross-defendants are not engaged in "trade or commerce" as defined by the statute, and, in any event, Defendant cannot state a claim.
4. Count 5 (common law fraud and misrepresentation): Defendant does not plead fraud with particularity and, by his own allegations, denies reliance on cross-defendants' statements.
5. Finally, all of Defendant's claims are barred by the *Noerr-Pennington* doctrine.¹

II. ARGUMENT

The Court should dismiss each of Defendant’s counterclaims, because none of them states a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In evaluating a Rule 12(b)(6) motion, all well-pleaded material allegations of the pleadings of the [non-movant] must be taken as

¹ The name of the doctrine comes from two United States Supreme Court decisions: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965).

true. *Lavado v. Keohane*, 992 F.2d 601, 605 (6th Cir. 1992) (quoting *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478, 480 (6th Cir. 1973)). A court need not accept as true legal conclusions or unwarranted factual inferences, *Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir. 1999). Even under the liberal standards of Rule 12(b)(6), none of defendant's counterclaims states a claim upon which relief may be granted.

A. DEFENDANT CANNOT RELY ON 18 U.S.C. § 876 FOR DEFENDANT'S EXTORTION CLAIMS BECAUSE THAT STATUTE PROVIDES NO CIVIL REMEDIES

Defendant's first and second counterclaims for extortion and conspiracy to commit extortion pursuant to 18 U.S.C. § 876 must be dismissed as a matter of law because the federal statute relied upon by defendant does not provide for civil remedies. Section 18 U.S.C. § 876 is a criminal extortion statute, which provides:

Whoever knowingly [commits proscribed acts such as threatening to kidnap or accuse addressee of a crime], shall be fined under this title or imprisoned . . . or both.

18 U.S.C. § 876. The statute does not provide for a civil cause of action, as courts have routinely recognized without exception. *See, e.g., Bryant v. Yellow Freight Sys.*, 989 F. Supp. 966, 968 (N.D. Ill. 1997) (there is no arguable predicate for asserting the existence of an implied private right of action for an asserted violation of 18 U.S.C. §§875 and 876); *Weiss v. Sawyer*, 28 F. Supp. 2d 1221, 1227 (W.D. Okla. 1997) (in attempted civil action for extortion under § 876, court holds none of these penal statutes confers a private right of action.); *Rosado v. Curtis*, 885 F. Supp. 1538, 1541 (M.D. Fla. 1995) (court was unable to locate authority that would imply a civil cause of action for violations of 18 U.S.C. § 876).

Further, federal courts in Michigan routinely dismiss civil claims improperly brought under criminal statutes. *See Zolman v. IRS*, 87 F.Supp.2d 763 (W.D.Mich 1999) (criminal statute upon which the *pro se* plaintiff relied, 26 U.S.C. §7214, created no private cause of action and is

insufficient to sustain a civil claim); *Willing v. Lake Orion Community Schools Board of Trustees*, 924 F.Supp. 815 (E.D.Mich 1996) (criminal statutes upon which the pro se plaintiff relied, 18 U.S.C. §§ 241 and 371, created no private cause of action and were insufficient to sustain a civil claim). Therefore, Counts 1 and 2 of Defendant's Counterclaim for extortion and conspiracy to commit extortion should be dismissed with prejudice.

B. DEFENDANT'S FRAUD AND MISREPRESENTATION COUNTERCLAIM MUST BE DISMISSED FOR FAILURE TO PLEAD WITH PARTICULARITY AND FAILURE TO PLEAD DETRIMENTAL RELIANCE

Defendant fails to meet the pleading requirements for fraud and misrepresentation. Fed. R. Civ. P. 9(b) states: "In all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity." "To satisfy FRCP 9(b), a claimant must at minimum allege the time, place, and contents of the misrepresentation(s) upon which he relied." *Bender v Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984); *FFOC Co. v Invent AG*, 882 F. Supp. 642, 658-659 (ED Mich 1994) (Gilmore, J). Additionally, the identity of the person making the alleged misrepresentation must also be given, as well as what the person gained by the representation. *Leoni v. Rogers*, 719 F.Supp. 555 (E.D. Mich. 1989). Failure to state a fraud claim with particularity constitutes failure to state a claim. *Benoay v. Decker*, 517 F.Supp. 490, 494 (E.D. Mich. 1981), *aff'd without opinion*, 735 F.2d 1363 (6th Cir. 1984). Thus, a complaint or any relevant part thereof, may be dismissed for failure to state a claim if the particularity requirement is not met in pleading fraud. *Id.*

Defendant's fraud claim fails to state "the time, place, and contents," "the identity of the person making the alleged misrepresentation," or "what the person gained by the representation." *FFOC*, 882 F. Supp. at 658. Defendant's failure to plead the circumstances constituting fraud with particularity constitutes a failure to state a claim. As such, Defendant's fraud counterclaim should be dismissed.

Moreover, Defendant's fraud claim is fatally defective because Defendant cannot plead reliance. Defendant alleges cross-defendants made "false representations of material facts" and "fraudulently represent[ed] misleading or false interpretations of federal statutes." Counterclaim, ¶ 62. Defendant also claims that cross-defendants represented that the Smart Card Technology is illegal. Counterclaim, ¶ 63. However, the fact that Defendant did not settle with DIRECTV and is contesting this litigation, rather than settling, demonstrates his lack of reliance on the alleged misrepresentations. Defendant denies the truth of these allegations. *E.g.*, Counterclaim, ¶ 57. Indeed, Defendant's answer disputes every substantive allegation DIRECTV has made.² Because Defendant admittedly did not take any action at all based upon the letters, it is impossible for Defendant to now allege detrimental reliance on the letters.

C. DEFENDANT'S RICO CLAIM FAILS AS A MATTER OF LAW

Defendant also attempts to bring a RICO claim under 18 U.S.C. § 1962(b). This claim suffers numerous deficiencies. "Violation of §1962(b) requires that the RICO defendant acquire or maintain an interest in, or control of, an enterprise through (or by way of) the pattern of racketeering activity." *Advocacy Organization for Patients and Providers v. Auto Club Insurance Association*, 176 F.3d 315, 328 (6th Cir. 1999) citing *Compagnie De Reassurance D'Ile De France v. New England Reinsurance Corp.*, 57 F.3d 56, 91-92 (1st Cir.1995). In order to constitute a pattern of racketeering activity, defendant must sufficiently allege at least two predicate acts under RICO. *Advocacy Organization for Patients and Providers*, 176 F.3d at 322 ("in order to establish racketeering activity under RICO, plaintiffs must allege a predicate act").

² The closest that Defendant gets is to allege that DIRECTV "intended that Plaintiff rely" on the accusations, however, Defendant admittedly did not so rely. Counterclaim, ¶¶ 29, 67.

Defendant has not has not alleged a "pattern of racketeering activity," or, indeed, even a single actionable predicate act under RICO. Defendant alleges³ that counter-defendant and third party defendants engaged in racketeering activity "through a 'settlement scam' [and] along with co-conspirators collected and attempted to collect an unlawful debt and through overt extortion demands. . . ." Counterclaim, ¶ 46. According to Defendant, the alleged extortion is an attempt "to collect personal property and money by way of collection of unlawful debts in violation of Extortion and Threats, 18 U.S.C. § 876." Counterclaim, ¶ 49. Defendant also asserts third-party defendants engaged in mail fraud. Counterclaim ¶ 48. None of these allegations, however, are sufficiently pled to constitute predicate acts under RICO.

First, Defendant's claim under 18 U.S.C. § 876 fares no better as a RICO predicate act than it did as an independent claim. Congress has specifically enumerated the conduct that may constitute a predicate act under RICO. *See* 18 U.S.C. § 1961. Notably, violation of 18 U.S.C. § 876 is not listed. Moreover, Defendant's RICO claim is nothing more than a series of conclusory allegations about the impropriety of DIRECTV's pre-suit demand letters. However, a threat to sue unless an individual agrees to a settlement does not constitute a criminal act and is not a predicate act for RICO purposes. *Heights Community Congress v. Smythe, Cramer Co.*, 862 F.Supp. 204, 207 (N.D. Ohio 1994) (dismissing RICO claim, noting that even threat to bring bad faith or frivolous litigation would not be a RICO predicate act); *see also G-I Holdings, Inc. v. Baron & Budd*, 179 F.Supp.2d 233, 259 (S.D.N.Y. 2001) (dismissing RICO claim, citing numerous cases holding that even threats of

³ Among other defects in Defendant's counterclaim is his consistent failure to state RICO allegations with the particularity required by Fed. R. Civ. P. 9(b). *See, e.g., Lachmund v. ADM Investor Servs., Inc.*, 191 F.3d 777, 784 (7th Cir. 1999) (noting that RICO claims are subject to Rule 9(b), which requires plaintiff to plead with particularity -- including time, place, and content of false representations -- all aspects of the predicate acts alleged).

meritless litigation or the actual pursuit of such litigation, have been held not to constitute acts of extortion). As shown above, that statute does not provide for civil remedies. Further, actionable predicate acts under RICO are specifically set out in 18 U.S.C. § 1961, and § 876 is not on that list.

Similarly, Defendant's allegation of collection on an "unlawful debt" is not sufficient to constitute a predicate act under RICO. Under RICO, an "unlawful debt" is one incurred in illegal gambling activity or in violation of usury laws. 18 U.S.C. § 1961. Defendant's counterclaims have nothing to do with either of these situations. Notably, Defendant has not brought a separate claim for violation of the Fair Debt Collection Practices Act because such claims have failed in virtually identical situations. *See, e.g., Coretti v. Lefkowitz*, 965 F. Supp. 3, 5 (D. Conn. 1997) (district court dismissed claim under Fair Debt Collection Practices Act where consumer's claim was based upon demand letter sent by cable television company for alleged theft of television signal); *see DIRECTV v. Breedlove, Horwath, Hallow, Hoyle and Keener*, Case No. 5:02-CV-679-BR3 (E.D.N.C. March 18, 2003) (copy attached hereto as Exhibit A) (district court dismissed counterclaim brought by defendant whom DIRECTV had accused of satellite piracy).

Finally, Defendant has not adequately alleged a claim of mail fraud for purposes of a predicate act under RICO. To allege mail fraud as a RICO predicate act, an aggrieved party must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme. *Byrne v. Nezhat*, 261 F.3d 1075, 1111 (11th Cir. 2001); *6100 Cleveland, Inc. v. Staff Builders Int'l, Inc.*, 127 F.Supp.2d 877, 882 (N.D. Ohio 1999) (dismissing RICO claim because predicate allegations of mail fraud established that claimant had not relied on any statement sent through the mails). Just as Defendant's common law fraud allegations are inadequate for failure to plead reliance, so are his mail fraud allegations. Because

Defendant denies DIRECTV's allegations of piracy (*e.g.*, ¶ 57), it is impossible for Defendant to allege now that Defendant acted in reliance on any statements sent through the mail.

Finally, as in *Advocacy Organization*, Defendant's RICO count is silent with regard to *how* DIRECTV acquired or maintained an interest in or control of any enterprise; Defendant's counterclaim "simply parrot[s] the language of the RICO statute." 176 F.3d at 329. Therefore, Defendant's RICO counterclaim must be dismissed as well.

D. DEFENDANT'S CLAIM UNDER THE MICHIGAN CONSUMER PROTECTION ACT FAILS

Defendant's claim under the Michigan Consumer Protection Act fails for a variety of reasons. First, Defendant's alleged satellite piracy is not "trade or commerce," as required by that statute. The Michigan Consumer Protection Act prohibits the use of unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce. *See* MCLA 445.903(1). "Trade or commerce" is "the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity." MCLA 445.902(d). The present case does not involve "trade or commerce." Rather, it involves allegations in a lawsuit of possession and use of illegal technological devices designed for the purpose of stealing satellite television programming.

Moreover, the intent of the act is "to protect consumers in their purchases of goods which are primarily used for personal, family or household purposes." *Zine v. Chrysler Corp.*, 600 N.W.2d 384, 392 (Mich. App. 1999) quoting *Noggles v. Battle Creek Wrecking, Inc.*, 395 N.W.2d 322 (Mich. App. 1986). The whole point of DIRECTV's allegations is that Defendant has been unlawfully appropriating DIRECTV's satellite signals. The Michigan Consumer Protection Act cannot be

construed as to protect alleged theft; Defendant is not suing in the capacity of a "consumer" protected by the Michigan Consumer Protection Act.

Defendant's claim under the MCPA is merely a "catch-all" attempt to state a claim for acts that are not actionable on their own. Defendant again repeats allegations of collecting on an unlawful debt and fraud. As shown above, Defendant cannot bring these claims. Defendant adds an allegation of "attempting to force a contract," but contracts are a matter of mutual consent, so there can be no actionable claim based upon an unsuccessful attempt to "force" a contract. Finally, in ¶ 57, Defendant merely repeats the language of the MCPA with no factual allegations specific to this matter.

For all of these reasons, Defendant's claim under the MCPA should be dismissed.

E. THE NOERR-PENNINGTON DOCTRINE ACTS AS A COMPLETE DEFENSE TO ALL OF DEFENDANT'S CLAIMS

1. Background Of The Noerr-Pennington Doctrine

Finally, all of Defendant's counterclaims are barred under the *Noerr-Pennington* doctrine. Courts have long recognized immunity for acts done to petition the government. *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S. Ct. 609, 611-12, 30 L. Ed. 2d 642, 646 (1972). To uphold this First Amendment right to petition, the courts have developed the *Noerr-Pennington* doctrine. This doctrine immunizes litigation and other petitioning conduct from liability. *See, e.g., Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 51, 113 S. Ct. 1920, 1923, 123 L. Ed. 2d 611, 618 (1993).

Although the *Noerr-Pennington* doctrine first arose in antitrust cases, the courts have applied its principles outside the antitrust context. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913-15, 102 S. Ct. 3409, 3425-26, 73 L. Ed. 2d 1215, 1236-38 (1982) (holding First Amendment immunized non-violent petitioning conduct, and applied *Noerr-Pennington* in

considering whether intent or purpose of boycott was relevant); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 160 (3d Cir. 1988) (*Noerr-Pennington* doctrine immunized defendants from tort liability for petitioning government to shut down nursing home); *Havoco of America, Ltd. v. Hollobow*, 702 F.2d 643, 649-50 (7th Cir. 1983) (applying *Noerr-Pennington* doctrine in context of complaints registered with Securities and Exchange Commission, and affirming summary judgment entered against liability claims based on those complaints).

2. The Pre-Litigation Demand Letters Are Immunized by the *Noerr-Pennington* Doctrine

The *Noerr-Pennington* doctrine has been extended to cover claims based upon pre-litigation letters, just like those involved here. For example, in *Pennwalt Corp. v. Zenith Laboratories*, 472 F.Supp. 413, 424 (E.D. Mich. 1979) the court applied *Noerr-Pennington* to strike counterclaims for interference with business relationships, abuse of trademark and abuse of process. The court stated:

The factual allegations are the same in each of the claims, and, as discussed above, there is nothing in those allegations that goes beyond threatening to file and filing lawsuits that appear to be based on probable cause. While the Noerr-Pennington doctrine evolved from antitrust claims, the First Amendment rights that it protects are equally applicable to each of the other claims made by Zenith.

See also McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1560 (11th Cir. 1992) (prelitigation demand letters immunized by *Noerr-Pennington* doctrine); *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367-68 (5th Cir. 1983) (same). Demand or prelitigation immunity derives from the immunity extended to good-faith litigation because the conduct incident and prior to the filing of a lawsuit is seen as "part and parcel" of such litigation. *See id.* In fact, the courts have even immunized prelitigation conduct that went beyond demand letters. *See Primetime 24 Joint Venture v. Nat'l Broadcasting Co., Inc.*, 219 F.3d 92, 99-100 (2nd Cir. 2000) (broadcast networks' repeated challenges to signal strength determinations by satellite programming provider to protect copyrights, even though "more immediately harmful to a competitor" than prelitigation threat letters, held

protected under *Noerr-Pennington* doctrine where challenges not sham); *Matsushita Elec. Corp. v. Loral Corp.*, 974 F. Supp. 345, 359 (S.D.N.Y. 1997) (letters encouraging settlement relating to litigation, even where sent to non-party companies, held immunized by *Noerr-Pennington* doctrine).

DIRECTV's demand letters are precisely the kind of prelitigation conduct that is protected by the *Noerr-Pennington* doctrine. The letters in question alert their recipients, including Defendant, of DIRECTV's intent to protect its programming from theft through litigation if necessary. The initial letter informed Defendant that in purchasing and possessing the illegal signal theft equipment, Defendant had violated federal statutes, and that DIRECTV was entitled to statutory damages and other relief should the company succeed in litigation. The letter further informed defendant that DIRECTV had been damaged by other users of signal theft equipment and would pursue legal action against those engaged in signal theft. The letter simply set a deadline for resolving the matter short of litigation. These communications prior to commencing litigation are protected speech under *Noerr-Pennington*. See *Coastal States Marketing*, 694 F.2d at 1367 ("The litigator should not be protected only when he strikes without warning. If litigation is in good faith, a token of that sincerity is a warning that it will be commenced and a possible effort to compromise the dispute.").⁴

Indeed, the communications at issue here -- which are directed solely to Defendant, and for the purpose of protecting the intellectual property rights of DIRECTV -- do not go as far as other prelitigation actions that have been given immunity under *Noerr-Pennington*. See, e.g., *Primetime 24 Joint Venture*, 219 F.3d at 99-100; *Barq's Inc. v. Barq's Beverages, Inc.*, 677 F. Supp. 449, 453 (E.D. La. 1987) (letters to competitors and suppliers that threatened litigation, and attending

⁴ Indeed, under California's anti-SLAPP statute (which essentially codifies and extends the protections of *Noerr-Pennington*), a Court dismissed a proposed class-action suit brought against DIRECTV by accused satellite pirates. See *Blanchard et al. v. DIRECTV et al.*, Case No.: BC284166 (Cal. Super Ct., April 1, 2003) (see copy attached as Exhibit B).

publicity, were "part and parcel of the petitioning immunity of *Noerr-Pennington* if the litigation itself was in good faith"). Because DIRECTV's conduct is immunized, all of Defendant's counterclaims are barred as a matter of law.

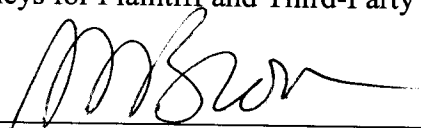
III. CONCLUSION

For the foregoing reasons, Plaintiff DIRECTV and Third-Party Defendants Hughes Electronics, Yarmuth Wilson Calfo, PLLC, and End User Recovery Project, LLC respectfully request that the Court dismiss all of Defendant Shea's counterclaims.

Respectfully submitted,

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