

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN**

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U.S. DISTRICT COURT
WESTERN DISTRICT OF MICH

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DIRECTV, Inc.,

Plaintiff/Counter-Defendant,

v

ROBERT SHEA, et al.

Defendant.

U.S. District Court
Case No. 5:03-CV-0061

HON. GORDON J. QUIST

**DEFENDANT SHEA'S RESPONSE IN
OPPOSITION AND SUPPORTING
BRIEF IN RESPONSE IN OPPOSITION
TO PLAINTIFF/COUNTER-
DEFENDANT AND THIRD PARTY
DEFENDANT'S MOTION TO DISMISS**

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RESPONSE IN OPPOSITION TO PLAINTIFF/COUNTER-DEFENDANT AND
THIRD PARTY DEFENDANT'S MOTION TO DISMISS**

**Submitted by:
Defendant/Counter-Plaintiff and
Third Party Plaintiff
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I. RESPONSE IN OPPOSITION TO MOTION TO DISMISS

NOW COMES the Defendant/Counter-Plaintiff, Robert Shea, by and through his attorneys, Allegan Law Offices, P.C., pursuant to Fed. R. Civ. P. Rule 12(b)(6), responds to Counter-Defendant DirecTV and Third Party Defendants Hughes Electronics, Inc., Yarmuth Wilsdon Calfo, PLLC and End User Recovery Project, LLC's Motion to Dismiss Counter-Complaint and Third Party Complaint of Defendant Robert Shea.

Defendant/Counter-Plaintiff Robert Shea has filed counter-claims and third party claims which state a claim on which relief may be granted and states the following in support:

II. HISTORICAL BACKGROUND

Over the past several years, DirecTV has attempted to stop the sale and distribution of electronic devices that it claims can be used along with other system devices to intercept its satellite TV signal. (i.e. smart card programmers, reader/writers, emulators, bootloaders, and unloopers)

Initially, DirecTV directed its enforcement efforts against the manufacturers of electronic devices forcing them to cease their operations within the United States. The manufacturers that DirecTV targeted were those manufacturers that took advantage of DirecTV's security flaws by either overtly marketing the devices for the purpose of hacking DirecTV's access card or by covertly marketing ISO-7816 standard smart card devices by advertising on web-sites maintained or supported by the satellite hacker community.

Frustrated with the inability to curtail the flow of information in smart card technology, DirecTV changed its strategy and initiated a program known as the End User Development Group (EUDG) designed to target individuals who had purchased smart card electronic equipment that DirecTV claims "could" be used to gain access to its programming signal. **(Rissler Depo. P. 21-22, attached as Exhibit 1)**

DirecTV's End User Development Group does not perform any other function besides making contact with individuals that are sent demand letters. EUDG's sole function is to make a demand for money, subscriptions, personal property, and settlement and releases.

DirecTV and Hughes Electronics senior corporate officers decided to implement the EUDG program of contacting and threatening purchasers of smart card devices in an effort to collect money and gain end user subscriptions. According to Mr. Rissler the massive undertaking of sending demand letters was made at a regular meeting of ranking DirecTV officials. **(Rissler Depo. P. 23-24)**

The decision to implement the mass mailing scheme was made by the DirecTV ranking officials at a regular meeting that allegedly did not consist of any written minutes of the meeting and with allegedly no written documentation to support the legality of sending hundreds of thousands of demand letters. Further, this multi-billion dollar corporation made the decision to demand money, subscriptions and personal property by threatening individuals, many of whom were already DirecTV's own subscribers, without doing any sort of Risk/Loss analysis.

(Rissler Depo. P. 25-26)

After obtaining the sales records, shipping records, and credit card receipts from the merchants of the smart card devices. **(DIRECTV Complaint ¶ 3)**. DirecTV armed only with these receipts, DirecTV's representatives contacted each and every purchaser identified in the records claiming that they had engaged in "signal theft" subjecting them to damages of up to \$10,000.00 per violation. The threatening communications demanded that individuals place a long distance phone call to inquire about the allegations and false statements. **(See Exhibit 2, 3, and Rissler Depo. p. 130 and 135)**

Without any verification or substantiation of the "signal theft" claims, DirecTV threatened legal action unless the individuals submitted to DirecTV's demands. DirecTV's End User Investigators were instructed to demand payment of \$3,500.00 per individual regardless of the facts or circumstances of each case. DirecTV has also used this strategy to force customers

and non-customers to sign up for lengthy subscription packages as a condition of settlement. (<http://www.securityfocus.com/news/6402>, Attached as Exhibit 4)

Further, when DirecTV is confronted by an individual or attorney requesting or inquiring as to evidence of actual satellite signal interception, DirecTV's EUDG's employees refuse to discuss the topic. Letters written on behalf of represented individuals requesting such information are ignored and are generally followed up with another demand for money. DirecTV claims that the settlements are negotiated between individuals and DirecTV to rectify past instances of signal theft, however, DirecTV has no authority to grant immunity for violations of Federal Criminal Statutes. Further, the monetary amount to settle DirecTV's claims are non-negotiable. (Exhibit 5)

DirecTV and Hughes Electronics' EUDG enterprise to extort and defraud money from individuals became a huge success. The settlement scam was so profitable that DirecTV and Hughes Electronics began looking for other organizations to further the letter campaign.

DirecTV and Hughes Electronics contracted with several law firms to send the demand letters to individuals that were identified as purchasing smart card technology. The firms discovered through independent investigation include, but may not be limited to: Yarmuth Wilsdon Calfo, PLLC, Greer, Herz & Adams, LLP and Lonstein Law Offices, P.C. These firms armed only with a simple invoice sent nearly identical demand letters. (Exhibit 6, 7, 8, and 9)

Yarmuth Wilsdon Calfo, PLLC from the State of Washington transferred the duties of answering the individual telephone calls and making the demand for money to a new organization that was incorporated in the State of Washington. This organization is called End User Recovery Project (EURP) and the organization's listed agent is Richard Yarmuth of the law firm Yarmuth Wilsdon Calfo, PLLC. (Exhibit 6 and 7)

DirecTV and Hughes Electronics embarked upon creating an enterprise (EUDG) within the corporation that was solely designed to send threatening demand letters and to collect money from purchasers of smart card devices

DirecTV and Hughes Electronics, further contributed to the creation of another enterprise through, Yarmuth Wilsdon Calfo, PLLC, this enterprise is called End User Recovery Project (EURP) that engages in the same tactics as EUDG and is solely designed to send threatening demand letters and to collect money from purchasers of smart card devices. **(Exhibit 2, 6 and 7)**

III. FACTUAL AND PROCEDURAL BACKGROUND

In November of 2002, Mr. Shea received a letter from Yarmuth Wilsdon Calfo, PLLC indicating that he had purchased an illegal signal theft equipment. The letter states *“I am contacting you because your purchase and use, or attempted use, of illegal signal theft equipment to access DirecTV’s programming violates federal and state laws.”* Further, the letter states that the electronic device is illegal and that the *“mere possession”* of such equipment is a violation of federal law subjecting him to fines of up to \$10,000.00 per violation. Further, the letter makes a false statement *“Moreover, your involvement in modifying devices to illegally gain access to DirecTV’s programming increase potential statutory damages to \$100,000.00.”* **(Exhibit 2)** The letter also stated that unless Mr. Shea was willing to submit to its settlement terms, DirecTV would initiate legal action against him. The letter references criminal statutes which would indicate to a layman that criminal charges would be sought should he refuse to call DirecTV’s agents. **(Exhibit 2)**

Mr. Shea has never stolen DirecTV’s satellite signal and adamantly refused to pay any money as he had already indicated that he had not used any electronic device nor was it his intention to use any electronic device for an improper or illegal purpose.

Yarmuth Wilsdon Calfo, PLLC did no further investigation nor did DirecTV attempt to determine if Mr. Shea had actually intercepted the programming of DirecTV. **(Rissler Depo. p. 157-162)**

On April 23, 2003, pursuant to an agreement, DirecTV produced Mr. Larry Rissler, Vice President of DirecTV’s Office of Signal Integrity as the individual most knowledgeable of the facts pursuant to Rule 30(b)(6).

During the deposition of Mr. Rissler, Mr. Rissler indicated the following when asked about proof regarding DirecTV's allegations of actual signal interception:

- Q. Im sorry. Under paragraph 16 it says by using the devices to decrypt. What actual or direct proof do you have that that is, in fact, the case?
- A. We don't have any direct proof. (Rissler Depo. p. 150 and 151, ¶¶ 25 and 1-3)
- Q. In paragraph 20, Defendant has used pirate access devices to decrypt and view DirecTV's satellite transmissions of television programming. What direct evidence do you have that the defendant has used pirate access devices to decrypt DirecTV's satellite transmissions?
- A. There's no direct evidence. (Rissler Depo. p. 151, ¶¶ 8-14)
- Q. And would you agree that as far as the fourth claim in DirecTV's complaint, conversion, DirecTV has no direct evidence that Mr. Vary has actually converted any of DirecTV's property for his own use?
- A. That's correct.
- Q. Without authorization; is that correct?
- A. Yes. (Rissler Depo. p. 151, ¶¶ 8-14)

When asked if DirecTV has any evidence to contradict statements made by Defendants, Mr. Rissler stated:

- Q. Do you believe that Mr. Vary has any reason to purchase a device other than what he's stating that he purchased the device for?
- A. The devices are typically purchased for the purpose of satellite signal theft.
- Q. Do you have any direct knowledge other than its primary purpose as to Mr. Vary's statement?
- A. I have no direct knowledge that he used these devices for the purpose of signal theft.
- Q. In fact, in paragraph 10 he states it was never his intention. In paragraph 11 Mr. Vary states that he never even attempted to try to use any of the devices to gain unauthorized signals from DirecTV. And in paragraph 12, he never assisted or promoted any other person to use any devices to steal or gain unauthorized signals from DirecTV.
- Do you have any direct evidence whatsoever to contradict those three paragraphs?
- A. I have no direct evidence to contradict those paragraphs. (Rissler Depo. p. 153, ¶¶ 2-21)

On May 21, 2003, DirecTV filed suit against Mr. Shea and others seeking relief for alleged violations of numerous federal statutes based on his purchase and use of a smart card programmer with glitching features "Unlooper" from Vector Technologies. (**DIRECTV Complaint ¶ 7**).

DirecTV and Hughes Electronics through EUDG are continuing to send demand letters to individuals in the State of Michigan demanding money, contracts for service and settlement agreements as of June 5, 2003. **(Exhibit 10)**

IV. STANDARD OF REVIEW

Under Rule 12(b)(6), Summary Judgment is properly granted when, in reviewing the allegations of the Plaintiff's complaint, Plaintiff undoubtedly can prove no set of facts in support of his claim that would entitle him to relief." *Ziegler v. IGP Hog Market, Inc.*, 249 F.3d 509, 511, 512 (6th Cir. 2001). In considering a motion to dismiss pursuant to Rule 12(b)(6), the court must construe the complaint in the light most favorable to the Plaintiff, and accept all factual allegations as true. *Nieman v. NLO*, 108 F.3d 1546, 1548 (6th Cir. 1997). Dismissal of the complaint is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

V. LAW AND ARGUMENT

As part of its End User Development Group (EUDG) and through Yarmuth Wilsdon Calfo, PLLC, under the End User Recovery Project (EURP), DirecTV has contacted and threatened to sue over 100,000 individuals across the country for allegedly purchasing various devices that DirecTV maintains are "Pirate Access Devices". Using the mailing lists as a way to contact individuals to increase the subscriber base and without any corroborating evidence or information regarding the individuals actual use of any electronic devices, DirecTV states that the "mere possession" of such devices are illegal subjecting each potential defendant to statutory damages of up to \$100,000.00. **(Exhibit 2, 3, 8, and 10)**

A. EXTORTION - 18 U.S.C. § 876

Mr. Shea has filed a complaint including claims for Extortion and Conspiracy counterclaims, the claims were plead in order to demonstrate predicate acts in support of Mr.

Shea's RICO counterclaims. Mr. Shea agrees that the Federal Criminal Statutes for Extortion and Conspiracy to Extort do not authorize a civil cause of action. However, in support of Mr. Shea's RICO counterclaims, certain predicate acts stemming from an enterprise supported or maintained by DirecTV or Yarmuth Wilsdon Calfo, PLLC must exist to the extent that the acts are covered under the RICO act such as extortion.

In, Teamsters Local 372 v. Detroit Newspapers, 956 F. Supp. 753; 1997 U.S. Dist. LEXIS 2117 (ED Mich. 1997), the court indicated that illegal acts which were obviously illegal and a series of illegal activities could establish a pattern of racketeering activity under the Racketeer Influenced Corrupt Organizations Act and the court further determined that extortion is clearly an illegal activity for the purposes of the RICO Act.

DirecTV has conspired to extort money, personal property and service contracts from individuals located in the State of Michigan via a mass mailing campaign that contains fraudulent and misleading information in an effort to extort or defraud individuals. Attached as **(Exhibit 2, 3, 8, and 10)** are examples of the demand letters that are being sent to individuals located in the State of Michigan. Many of the individuals that received the demand letters were confused due to the selected text of the complex Federal Statutes. Further, when individual places a long distance telephone call to the number provided, the individual would speak with an employee or agent of DirecTV.

DirecTV's employees and agents are instructed to inform individuals that they have committed a crime and that the mere possession of smart card technology is a crime. Further, DirecTV's employees and agents represent that just possession of a smart card device gives rise to a civil damages. The assertions made by DirecTV and its agents are patently false as Flowers v. Tandy Corp., 773 F. 2d. 585 (4th Cir. 1985), and DirecTV v Karpinsky, 2003 U.S. Dist. Lexis 10912 (ED Mich 2003), hold that mere possession of even a "pirate" device does not give rise to a civil litigation.

Mr. Shea received the letters from Yarmuth Wilsdon Calfo, PLLC and the letters were an attempt to extort and defraud money, personal property, and service contracts from Mr. Shea.

Mr. Shea has properly plead all the above allegations regarding extortion in his complaint and because these allegations are in support of Mr. Fields' RICO claims these allegations support a claim upon which relief may be granted by this court.

B. RICO ACT - 18 U.S.C. § 1962(a)-(c)

The purpose of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1962(a)-(c), (RICO) is to divest association of fruits of its ill-gotten gains. Mr. Shea must prove that DirecTV through predicate acts that form a pattern of racketeering activity, directly or indirectly invest in, maintains an interest in, or participates in an "enterprise" that affects interstate commerce.

Mr. Shea maintains that DirecTV has engaged in a pattern of racketeering activity by extorting money, contracts for services and personal property and further by way of fraud in violation of the Michigan Consumer Protection Act.

Private civil action under RICO does not require defendant's prior conviction of RICO violation, or of underlying predicate offenses, nor does it require racketeering injury distinct from that occurring as a result of predicate acts themselves. *Sedima, S.P.R.L. v Imrex Co.*, 473 US 479, 87 L ED 2d 346 (1985).

Mr. Shea alleges that EUDG and EURP are the entities or "persons" engaged in the illegal activity that constitute the enterprise. To constitute an "enterprise" for purposes of RICO claim, there must be two separate entities. Hughes Electronics Maintains DirecTV. DirecTV maintains EUDG, Yarmuth Wilsdon Calfo, PLLC and EURP. Also, DirecTV's agent Yarmuth Wilsdon Calfo, PLLC maintains EURP. It is possible for parent corporation to be defendant and

its subsidiary to be enterprise. *Ichiyasu v Christie, Manson & Woods International, Inc.*, 637 F. Supp 187 (ND Ill 1986) and *Lorenz v CSX Corp.*, 1 F3d 1406 (CA3 Pa. 1993).

In contrast to, *Zimmerman v HBO Affiliate Group*, 834 F2d 1163 (CA3 Pa. 1987), a complaint in civil RICO action alleging extortionate nature of letter from cable television companies. The plaintiff in *Zimmerman* failed to state claim of injury to plaintiff's business or property as required by RICO, where the only alleged injury was mental distress. In the instant action differs because the injury to Mr. Shea is both statutory under Michigan Consumer Protection Act and actual damages.

Contrary to DirecTV's assertions, extortion conducted as part of an established pattern of racketeering qualifies as an illegal activity for the purposes of the RICO Act. In, *Teamsters Local 372 v. Detroit Newspapers*, 956 F. Supp. 753; 1997 U.S. Dist. LEXIS 2117 (ED Mich. 1997), the court indicated that illegal acts which were obviously illegal and a series of illegal activities could establish a pattern of racketeering activity and that extortion is clearly an illegal activity for the purposes of the RICO Act.

A Civil RICO plaintiff need not allege or prove injury beyond injury to business or property resulting from underlying acts of racketeering; allegations of excessive interest charge resulting from defendants' fraudulent scheme to overstate prime rate was enough to satisfy requirements of the RICO Act. *American Nat'l Bank & Trust Co. v Haroco, Inc.*, 473 US 606 (1985).

Mr. Shea has plead that the same or similar fact pattern that occurred in his case, has occurred to thousands of other individuals in which DirecTV was successful in their attempts to gain money, personal property and subscriptions during the telephone conversations that were obtained via the demand letters.

Mr. Shea has properly plead all the above allegations regarding RICO in his complaint. Therefore, Mr. Shea has stated a claim upon which relief may be granted by this court.

C. MICHIGAN CONSUMER PROTECTION ACT

MCPA, MCL § 445.903, prohibits the use of unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce. Trade or commerce is defined as the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes.

DirecTV and its agents have attempted to collect money, personal property and service contracts from Mr. Shea by engaging in unfair, unconscionable and deceptive business methods. The specific subsections that DirecTV has violated under MCPA is:

MCPA, MCL§ 445.903(n) “Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.”

DirecTV has made false and misleading statements that Mr. Fields is liable for civil damages by his possession of smart card devices. “I am contacting you because your purchase and use, or attempted use, of illegal signal theft equipment to access DirecTV’s programming violates federal and state laws”. **(Exhibit 2)**

DirecTV and its agents knew or should have known that possession of smart card technology is not illegal and for an individual to be liable for damages to DirecTV, DirecTV’s signal must actually be intercepted. *Flowers v. Tandy Corp.*, 773 F. 2d. 585 (4th Cir. 1985), and *DirecTV v Karpinsky*, 2003 U.S. Dist. Lexis 10912 (ED Mich 2003)

End User Development Group and End User Recovery Project have been attempting to build DirecTV’s subscriber base by contacting individuals that purchased smart card technology using the false and misleading statements regarding the legal rights, obligations, or remedies of a party.

MCPA, MCL§ 445.903(s) “Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not be reasonably known by the consumer.”

DirecTV has indicated that it had in its possession business records that Mr. Shea engaged in satellite signal theft. “Business records recently surrendered to this office show that you purchased illegal signal theft equipment to gain unauthorized access to DirecTV’s programming.” **(Exhibit 2)** DirecTV has failed to produce any records that Mr. Shea purchased anything that is “illegal per se” or has gained unauthorized access to DirecTV’s programming. In fact, DirecTV has only produced a simple invoice for smart card technology equipment.

MCPA, MCL§ 445.903(v) “Taking or arranging for the consumer to sign an acknowledgment, certificate, or other writing affirming acceptance, delivery, compliance with a requirement of law, or other performance, if the merchant knows or has reason to know that the statement in not true.”

DirecTV has engaged in unethical business practices by attempting to force thousands of individuals into signing settlement agreements in furtherance of the “settlement scam”. This business practice targeted Mr. Shea and demanded that he pay \$3,500.00, surrender his personal property and sign a settlement. DirecTV knew or should have known that Mr. Shea was not stealing DirecTV’s satellite signal. In the alternative, if DirecTV had reason to believe illegal signal interception was taking place, DirecTV should have reported satellite signal theft to the proper authorities rather than attempting to collect money, settlement agreements and subscriptions.

DirecTV has violated other provision of the MCPA through the mass mailing campaign which includes MCL§ 445.903(t), (z), and (cc). DirecTV argues that alleged piracy is not “trade or commerce” as required by the statute. Mr. Shea has never alleged that piracy was trade or commerce. However, DirecTV provides subscription services for television programming to individuals and the attempts to gain or develop “end users” of its subscription services is conduct of trade or commerce protected under the MCPA. Further, DirecTV’s attempts to develop end users through unconscionable, unfair and deceptive business practices through its EUDG and

EURP as discussed above, constitutes sufficient violations for which individuals are protected under the MCPA.

Mr. Shea has properly plead all the above allegations regarding Michigan Consumer Protection Act in his complaint. Therefore, Mr. Shea has stated a claim upon which relief may be granted by this court.

D. FRAUD AND MISREPRESENTATION

Defendant Shea has stated a claim for fraud and misrepresentation. Michaels Bldg. Co. v Ameritrust Co., N.A., 848 F2d 674; 1988 U.S. App. Lexis 6397, (6th Cir. 1988) the court stated: “In ruling upon a motion to dismiss under 9(b) for failure to plead fraud “with particularity,” a court must factor in the policy of simplicity in pleading which the drafters of the Federal Rules codified in Rule 8. Rule 8 requires a “short and plain statement of the claim,” and calls for “simple, concise, and direct” allegations. Indeed, Rule 9(b)’s particularity requirement does not mute the general principles set out in Rule 8; rather, the two rules must be read in harmony.”

Common-law fraud is as described in, M&D, Inc. v. McConkey, 226 Mich App. 801 (1997), is:

“As a general rule, actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage.”

Mr. Shea has alleged that DirecTV through its agents have sent form letters to thousands of individuals stating that they have violated federal and state law due to the simple purchase of smart card technology devices. The letter indicates that individuals should place a long distance telephone call to discuss the matter. However, once an individual calls, no discussions are held, only a further demand for money, personal property, subscriptions and settlement agreements is made through the threat of litigation.

DirecTV argues that because the defendant did not capitulate to all of DirecTV’s

demands, that defendant did not act in reliance to the false statements to his detriment.

However, it is clear that Mr. Shea relied on the false statements regarding his possession of smart card technology devices when disposed of his personal property as he did not know the actual legality of the device.

The Sixth Circuit in *Michaels Bldg. Co. v Ameritrust Co., N.A.*, 848 F2d 674; 1988 U.S. App. Lexis 6397, (6th Cir. 1988), at 15, further stated that:

“We are convince that plaintiffs’ amended complaint is sufficiently detailed to satisfy the notice requirement. The particular fraud count specifies the parties and the participants to the alleged fraud, the representations made, the nature in which the statements are alleged to be misleading or false, the time, place and content of the representations, the fraudulent scheme, the fraudulent intent of the defendants, reliance on the fraud, and the injury resulting from the fraud. In addition, the plaintiffs identified the fraudulent loan documents and attached copies of them to the complaint.”

The pleadings of Mr. Shea, clearly meets the above requirements. Mr. Shea has alleged the parties involved in the settlement scam. (DirecTV, Hughes Electronics, Yarmuth Wilsdon Calfo, PLLC, and End User Recovery Project) The pleadings set forth the false and misleading statements that mere possession of smart card technology gives rise to civil liability. The time, place and content of the letter is self-evident on its face as a copy of the Demand Letter was attached as an exhibit and referred to in the pleadings.

The fraudulent scheme and intent by DirecTV and its agents was properly plead as Mr. Shea has alleged that he is a victim of a mass mailing “settlement scam” initiated by DirecTV and its agents. That the intent was to send demand letters to individuals so that the individuals would place a long distance telephone call so that DirecTV’s employees or agents could attempt to secure a settlement agreement that calls for individuals to give DirecTV money, personal property, subscriptions.

Mr. Shea acted in reliance by disposing of his personal property. The injury occurred when the Mr. Shea lost the value of the device when he disposed of the device in furtherance of the demands of the settlement scam.

E. NOERR-PENNINGTON DOCTRINE

The Noerr-Pennington Doctrine does not bar any of Mr. Shea's counter-claims as the doctrine immunizes **antitrust** litigation and other **antitrust** petitioning conduct from liability if the speech is protected or privileged. The doctrine protects First Amendment speech and antitrust litigation so long as the litigation is not a "sham". However, Mr. Shea has not plead a cause of action for antitrust regarding the counter-claims or third party claims.

The attempts to broaden the subscriber base of DirecTV through false and misleading statements in violation of Federal and State Law is clearly not protected First Amendment speech. Further, the communication in the mass mailing "settlement scam" is not pre-litigation speech protected by the First Amendment nor of any doctrine for immunity. Also if the speech or its impending litigation or petitioning conduct is clearly a "sham" it will likewise not be protected. DirecTV's demand letters were clearly an attempt to obtain a settlement agreements through false and fraudulent means.

The false statements made by DirecTV and its agents in the demand letters were made to further the settlement scam of DirecTV. In fact, the litigation of a few hundred individuals in each forum state clearly serves an alternative purpose which is to scare individuals that are still receiving DirecTV's threatening demand letters. The amount of letters sent verses the number of individuals sued by DirecTV shows that only a token number of individuals have been sued to further the settlement scam.

PRE-LITIGATION IMMUNITY FOR ANTITRUST CASES ONLY

The Noerr-Pennington immunity may extend to non-sham, **pre-litigation threats of suit, demand letters**, and communications about pending antitrust suits. Decisions extending immunity to pre-litigation conduct does not advance DirecTV's argument that Noerr-Pennington immunity extends to counter-claims that do not include a count of antitrust or claims that are directly resulting from the anticompetitive actions.

The 6th Circuit Court in, *In Re: Cardizem CD Antitrust Litigation*, 105 F2d 618; 2000 U.S. Lexis 13186 (ED Mich 2000), stated:

“Construing the allegations in Plaintiff’s Complaints in the light most favorable to them, this Court is persuaded that Noerr-Pennington jurisprudence does not justify application of this doctrine to immunize the anticompetitive harms caused by the HMRI/Andrx Agreement.”

The 6th Circuit Court distinguished between the harm of “incidental effects” analysis in Noerr to the anticompetitive harm of a private market between horizontal competitors who were adversaries in an action. DirecTV does not explain how Noerr advances its claim that the Michigan Consumer Protection Act that protects individuals from deceptive business practices is an “incidental effect” of pending litigation and thus entitled to immunity from the Michigan Consumer Protection Act for of violations of the Michigan Statute.

Mr. Shea argues that demand letters must be protected First Amendment Speech and clearly, DirecTV’s demand letter of November 5, 2002, which contains false, fraudulent, untrue statements, and statements that mislead and mis-quote the nature of Federal Laws is clearly not the type of speech intended to be protected by the Noerr-Pennington Doctrine.

DirecTV argues that **“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 so far as other prelitigation actions that have been given immunity under Noerr-Pennington”** However, if the communication at issue was **“directed solely”** to defendant, then how does DirecTV and its agents explain that the communication matches word for word the exact same language as every other demand letter that was sent to individuals in the State of Michigan. **(Exhibits 2, 3, and 8)**

The demand letter sent to the Defendant and others in the State of Michigan is part of a mass mailing settlement scam. No independent investigation was conducted to determine if DirecTV has been damaged by any individual and no damage has occurred due to purchases of smart card technology. No evidence or eyewitnesses establish any interception of DirecTV’s

satellite signals. In fact, DirecTV has failed to show that smart card technology or smart card devices are “illegal per se” by either statute or by case law.

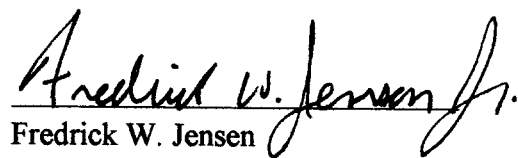
The argument DirecTV advances in the Motion to Dismiss is not supported by the Court’s “incidental effects” analysis in Noerr. Therefore, no immunity can be extended to DirecTV’s pre-litigation demand letters that contain false, fraudulent and misleading statements in violation of common law and the Michigan Consumer Protection Act.

VI. CONCLUSION

WHEREFORE, Defendant/Counter-Plaintiff, ROBERT SHEA, requests that this Court deny Plaintiff DirecTV and Third Party Defendants, Hughes Electronics, Yarmuth Wilsdon Calfo, PLLC, and End User Recovery Project, LLC request for motion to dismiss the counter-claims and third-party as the Defendant has shown sufficient evidence and support to state a claim on which relief may be granted.

WHEREFORE, Defendant/Counter-Plaintiff, ROBERT SHEA, requests that this court grant him leave to amend the counter-complaint and third-party complaints to correct any defective pleadings should this court find that the Defendant/Counter-Plaintiff’s counter-claims and third-party claims be insufficiently plead.

Dated: August 4, 2003



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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing document was served upon the attorneys of record of all parties to the above action and to all parties appearing in proper by mailing the same to them at their respective addresses as disclosed by the pleadings of record herein, with first class postage fully prepaid thereon, on the 4th day of Aug., 2003, at Allegan, Michigan. I declare under the penalty of perjury that the above statement is true to the best of my information, knowledge and belief.

Dated: August 4, 2003

/s/ Frederick W. Jensen, Jr.

Frederick W. Jensen, Jr.