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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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BETSY FEIST, Individually, and on behalf of all others similarly situated,

Plaintiff,

v. 11 Civ. 5436 (JGK)

RCN Corporation and PAXFIRE, INC.,

Defendants.
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New York, N.Y.
September 18, 2012
10:36 a.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

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Attorneys for Paxfire, Inc.
BY: ANDREW GROSSO

THE CLERK: Feist v. RCN.
All parties please state who they are for the record.
MR. SEIDMAN: Peter Seidman, with Milberg LLP, for Betsy Feist.
THE COURT: I'm sorry.
MR. SEIDMAN: Peter Seidman, S-e-i-d-m-a-n, with Milberg LLP, for Ms. Feist.
THE COURT: Thank you.
MS. CLARK: Melissa Ryan Clark, with Milberg, also for Ms. Feist.
MR. BOBKIN: Good morning, your Honor. Adam Bobkin, Milberg, for the plaintiff, Ms. Feist.
MR. REESE: Michael Reese, Reese Richman LLP, on behalf of plaintiff, Ms. Feist.
MR. GROSSO: For Paxfire, Andrew Grosso, of Andrew Grosso & Associates.
MR. NEGER: And for RCN Telecom Services LLC, Peter Neger, with Bingham McCutchen, your Honor.
THE COURT: An interested observer.
MR. NEGER: Indeed.
THE COURT: OK. I received a letter from Mr. Grosso, dated September 14, 2012, pointing out that there were -- in addition to the motion to dismiss the counterclaims, there were two other motions that were pending. One was a motion for leave to file a surreply. I will grant that motion.

Second, there was a motion for leave to amend the third affirmative defense and to file a second amended answer. The only amendment would add Paxfire to the language of the defense. And there has been no opposition to that, has there?

MS. CLARK: No, your Honor.

THE COURT: OK. So that motion is granted.

And the amended answer is deemed filed, and the current motion directed against the counterclaims are directed against the counterclaims in that most recent pleading.

All right. We now come to the motion to dismiss the counterclaims.

Now, I see that this process has resulted in narrowing the counterclaims and several of the counterclaims have been withdrawn, and now I have a motion to dismiss the remaining counterclaims. I am familiar with the papers. I am certainly prepared to listen to argument.

All right. Yes? If anyone wants to argue the motion to dismiss the counterclaims?

MS. CLARK: Good morning, your Honor. I'm Melissa Clark. I am here today on behalf of the plaintiff.

As you know, we filed a motion to dismiss defendant Paxfire's counterclaims. Our plaintiff Betsy Feist filed a class action complaint against Paxfire in August of last year, and that complaint alleged, in sum, that Paxfire as well as defendant RCN, who was her Internet service provider, monitored

and intercepted her Internet use in order to make money off of her searches. In response to that complaint, Paxfire filed counterclaims seeking in excess of $80 million in damages.

THE COURT: Paxfire alleges that, you know, sort of unusually for this kind of case, that it has been grievously hurt -- grievously -- lost lots and lots of money based in part on what it alleges -- and, you know, these are only allegations in the complaint -- were, among other things, false, defamatory comments spread by the plaintiff even prior to any statements made in the complaint. But the language appears to be fairly specific. The charges appear to be fairly specific and quite, you know, damaging -- violation of law spread, allegedly, you know, prior to the time that the lawsuit was even brought.

So rather than follow what, you know, some would say is a reasonable way of litigation in the court, it's alleged in the counterclaims that the plaintiff started a campaign prior to the time that the lawsuit was brought and spread false and defamatory comments that actually had a deleterious effect on specific contracts that Paxfire had and on business relations that Paxfire had. Whether any of that is really true we don't know; this is a motion to dismiss the counterclaims.

But the harms are allegedly very grievous, and the statements are very specific. And I realize that this is a motion to dismiss. So tell me how, in view of all of that, I can simply, you know, ignore it, say go home, sorry. You know,

the defendant claims that they've been grievously hurt to the tune of millions of millions of dollars, and the allegations are fairly specific. I know you argue that some of them aren't so plausible.

On another day you would be arguing to me that I ought not to dismiss a plaintiff's complaint because the allegations are, you know, sufficiently detailed and plausible and that the standards to be applied should not be so rigorously applied as to deny access to the courts. It would be, you know, interesting if I applied those standards to these counterclaims. All I do, though, is I apply the law as best I read it.

So your motion.

MS. CLARK: Your Honor, we agree, of course, that the counterclaims must be plausible, and there are a number of pleading standards that Paxfire has simply failed to meet that warrant dismissal on the law. We've previously moved to dismiss this complaint. We filed an opposition to Paxfire's leave to amend this complaint -- these counterclaims, rather.

THE COURT: And you were successful because, you know, you read the counterclaims now and you see "withdrawn," "withdrawn," "withdrawn."

MS. CLARK: Right. We also moved for sanctions with regard to the initial counterclaims, and yet there are still a number of --

THE COURT: And I think I denied that motion, right?

MS. CLARK: You did. You did. And granted --

THE COURT: And I did it with a little talk about not multiplying the proceedings. Now I have a motion to dismiss the remaining counterclaims even though they are pretty specifically pleaded. Thankfully, I don't have a counter Rule 11 motion that says the other side threatened you that if you didn't withdraw your motion to dismiss the counterclaims they would bring a Rule 11 motion against the motion to dismiss the counterclaims. So I just have to decide the motion to dismiss the counterclaims.

MS. CLARK: Yes, your Honor.

There are two sets of statements that Paxfire alleged harmed its business. The first sort of statement is made in the complaint. And as we briefed in great detail, statements made in a complaint are privileged. Unless the complaint is done entirely in bad faith for a solely malicious purpose with no personal interest or intent to prosecute the litigation, statements made in a complaint are protected.

The second set of statements that Paxfire has identified are statements that appeared in an article written by the New Scientist. And I believe there are three specific statements in that article that have been identified in the counterclaims, two of which are a fair and accurate reporting of the complaint and that, too, is protected --

THE COURT: There had not yet been a complaint. There was no litigation yet.

MS. CLARK: That is true. It was written -- I believe the article was published a few hours before the complete got on file.

THE COURT: And the statements must surely have been made obviously before the litigation ever began. It was an effort to trumpet in the press the allegations.

Go ahead.

MS. CLARK: Your Honor, the statements that appear in the New Scientist regarding the litigation are fairly straightforward. The complaint claims and the complaint alleges violations of the Wiretap Act, for example, and courts have held --

THE COURT: You know, as an allegation of violation of law.

MS. CLARK: Sure. Sure. But statements that are pertinent --

THE COURT: So what, right?

MS. CLARK: Statements that are pertinent to a litigation, even if they are made prior to the litigation or in the course of an investigation, are privileged. And the New Scientist is not a randomly-selected media outlet that Paxfire alleges Ms. Feist called to publish her allegations.

The New Scientist had been investigating Paxfire's

alleged course of conduct for a great deal of time, had reported on the Netalyzr, which is a tool that assisted in discovering Paxfire's alleged conduct. I wrote about that in May of 2010. And the two parties had a common interest in investigating the issue.

THE COURT: Well, you know, that argument sort of feeds into the conspiracy arguments by Paxfire, that this was an effort on the part of various people, including the plaintiff, to put Paxfire out of business because they didn't like Paxfire's business. And you say, well, they have a common interest. What was their common interest? Putting Paxfire out of business because they didn't like Paxfire.

Even if there were a common interest, the common interest is a qualified privilege, which of course can be overcome by either common law malice or constitutional malice. Very difficult to decide that on a motion to dismiss.

Was the plaintiff motivated solely by spite? Malice? Ill will? Did the plaintiff know that the charges were in fact not accurate, or was the plaintiff reckless in making the charges? Difficult to decide on a motion to dismiss.

But I'm sorry, I interrupted you.

MS. CLARK: I don't believe that Paxfire alleges that New Scientist was part of the alleged conspiracy. Paxfire alleges that Ms. Feist, through her counsel, was engaged in a conspiracy with the Electronic Frontier Foundation (EFF) and

the International Computer Science Institute (ICSI). Those two organizations are academic research organizations that Ms. Feist's counsel consulted with in investigating her complaint. And, clearly, investigation of one's claims before they are filed is mandated by Rule 11. And if every consultation with a technology expert was -- you know, put a plaintiff at risk for conspiracy allegations, I think that would have significant effects on the ability for a plaintiff to have his or her day in court.

As far as the malice allegation, they do defeat privileges if they are plausibly pled. But Ms. Feist, who is present in the courtroom today, is an individual Internet user. She is not a competitor of Paxfire. She is not a privacy advocate. She found out that her Internet searches were being viewed and monitored, and has a legitimate interest in not only protecting her privacy but receiving compensation because Paxfire and RCN themselves received compensation from her private information.

To defeat a common interest privilege, her intention has to be solely malicious. If she has any interest, even if it is as a competitor, she can still assert the privilege and be protected for any claims that are alleged to be defamatory.

So here I don't think Paxfire has come close to setting forth any plausible theory as to why Ms. Feist would bring such a litigation for a solely malicious intent.

With regard to common interest privilege, in addition to having a common interest with the New Scientist, as they were both investigating a privacy concern, Konikoff v. Prudential, which came out of this court in 1999, addressed communications with the media regarding litigation, and stated that, generally, the media is not the entity that the information is being disseminated to, it is the entity the information is being disseminated through. That wasn't so much the case here. Ms. Feist's counsel spoke with the New Scientist in the course of investigation of a complaint. But Ms. Feist also has a common interest with thousands of absent class members.

She is a putative representative of a class of thousands of Internet users across multiple Internet service providers, and Konikoff v. Prudential says that where a speaker has an interest in informing a widely dispersed audience of certain facts, it may do so even through the media and is protected from the kinds of allegations that Paxfire is making.

In addition, there is a third statement that appears in Paxfire's allegations as a defamatory statement that it alleges Ms. Feist made, but if you actually look at the article its preface was "Researchers believe" and expressly attributes that statement to someone other than Ms. Feist.

I think it is also important to note the overarching failure to allege that Ms. Feist herself did anything wrong.

She moved into this complaint kind of ambiguously by and through her counsel through communications with EFF and ICSI, but she is not alleged to have personally made any statements, authorized any statements, spoken to EFF, ICSI, or the New Scientist.

I think it becomes quite clear that this is a retaliatory action based on the fact that a complaint was filed against Paxfire.

I think the same applies with regard to the tortious interference allegations which themselves have a prima facie requirement that you plead malice, wrongful means. That has not been appropriately pled.

And there is also the Noerr-Pennington doctrine which protects the First Amendment right to petition the government to redress your claims, and in this instance Ms. Feist had a legitimate privacy interest. That petition to the government can be in the form of a publicity campaign or the filing of a complaint, and so she has done so.

But even beyond the, you know, perhaps more ambiguous elements of malice and intent, there are simple pleading failures. For the defamation claims, C.P.L.R. 3016 requires that the particular words be specified in the complaint verbatim. Paxfire has seen numerous briefings by plaintiff citing this argument and yet has failed to actually quote or specify or even cite paragraphs in the complaint where any of

this defamatory language appears. That is a failure as a matter of law to plead a defamation claim. Paxfire was unable to plead who the statements were made to, the exact timing of the statements, who exactly made the statements.

So there are bigger-picture pleading deficiencies in Paxfire's claims that warrant dismissal.

Another issue that Paxfire must establish, that Ms. Feist knew that her statements were false or were negligent, was negligent in failing to investigate her claims. And one of Paxfire's own allegations is that she purportedly conspired with EFF and ICSI. She consulted with these major research organizations about the accuracy and background of her complaint and --

THE COURT: Do you think that the standard is properly negligence or gross irresponsibility?

MS. CLARK: I think the standard for defamation can be negligence as to her failure to ascertain the truth or falsity of her statement.

THE COURT: OK. I think the standard may actually be higher. I mean, I think I would be prepared to say that it's gross irresponsibility under Chapadeau, but I am not sure I have to reach that.

MS. CLARK: I agree. Under any standard, she went above and beyond to investigate her claims.

In addition, reasonable reliance on an investigation

defeats any inference that she acted with malice or wrongful means in filing her complaint.

There are also other privileges that we've identified in the briefing such as the self-interest privilege, and there is a reasonable belief that the information is of sufficiently important interest to the publisher and that the recipient's knowledge of that information will be of service in the protection of her interests. So to the extent the Court is not persuaded by these other very strong privileges, certainly Ms. Feist is reasonable in believing that speaking to the New Scientist who is investigating Paxfire's conduct could assist her in protecting her own privacy rights.

There is also a privilege that protects statements made that are a legitimate public concern where if privacy -- where -- excuse me. If Feist acted in a grossly irresponsible manner here in failing to rely on a thorough investigation, then perhaps her statements about legitimate public concerns would not be protected. But privacy rights of thousands of Internet users is in the news every day and is undoubtedly a concern that affects almost the entire population, and such statements are also protected.

With regard to damages, Paxfire has also failed to plead some crucial elements. It pleads very generally that it has business relationships and contracts. But certainly for tortious interference with contracts, you have to plead the

terms of those contracts, whether they were terminable at will and whether the alleged tortious interference was the but for cause of the contract's termination, and Paxfire has failed to provide any detail about its contracts or those terms.

It also has tortious interference with business relationships claims, but it has yet to allege that Ms. Feist took any action towards those third parties to actually induce them to terminate their relationship with Paxfire. And that, too, is a required pleading element that none of the issues that I've discussed today create issues of fact. These are elements that Paxfire must have pled in its counterclaims, and this is its third attempt to do so and it has still failed.

I think that covers some of the larger failures in the counterclaims. If your Honor has any questions?

THE COURT: No. Thank you.

MS. CLARK: Thank you.

MR. GROSSO: Good morning, your Honor.

This case began with EFF in San Francisco. We've alleged that it was EFF and ICSI that decided, for policy reasons, to destroy Paxfire and its business model. They then contacted Ms. Feist's lawyers, and Ms. Feist was eventually convinced to bring this case and act as the front.

The statements made by the New Scientist three hours before the complaint was filed and the statements made by EFF on its blog after the case was filed are false, as are numerous

allegations in the complaint itself.
The judicial privilege does not apply. It does not apply to the New Scientist article because the New Scientist was not reporting upon a case that had been filed. Rather, it was reporting upon leaks that Ms. Feist's attorneys gave to the New Scientist in order to buttress their ad terrorem pact against Paxfire.
That New Scientist article has numerous false statements, three of which are clearly specifically correctly specified. One of them is that Paxfire hijacked searches of millions of Internet users. Now, we've heard Ms. Clark say that what the language was was that "researchers believe." That is in that article but it's not the only time the term "hijacking" is used.
Now, even though the article is not attached to the complaint, it is referenced, and it has been provided to the Court as Exhibit 1B in a filing in January, specifically my opposition to their Rule 11 motion and my response to their opposition to prevent me from filing the amended complaint, so with that, and without trying to turn this into a motion for summary judgment, I am going to read the first sentence of that article. It says: "Searches made by millions of Internet users are being hijacked."That is an express defamatory statement and it is false.
That Paxfire violated numerous statutes, including

wiretapping laws, is also in that article, and it is defamatory because it says that we're violating criminal law.

That Paxfire violated privacy safeguards enshrined in the 1968 Wiretap Act is similarly defamatory to Paxfire.

Therefore, we have sufficiently met the standard in terms of specifying defamatory statements in the New Scientist article. The New Scientist article was not reporting on a lawsuit that had been filed but, rather, was being used by Ms. Feist in order to further terrorize Paxfire.

The common interest privilege does not apply. The case cited by Ms. Clark, Konikoff v. Prudential Insurance Company, says that that privilege does not protect publication to the whole world, which is what the New Scientist did with its magazine and with its website. So there is no support there for that concept.

The article on the website of EFF is similarly not protected. And I would cite to Williams v. Williams in my brief as well as Long v. -- I can never pronounce this -- Marubeni America Corporation, 406 F.Supp.2d 285 (S.D.N.Y), where they specify that there is no protection when a lawsuit is filed purposely in order to enable somebody to publicize defamatory statements afterwards. That is the situation we have here. The lawsuit was a vehicle so that EFF and ICSI could take down Paxfire.

Similarly, the complaint itself is not protected, and

that is because the judicial privilege was waived by the leaking to the press before the lawsuit was filed. And we relied upon Cantu v. Flanigan, cited in our brief.

I turn my attention to the Noerr-Pennington Doctrine.

The case that Ms. Feist brought is not plausible. She had a privacy agreement with RCN, that really should be specified as a non-- or anti-privacy agreement, that permitted RCN to do everything that she is now alleging RCN and Paxfire did. And Paxfire was RCN's contractor and, therefore, its actions fall under the same provisions. As a result of that, she could not have a plausible belief that her lawsuit would succeed.

Further, we take a look at the Netalyzr. Now, the Netalyzr, which is this software package, initially figured to be prominent before the trier of fact, but I'm not sure that is going to happen anymore. Out in the West Coast I served subpoenas on the three researchers who designed the Netalyzr and published articles about it and upon ICSI, the International Computer Science Institute, for whom they worked. Ms. Feist filed motions to quash those subpoenas, citing expert consulting privilege, saying they would not call those people as expert witnesses and therefore the privilege prohibited me from interviewing -- from deposing them and obtaining documents from them.

The Court, in large part, granted that motion. I had

not appealed that portion of the motion. But what it does is if those witnesses are unavailable to me because of the actions of Ms. Feist, they cannot introduce any evidence about the Netalyzr into the fact proceedings of this case.

So we're left with a situation where Ms. Feist says that, gee, I looked at the Netalyzr and it showed me that they were doing all of these terrible things, but the Netalyzr cannot do that. Those are her allegations in the complaint, and we will support that.

In other words, using the Netalyzr, Ms. Feist could not possibly have come up with the conclusions that she put into her complaint. She lied. Now, whether she lied personally or upon the reliance of her lawyers is not relevant, although, again, the allegation is she personally used the Netalyzr. But just assuming for the moment that there is some justification that she relied on her lawyers. Her lawyers are her agents, and the law in this circuit is that attorney knowledge is attributable to a client because there is that attorney relationship.

With regard to damages --

THE COURT: On the defamation claim, the standard of responsibility in your view is what?

MR. GROSSO: I think that it would be more than just negligence. I think --

THE COURT: Gross irresponsibility?

MR. GROSSO: Right. And in view of the fact that she used the Netalyzr and never bothered to verify that with the researchers, the Netalyzr cannot do what she said it did. I think we meet that.

With regard to damages, we have alleged that Paxfire was about to be offered $10 million or more, and as a direct result of this lawsuit and the publicity around it, that offer was withdrawn and the deal was quashed. As a result, Paxfire is now effectively bankrupt, and we would demonstrate that. We have been seriously hurt.

The tortious interference was directed against Paxfire's clients, its own customers, ISPs, because it was by publicizing this information to the world that the counterclaim defendant knew that Paxfire's customers would believe it. In fact, there was such a tremendous uproar that among the ten companies mentioned by Ms. Feist in her complaint as being customers of Paxfire, that is ISPs using Paxfire's services, four of them have so far left Paxfire entirely: RCN Corporation, which is named in count one, for tortious interference. Since the time that complaint was filed, Wide Open West used, also known as PC Direct, and Insight also terminated their contracts with Paxfire because of this lawsuit. Others have also left Paxfire but those were not mentioned in --

THE COURT: I thought in your papers you agreed that

you could only maintain the tortious interference with contract based on your prior contract with RCN.
MR. GROSSO: That was at that time because that was the only one of the ten named that had terminated the agreement with Paxfire. The other -- I will back up.
Two tortious interference counts. Count one is termination of contract.
THE COURT: Right.
MR. GROSSO: At the time the complaint was filed, only one company terminated its contract. That was RCN.
Also a number of other companies mentioned in count two had cut back, curtailed their business with Paxfire. So that's tortious interference with prospective business advantage.
THE COURT: And tortious interference with business, you relied on XO, RCN, Wide Open West and Direct?
MR. GROSSO: Right. And I think -- yes. But since that time Wide Open West used Insight to join RCN in terminating the --
THE COURT: I don't think I can amend your counterclaim at this point.
MR. GROSSO: I understand, but we do have them named in count two so we'll get something for them.
But the damage is significant. We are losing our customers. We are going out of business, and we lost a $10

million client deal.

With regard to Ms. Clark's complaint that I have not specified in the complaint that the RCN contract was not terminable at will, the contract is obviously an integral part of the complaint. And, again, one can reference contracts if they are an integral part of the complaint and if they had been provided -- the contract has been provided to the other parties. This has been provided to the plaintiff. Obviously, RCN has a copy of it.

And I am willing to give one to the Court. It is not terminable at will, and we can satisfy that requirement.

THE COURT: It is your representation in your papers?

MR. GROSSO: Yes.

In summary, the privileges -- there is one more thing.

In addition to it being implausible for the reasons I've said, there is a case in this circuit, Paul v. Earthlink, which holds that if an Internet service provider transfers electronic signals to a device in its ordinary course of business, that that is not an interception. And, indeed, all of the signals that Ms. Feist complains about were transferred to devices of Paxfire in RCN's ordinary course of business.

So coupled between the privacy agreement, the law of this circuit and Ms. Feist's misuse of the Netalyzr, there is no way she could have legitimately believed that her case had a basis. And it was brought for another purpose, it was brought

for the purpose of knocking out Paxfire.

THE COURT: All right. Thank you.

All right. I am prepared to decide.

The defendant, Paxfire, Inc., brought counterclaims against the plaintiff, Betsy Feist, alleging libel, slander, tortious interference with contracts, tortious interference with business relationships, and civil conspiracy. The plaintiff has filed a motion to dismiss Paxfire's counterclaims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

On a motion to dismiss a counterclaim pursuant to Federal Rule of Civil Procedure 12(b)(6), the allegations in the counterclaim are accepted as true. See Grandon v. Merrill Lynch & Co., Inc., 147 F.3d 184, 188 (2d Cir. 1998). In deciding a motion to dismiss, all reasonable inferences must be drawn in the counter plaintiff's favor. See Gant v. Wallingford Board of Education, 69 F.3d 669, 673 (2d Cir. 1995); Cosmas v. Hassett, 886 F.2d 8, 11 (2d Cir. 1989). The Court's function on a motion to dismiss is "not to weigh the evidence that might be presented at a trial but merely to determine whether the [counterclaim] itself is legally sufficient." See Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985).

The Court should not dismiss counterclaim if the counter-plaintiff has stated "enough facts to state a claim to

relief that it is plausible on its face." See Twombly v. Bell Atlantic Corp., 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the counter-plaintiff pleads factual content that allows the Court to draw the reasonable inference that the counter-defendant is liable for the misconduct alleged." See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In deciding the counter-defendant's motion to dismiss, the Court may consider documents attached to the counterclaim or incorporated in it by reference, matters of which judicial notice may be taken, or documents that the counter-plaintiff relied upon in bringing suit and either are in her possession or of which she had knowledge. See Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002); see also Jofen v. Epoch Biosciences, Inc., No. 01 Civ. 4129, 2002 WL 1461351, at *1 (S.D.N.Y. July 8, 2002). While the Court should construe the factual allegations in the light most favorable to the counter-plaintiff, "the tenet that a court must accept as true all of the allegations contained in a counterclaim is inapplicable to legal conclusions." See Iqbal, 556 U.S. at 678; see also Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121 (2d Cir. 2007); Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236, 240 (2d Cir. 2002).

The following factual allegations set forth in the Amended Counterclaims are accepted as true for the purposes of this motion to dismiss unless otherwise noted.

Paxfire is a Delaware corporation with its principal place of business in Virginia. Paxfire's primary business involves the sale of technology services to Internet service providers ("ISPs"). This business consists of providing error traffic services and direct navigation services. Both of these services direct ISP end-users or customers to Web pages. Error traffic services direct end-users to a page suggesting sites and URL links that the end-user might choose to visit after an end-user enters an error into the address bar. Direct navigation services direct ISP end-users to a trademark holder's page after the end-user enters the trademark into the address bar or Web browser.

The Electronic Frontier Foundation ("EFF") and the International Computer Science Institute ("ICSI") disproved of Paxfire's business practices of providing error traffic and direct navigation services to ISPs and their end-users. EFF and ICSI believed these services violated end-users' privacy and should be elective. Paxfire alleges that this common disapproval formed the basis of an agreement between ICSI and EFF to act as "self-appointed enforcement officials policing the Internet to deter conduct to which they objected."

Sometime prior to August 1, 2011, Betsy Feist, the plaintiff, agreed to join EFF and ICI allegedly in accomplishing their goal of discouraging Paxfire's business practices. Paxfire alleges that Feist acted as the "legal

front," serving "as the necessary third-party plaintiff for the purposes of bringing the class action lawsuit to accomplish the agreement's goals." (Amended Counterclaim Paragraph 44.)

Sometime between August 1, 2011 and August 4, 2011, Feist communicated with Jim Giles of The New Scientist, a media outlet on the Internet. Paxfire alleges that in addition to informing Giles that she was filing a class action complaint, Feist also made "numerous false and defamatory statements about Paxfire." (Amended Counterclaim Paragraph 49.) Specifically, Paxfire alleges that Feist stated (1) "Paxfire 'hijacked' searches of millions of Internet users"; (2) "Paxfire violated numerous statutes, including wiretapping laws'; and (3) "Paxfire violated 'privacy safeguards enshrined' in the 1968 Wiretap Act." (Amended Counterclaim Paragraph 49(d).) In addition, Paxfire alleges that Feist made these statements "for the purpose of causing an article with these statements to be published." (Amended Counterclaim Paragraph 49.)

On August 4, 2011, Feist filed a class action complaint against Paxfire and RCN Corp. ("RCN"). Paxfire contends that the complaint contains additional defamatory statements. Paxfire further contends that at the time Feist filed her Class Action Complaint, she "knew that she had insufficient basis to make such statements" and "purposely avoided making inquiry of Paxfire so as not to learn the truth regarding these statements and allegations."

Paxfire asserts that Feist's defamatory statements damaged Paxfire's business relationships and reputation. In particular, Paxfire alleges that Feist "intentionally procured, directly and vicariously through her co-conspirators, a breach of Paxfire's contract with RCN." (Amended Counterclaim Paragraph 61.) In addition, Paxfire contends that Feist intentionally procured the "reduction, suspension, and termination of Paxfire's business relationships through wrongful means, including misrepresentations and her civil class action lawsuit." (Amended Counterclaim Paragraph 68.) Paxfire specifically alleges that Feist harmed Paxfire's ongoing business relationships with the following companies: XO Communications, Wide Open West, Direct PC, and RCN. (Amended Counterclaim Paragraph 67.)

On August 31, 2011 Paxfire filed initial counterclaims against Feist. On February 13, 2012 Paxfire filed the present amended counterclaims asserting claims against Feist for (1) slander; (2) libel; (3) tortious interference with contract; (4) tortious interference with business relationships; and (5) civil conspiracy.

Feist moves to dismiss the defamation, tortious interference, and civil conspiracy counterclaims pursuant to Federal Rule of Civil Procedure 12(b)(6). Feist argues that Paxfire's counterclaims should be dismissed because: (a) Paxfire has not stated a defamation claim with the required

particularity; (b) Feist is immune from defamation claims; (c) Paxfire has failed to adequately allege the elements of a tortious interference claim; (d) Feist is protected from tortious interference claims by the Noerr-Pennington doctrine; and (e) Paxfire has not adequately pleaded a civil conspiracy claim.

The elements of a defamation claim under New York law are "[1] a false statement, [2] published without privilege or authorization to a third party, [3] constituting fault as judged by, at minimum, a negligence standard, and . . . [4] either caus[ing] special harm or constitut[ing] defamation per se." Dillon v. City of N.Y., 704 N.Y.S.2d 1, 5 (App. Div. 1999). A claim for libel has an added element, namely that [5] the defamatory statement must be in writing. See Meloff v. New York Life Insurance Co., 240 F.3d 138, 145, (2d Cir. 2001).

For a claim of defamation to meet this standard, courts in this Circuit have held that a plaintiff must identify: (1) the allegedly defamatory statements; (2) the person who made the statements; (3) the time when the statements were made; and (4) the third parties to whom the statements were published. Reserve Solutions, Inc. v. Vernaglia, 438 F.Supp.2d 280, 289, (S.D.N.Y. 2006). See also Mobile Data Shred, Inc. v. United Bank of Switzerland, No. 99 Civ. 10315, 2000 WL 351516, at *6 (S.D.N.Y. April 5, 2000). New York Civil Practice Law and Rules Section 3016(a) also

requires that "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." N.Y. C.P.L.R. Section 3016(a) (McKinney 1991).

As a preliminary matter, the Court must determine the level of fault applicable in this defamation action. Under New York law where the content of a publication is "arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition," the party allegedly defamed by such publication may not recover unless "the publisher acted in a grocery irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569, 571 (N.Y. 1975). "To act in a 'grocery irresponsible manner' under Chapadeau is to act with more recklessness than the 'ordinary negligence' standard of care." Med-Sales Associates, Inc. v. Lebhar-Friedman, Inc., 663 F.Supp. 908, 912 (S.D.N.Y. 1987).

Although the plaintiff is not a media defendant and did not personally publish any article, the Chapadeau gross irresponsibility standard has been held to apply to a private plaintiff speaking on matters of public concern. See Konikoff v. Prudential Insurance Co. of America, 234 F.3d 92, 102 (2d Cir. 2000).

Here, Feist's statements are arguably within the

sphere of public concern. The statements Feist made to Giles allege that Paxfire was breaking the law by violating the privacy of millions of Internet users. Feist then filed a class action lawsuit seeking to curb this activity. The public welfare is benefited from the exposure of illegal activity. See Pollnow v. Poughkeepsie Newspapers, Inc., 486 N.Y.S.2d 11, 16 (App. Div. 1985). ('it is [] plain that a private person's alleged criminal conduct and the operation of the criminal justice system with respect to the disposition of the charges against such an individual are matters of legitimate public concern.") Paxfire agrees that gross irresponsibility is the proper standard of fault to be applied. Accordingly, Feist's statements will be analyzed under the Chapadeau standard.

Feist argues that Paxfire has not adequately alleged that she was grossly irresponsible in making the defamatory statements. But Paxfire has alleged that Feist made "numerous false and defamatory statements about Paxfire" to Jim Giles of The New Scientist. Moreover, Paxfire has alleged that Feist "did not have evidence as to the truth or falsity of [the] statements," See Amended Counterclaim Paragraph 51, and "purposely avoided . . . learn[ing] the truth regarding these statements and allegations." See Amended Counterclaim Paragraph 52. If true, Feist's actions could constitute gross irresponsibility. See Sepenuk v. Marshall, No. 98 Civ. 1569, 2000 WL 1808977 at *3 (S.D.N.Y. Dec. 8, 2000) ('[plaintiff] has

put forth evidence which could support a finding that the [defendant's] statements . . . were knowingly false, thus evincing gross irresponsibility"); see also Lewis v. Newsday, Inc., 668 N.Y.S.2d 377, 379 (App. Div. 1998) (finding that newspaper's publication of statements from sources who were "mere conduits for unverified rumor" raised a triable issue of fact as to whether the newspaper was "grossly irresponsible" where it made no effort to substantiate statements and sources and made no representation that they had done so). Feist contends that she cannot be found grossly irresponsible because she reasonably relied on EFF and ICSI when she made her statements. However, whether Feist's reliance was reasonable is a question of fact best left for the jury. See Kerman v. City of New York, 374 F.3d 93, 116 (2d Cir. 2004) ("questions as to whether there was gross negligence, intent, or reckless disregard are questions of fact to be answered by the jury."). Accordingly, Paxfire has adequately alleged that Feist was grossly irresponsible when she made the defamatory remarks to Giles with the intent that they be published.

Feist next argues that Paxfire has failed to set forth the particular defamatory words complained of or established their falsity. In order to survive a motion to dismiss "a plaintiff must plead a claim for defamation with adequate specificity to afford defendant sufficient notice of the communications complained of to enable her to defend herself."

See Tasso v. Platinum Guild International, No. 94 Civ. 8288, 1997 WL 16066, at *2 (S.D.N.Y. January 16, 1997.) Paxfire has met this standard by alleging three specific defamatory statements that are allegedly attributable to Feist, and which are the subject of the defamation claim. See Amended counterclaim Paragraph 49. Paxfire has also alleged that Feist reported the defamatory statements to Jim Giles at a specific time, namely, "during the period of August 1 to noon on August 4, 2011." See Amended Counterclaim Paragraph 49. This is sufficient to put Feist on notice of the communications complained of and enable her to defend herself.

Although Feist argues that Paxfire has failed to establish the falsity of the defamatory statements, on a motion to dismiss "the Court accepts plaintiff's allegations as true, it assumes that defendants' statements are false and that defendants were culpable in making the statements." Henneberry v. Sumitomo Corp. of America, No. 04 Civ. 2128, 2005 WL 991772, at *16 (S.D.N.Y. April 27, 2005); see also Lucking v. Maier, No. 03 Civ. 1401, 2003 WL 23018787, at *3 n. 4 (S.D.N.Y. December 23, 2003). Paxfire has alleged that Feist's statements were false. Accordingly, Paxfire's allegations of falsity are sufficient to survive a motion to dismiss. See Daniels v. Provident Life & Casualty Insurance Co., No. 02 Civ. 0668E, 2002 WL 31887800, at *5, (W.D.N.Y. December 22, 2002). See also Tuff-N-Rumble Management, Inc. v. Sugarhill Music

Publishing, Inc., 8 F.Supp.2d 357, 362 (S.D.N.Y. 1998). ("[defendant's] claim that its statements are true raises a factual issue that does not weaken the sufficiency of the pleading").

Paxfire also alleges special damages. See Amended Complaint Paragraph 82. In addition, Paxfire alleges that Feist made statements that compromised the integrity of Paxfire's business when she accused Paxfire of illegal conduct. Such allegations support a claim of defamation per se. See Ruder & Finn, Inc. v. Seaboard Surety Co, 422 N.E.2d 518, 522 (N.Y. 1981). See also Treppel v. Biovail Corp., No. 03 Civ. 3002, 2004 WL 2339759, at *17 (S.D.N.Y. October 15, 2004).

These allegations are sufficient to put Feist on notice of the claims against her. Accordingly, Feist's motion to dismiss Paxfire's defamation counterclaim on this basis is denied.

Feist alternatively argues that her statements were not defamatory because they are protected by the absolute and common interest privileges.

"Statements uttered in the course of a judicial or quasi-judicial proceeding are absolutely privileged so long as they are material and pertinent to the questions involved." Bernstein v. Seeman, 593 F.Supp.2d 630, 636 (S.D.N.Y. 2009). "Proceedings are quasi-judicial if: (1) a hearing is held; (2) both parties may participate; (3) the presiding officer may

subpoena witnesses; and (4) the body has the power to take remedial action." Boice v. Unisys Corp., 50 F.3d 1145, 1150 (2d Cir. 1995).

Here, any statements in Feist's complaint are protected by the absolute privilege because judicial action is commenced by filing a complaint with the court. However, the absolute privilege does not extend to any statements Feist or her attorneys made to Jim Giles before the lawsuit was filed because Giles was not involved in the lawsuit. See Long v. Marubeni Am. Corp., 406 F.Supp.2d 285, 294 (S.D.N.Y. 2005). ("The privilege is usually understood as not applying . . . to out-of-court statements made to persons not related to the litigation."); see also Schulman v. Anderson Russell Kill & Olick, PC, 458 N.Y.S.2d 448, 453-54 (Sup. Ct. 1982) ("the absolute privilege protecting statements in the course of judicial proceedings does not apply to lawyers' informal communications designed to gather information or to identify potential witnesses"). Furthermore, there is no argument that the statements Feist made to Giles were uttered in the course of a judicial or quasi-judicial proceeding. Accordingly, the statements Feist made to Giles are not absolutely privileged.

Likewise, the common interest privilege does not protect Feist's statements to Giles. "[D]efamatory communications made by one person to another upon a subject in which both have an interest are protected by the common

interest privilege, which is a defense to defamation. Meloff, 240 F.3d at 145 (citing Konikoff, 234 F.3d at 98 (2d Cir. 2000). A plaintiff may overcome the privilege by proving that the statement was not substantially true and that the defendant abused the privilege. See id. at 146. A defendant abuses the privilege if the defendant acted beyond the scope of the privilege, acted with common law malice, or acted "with knowledge that the statement was false or with a reckless disregard as to its truth." Id. (Citing Weldy v. Piedmont Airlines, Inc., 985 F.2d 57, 62 (2d Cir. 1993)).

Here, Feist alleges that her communications with Giles are protected by the qualified privilege because she has a common interest with Jim Giles. However, Paxfire contends that Feist abused her common interest privilege because she acted with malice. See Amended Complaint Paragraph 81. Thus, whether the common interest privilege protects Feist's communications is a question of fact that cannot be decided at this stage of the litigation. See Boyd v. Nationwide Mut. Ins. Co., 208 F.3d 406, 410 (2d Cir. 2000) ("[Plaintiff]'s claim raises doubts about the defendant's good faith, which is the linchpin of any qualified privilege . . . [that] permits a sufficient inference that Nationwide abused its qualified privilege."); see also Stern v. Leucadia Nat.'l Corp., 844 F.2d 997, 1004 (2d Cir. 1988). Thus, it cannot be determined on a motion to dismiss that Feist's statements to Giles are

privileged and Paxfire has adequately pleaded its defamation claim. Accordingly, Feist's motion to dismiss Paxfire's defamation counterclaim is denied with respect to any statements Feist made to Giles before she filed her lawsuit.

Feist next argues that Paxfire has failed to adequately plead a claim for tortious interference.

In particular, Feist contends that Paxfire has not adequately allege the existence of valid contracts with the ISPs. Under New York law, the elements of a tortious interference with contract claim are (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional procurement of the third party's breach of the contract without justification; (4) actual breach of the contract; and (5) damages resulting therefrom. Kirch v. Liberty Media Corp., 449 F.3d 388, 401-02 (2d Cir. 2006). Paxfire has alleged that it had valid contracts with eleven ISPs. See Amended Complaint Paragraph 59. Paxfire has also alleged that Feist had actual knowledge of these contracts. See Amended Counterclaim Paragraph 60. This allegation is supported by the fact that Feist identified that Paxfire had business relationships with all the relevant ISPs, except XO Communications, in her own complaint. Further, Paxfire alleges that it suffered damages as a result of Feist's actions. See Amended Counterclaim Paragraph 63 and 82. Although Feist

argues that Paxfire has failed to plead that its contracts were not terminable at will, this does not warrant dismissal unless it is clear that such contracts were in fact terminable at will. See AIM Int'l Trading, L.L.C. v. Valcucine S.p.A., No. 02 Civ. 1363, 2003 WL 21203503, at *5 (S.D.N.Y. 2003). Thus, because it is not clear from the Amended Counterclaim that Paxfire's contracts are terminable at will, this does not provide a basis for dismissal. Indeed, Paxfire has proffered that its contracts with the ISPs were not terminable at will. See Plaintiff's Memo of Law at 13.

However, of the eleven ISPs cited, Paxfire has only alleged actual contract breaches with RCN and XO Communications. See Amended Counterclaims Paragraphs 61 and 82. Further, Paxfire only alleges that Feist intentionally procured an unjustified breach of Paxfire's contract with RCN. See Amended Counterclaim Paragraph 61. Indeed, Paxfire concedes this point. Accordingly, Paxfire may only maintain a claim for tortious interference with contract based on its previous contract with RCN. See RSM Production Corp. v. Fridman, 643 F.Supp.2d 382, 405 (S.D.N.Y. 2009).

Although Paxfire may not maintain a claim for tortious interference with contract with the other ISPs, it may sustain its claim for tortious interference with business relationships with the ISPs. To state a claim for tortious interference with a business relationship a plaintiff must allege that "(1) the

plaintiff had a business relation with a third party; (2) the defendant interfered with those business relations; (3) the defendant acted for a wrongful purpose or used dishonest, unfair, or improper means; and (4) the defendant's acts injured the relationship." Catskill Development, L.L.C. v. Park Place Entertainment Corp., 547 F.3d 115, 132 (2d Cir. 2008).

Feist argues that Paxfire has inadequately pleaded that it had business relationships, but Paxfire has alleged prior business relationships with ten ISPs. See Amended Complaint Paragraph 65. Paxfire also alleges that Feist interfered with its ongoing business relationships with these ISPs. See Amended Counterclaim Paragraph 67. Further, Paxfire alleges that Feist used wrongful means to interfere with these business relationships. See Amended Counterclaim Paragraph 68. Feist argues that this is insufficient because Paxfire has failed to allege that Feist acted solely by wrongful means. However, the wrongfulness of Feist's actions cannot be determined at the motion to dismiss stage of the litigation. See, for example, Cerveceria Modelo S.A. De C.V. v. USPA Accessories LLC, No. 07 Civ. 7998, 2008 WL 1710910, at *5 (s.D.N.Y. April 10, 2008); see also Mina Inv. Holdings Ltd. v. Lefkowitz, 184 F.R.D. 245, 251 (S.D.N.Y. 1999).

However, at this point Paxfire has only alleged actual injuries to its business relationships with XO Communications, RCN Corporation, Wide Open West and Direct PC. See Amended

Counterclaim Paragraph 67. Paxfire also alleges that Feist was aware of its business relationship with each of these entities. See Amended Counterclaim Paragraph 66. Therefore, Paxfire's Counterclaim alleging tortious interference with its business relations with each of these four ISPs cannot be dismissed on this motion to dismiss.

Feist argues that even if Paxfire has adequately pleaded a tortious interference claim, she is protected by the Noerr-Pennington Doctrine. This Doctrine, which derives from a trilogy of antitrust cases decided by the Supreme Court and is based on First Amendment principles guaranteeing the right to petition the government, immunizes from antitrust scrutiny "mere attempts to influence the passage or enforcement of laws," Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135 (1961), regardless of any anticompetitive motives behind these attempts, as well as good-faith attempts to secure legitimate goals through administrative agencies and courts. See California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972). The doctrine has also been extended to areas outside of the antitrust arena, and has specifically been held to protect the exercise a defendant's First Amendment rights even when such action would normally constitute tortious interference. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911-12 (1982). The doctrine, however, does not shield a

defendant from liability for instituting "sham" litigation. See Noerr, 365 U.S. at 144; see also Professional Real Estate Investors v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60-61 (1993).

Here, Paxfire alleges that Feist committed tortious interference before filing her lawsuit by making false statements to private third parties. These actions would not be protected by the Noerr-Pennington Doctrine because they were not directed at any federal agency. Moreover, these acts were not in any way incident to her litigation. Thus, the Doctrine would not shield Feist from liability for any alleged tortious interference that occurred prior to filing her lawsuit.

Paxfire also argues that Feist's litigation is a sham and therefore that the Noerr-Pennington Doctrine is not applicable to her lawsuit. However, whether Feist's lawsuit is a sham is a factual issue that cannot be decided at the motion-to-dismiss stage of litigation. See Riddell Sports, Inc. v. Brooks, No. 92 Civ. 7851, 1997 WL 148818, at *5 (S.D.N.Y. March 27, 1997. ("Whether litigation is a sham is a fact-intensive inquiry that cannot be decided on a motion for summary judgment."); see also N.Y. Jets LLC v. Cablevision Systems Corp., No. 05 Civ. 2875, 2005 WL 3454652 at *2 (S.D.N.Y. December 19, 2005) ("where . . . facts are in dispute, there is no requirement that a court determine whether the sham exception applies without the benefit of full

discovery.") (Internal quotation marks omitted.)

Finally, Feist moves to dismiss Paxfire's civil conspiracy claim. The elements of a civil conspiracy claim are "(i) an agreement between two or more persons, (ii) an overt act, (iii) an intentional participation in the furtherance of a plan or purpose, and (iv) resulting damages." Official Committee of Unsecured Creditors v. Donaldson, Lufkin & Jenrette Securities Corp., No. 00 Civ. 8688, 2002 WL 362794 at *13 (S.D.N.Y. March 6, 2002.) In addition, New York does not recognize a substantive tort of civil conspiracy. See, e.g., Antonios A. Alevizopoulos & Associates v. Comcast International Holdings, Inc., 100 F.Supp.2d 178, 187 (S.D.N.Y. 2000). In order to state a claim for civil conspiracy, therefore, there must be an allegation of an independent intentional tort. See Agron v. Douglas W. Dunham, Esq. & Assocs., No. 02 Civ. 10071, 2004 WL 691682, at *6 (S.D.N.Y. March 31, 2004); see also Alevizopoulos & Associates, 100 F.Supp.2d at 187-88.

In the present case, Paxfire alleges that Feist entered into an agreement with EFF and ICSI to disrupt Paxfire's business. See Amended Counterclaim Paragraph 44. Paxfire alleges that this agreement was furthered, in part, by an e-mail circulated between the alleged conspirators. In addition, Paxfire asserts that Feist intentionally participated in this plan by making statements to Jim Giles, and that these statements damaged Paxfire. Paxfire has also alleged that

there are underlying intentional torts which were the object of the civil conspiracy. Thus, Paxfire has alleged enough facts to adequately plead a civil conspiracy claim. Accordingly, because the civil conspiracy claim hinges on the aforementioned tort claims, the same issues which preclude dismissal of those claims prevent dismissal of the civil conspiracy claim. See Omni Consulting Group, Inc. v. Marina Consulting, Inc., No. 01 Civ. 511A, 20007 WL 2693813, at *8 (W.D.N.Y. September 12, 2007).

The Court has carefully considered all of the arguments of the parties. To the extent not specifically addressed above, remaining arguments are either moot or without merit. For the foregoing reasons, the plaintiff's motion to dismiss the Amended Counterclaims is denied in part and granted in part.

The Clerk is directed to close Docket No. 747.

So ordered.

All right. There is a scheduling order and the case is proceeding apace.

MR. NEGER: This is Peter Neger, your Honor.

We had a status conference with Magistrate Judge Ellis I guess it would be a week ago, and he directed the parties to make some adjustments to the scheduling order. We submitted a proposed revised order to him I think it was yesterday. I could hand that up to your Honor if you wish, but I know it is

before Magistrate Judge Ellis for his review, and I suspect that he will approve it and pass it on to your Honor.

THE COURT: OK. Actually, I assigned it to Magistrate Judge Ellis for general pretrial, right?

MR. NEGER: Yes.

THE COURT: So I assume that he can sign the revised scheduling order.

MR. NEGER: Perfect.

THE COURT: What is the date for the completion of discovery?

MR. NEGER: The fact discovery is completed, your Honor --

THE COURT: Could you pass it up.

MR. NEGER: Yes. Absolutely.

THE COURT: It would be helpful. Thank you.

(Pause)

OK. Thank you.

Is this copy for me?

MR. NEGER: You may have it, your Honor.

THE COURT: All right. Anything else?

(Pause)

OK. Good morning, all.

MR. NEGER: Thank you, your Honor.

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