UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CIRA CALABRESE, MEL GEVANTER, ANTHONY FIORE, STEWART KALTER, RALPH REEL, SYLVIA HOWELL-FRIDIE, STEVEN SCHIFF and those similarly situated,	:	
Plaintiffs,	:	
- against -	:	02 Civ. 5171 (JS) (ARL)
CSC HOLDINGS, INC., a/k/a CABLEVISION, SHAUN K. HOGAN, DANIEL J. LEFKOWITZ, WAYNE R. LOUIS, PATRICK J. SULLIVAN, JAMES F. MAGEE, ROBERT ASTARITA, AMY GROVEMAN, and LEFKOWITZ, LOUIS & SULLIVAN, L.L.P.,	:	
Defendants.	:	

REPLY MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS THE THIRD AMENDED COMPLAINT BY DEFENDANT CSC HOLDINGS, INC., JAMES F. MAGEE, ROBERT ASTARITA, AND AMY GROVEMAN

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This lawsuit is designed, first and last, to penalize Cablevision's efforts to enforce its federal statutory rights to prevent the theft of cable services. As this and other courts have uniformly held, cable decoders serve only one purpose: to steal cable services in violation of the Communications Act (the Act). Indeed, the cases have recognized – time and again – that the mere possession of a decoder is *prima facie* evidence of unlawful use. True, as plaintiffs repeatedly remind us, it is actual use that violates the law. But without contrary evidence, simple possession of a decoder gives rise to a presumption of actual use – and therefore states a *prima facie* violation of the Act.[1]

Based on such *prima facie* evidence of illegal use, Cablevision sends out letters to persons whose names show up as purchasers of decoders, truthfully warning: "Use of a cable television decoder(s) on Cablevision's television system without Cablevision's authorization is a violation of both federal and state law." Third Amended Complaint (3AC) ¶ 29; Opening Brief (Mem.) Ex. B. Cablevision's letters offer the recipients the opportunity to settle out of court (3AC ¶ 27) or to litigate the

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[1] Plaintiffs assert that "this representation merits Rule 11 consideration" (but unwilling to move, plaintiffs ask the Court to act *sua sponte*). Opp. 7. Plaintiffs note that "a default judgment deems all the well-pleaded allegations in the pleadings to be admitted." *Ibid* (internal quotation omitted). Of course that is true. Thus, in entering default judgment in *CSC Holdings, Inc* v. *Hussain*, No. CV 01-3782 (JS) (E.D.N.Y. Apr. 18, 2003) (Mem. Ex. C.3), this Court held that those allegations, if true, were sufficient to establish liability – the very definition of a *prima facie* case. See BLACK'S LAW DICTIONARY 1189-90 (6th ed. 1990). And in *CSC Holdings, Inc.* v. *Maffucci*, No. CV 01-3652, slip op. 4 (E.D.N.Y. Oct. 27, 2003) (Mem. Ex. C.1), the court granted Cablevision's motion for summary judgment: "[E]vidence to show that Defendant purchased a device intended to be used solely to give the user unauthorized access to cable signals" was "sufficient to state a claim under" the Act. Whether the *Hussain* and *Maffucci* defendants could have defeated Cablevision's allegations had they put on proof is irrelevant. The default judgment in *Hussain* and summary judgment in *Maffucci* necessarily mean that by alleging the purchase of decoders with no purpose but to "give the user unauthorized access to cable signals" (*Maffucci*, Ex. C.1 at 4), a plaintiff states a *prima facie* case of a violation of the Act – precisely the import we accorded those decisions. Mem. 2.

case if they do not wish to settle (*id* ¶ 28). Such pre-litigation letters – giving notice of intent to enforce rights under federal law – and the subsequent lawsuits are the very essence of First Amendment conduct under the Petition Clause and the principles articulated in *United Mine Workers* v. *Pennington*, 381 U.S. 676 (1965), and *Eastern R R. Presidents Conf.* v. *Noerr Motor Freight, Inc* , 365 U.S. 127 (1961).

As we showed in our opening brief, these basic First Amendment principles (which inure to Cablevision's benefit, see *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 636 (1994)) foreclose all of the claims – federal and state – alleged in the 3AC. Mem. 5-11. Perhaps not surprisingly, plaintiffs relegate their response on this crucial issue to the last three pages of their 25-page brief. And what little they do say is beside the point. On both First Amendment and multiple other grounds, the 3AC should be dismissed with prejudice.

I. The Conduct Alleged Is Shielded By The Petition Clause of the First Amendment

A. Immunity under the Petition Clause extends to all litigation and pre-litigation conduct that does not fall into the narrow "sham" exception. *Primetime 24 Joint Venture* v. *National Broadcasting Co.*, 219 F.3d 92, 100 (2d Cir. 2000). Although plaintiffs contend that Cablevision's First Amendment rights afford only antitrust immunity (Opp. 22-23), the Petition Clause admits of no such limitation (U.S. CONST. amend. I): "Congress shall make *no law* * * * abridging * * * the right of the people * * * to petition the Government for redress of grievances." (Emphasis added).

Indeed, less than two years ago, all nine Justices of the Supreme Court agreed that Petition-Clause immunity extends beyond antitrust issues. *BE&K Constr. Co* v. *NLRB*, 536 U.S. 516, 528-30 (2002) (applying the *Noerr-Pennington* doctrine to immunize a suit under the National Labor Relations Act); *id.* at 537 (Scalia, J., concurring); *id.* at 539 (Breyer, J., concurring). Even plaintiffs

cannot help but cite a case in which *Noerr-Pennington* principles were applied outside antitrust. See Opp. 25 (citing *Bill Johnson's Restaurants* v. *NLRB*, 461 U.S. 731 (1983)). And the rationale for *Noerr-Pennington* immunity in the antitrust arena – the "considerable deterrent" of treble-damages liability under Clayton Act section 4 (*BE&K Constr.*, 536 U.S. at 541 (Breyer, J., concurring); see also *id* at 528-29) – applies equally to civil RICO, which provides the identical remedy (see § 1964(c)).[2] "[M]any courts[] have held that * * * *Noerr-Pennington* applies outside antitrust[.]" *Sosa* v. *DirecTV, Inc.*, No. CV 03-5972 (AHM), slip op. 2 (C.D. Cal. Dec. 3, 2003) (attached as Ex. A) (citing cases); see also *DirecTV, Inc.* v. *Personette*, No. 03-CV-66 (GJQ), slip op. 10 (W.D. Mich. Oct. 20, 2003) (attached as Ex. B) (citing *Primetime 24* for the proposition that "the courts have extended the doctrine to other activities based upon First Amendment principles").

B. Relying principally on the Tenth Circuit's decision in *Cardtoons, L.C* v. *Major League Baseball Players Ass'n*, 208 F.3d 885 (10th Cir. 2000) (*en banc*), plaintiffs next contend that pre-litigation conduct is not covered by the Petition Clause because such conduct involves "purely private threats of litigation" and therefore is not "addressed to the government." Opp. 23. But that argument runs afoul of the (controlling) Second Circuit decision in *Primetime 24*. There, the court of appeals explained that "[c]ourts have extended *Noerr-Pennington* to encompass concerted efforts incident to litigation, such as prelitigation 'threat letters' and settlement offers." *Primetime 24*, 219

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[2] Plaintiffs ignore the fact that the civil damages remedy under RICO was modeled on the antitrust laws. See *Holmes* v. *Securities Inv. Protection Corp.*, 503 U.S. 258, 267 (1992) ("Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act * * *. We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used * * * in the Clayton Act's § 4."). Section 1964(c) was enacted in 1970 (see Pub. L. No. 91-452, § 901(a), 91st Cong., 2d Sess. (Oct. 15, 1970)) – less than ten years after the Supreme Court held in *Noerr* that petitioning is immune from antitrust liability. *NOW* v. *Scheidler*, 968 F.2d 612, 621 (7th Cir. 1992) (cited at Opp. 24), is inapposite; the defendant that case was engaged in picketing outside abortion clinics, not litigation.

F.3d at 100 (internal citations omitted). Although the court ultimately held that the plaintiff had sufficiently alleged the "sham exception" to *Noerr-Pennington*, it unequivocally held that defendants' pre-litigation conduct – which was every bit as "purely private" as Cablevision's pre-litigation letters in this case – was presumptively shielded by the First Amendment. Accord, *Matsushita Elec Corp* v. *Loral Corp.*, 974 F. Supp. 345, 352, 359 (S.D.N.Y. 1997) (holding that pre-litigation warning letters indistinguishable from those at issue in this case were immunized).[3]

Three courts recently have applied these principles in a closely related setting See *Sosa*, Ex. A at 3-5; *Personette*, Ex. B at 10-11; *DirecTV, Inc.* v. *Taylor*, No. 03-CV-71023 (PK) (E.D. Mich. Oct. 17, 2003) (*Taylor* Rep. & Rec.) (attached as Ex. C), adopted by *DirecTV, Inc.* v. *Taylor*, No. 03-71023 (VAR) (E.D. Mich. Dec. 4, 2003) (attached as Ex. D).[4] The *Sosa* court held that *Noerr-Pennington* immunized a pre-litigation warning letter sent by the defendant, DirecTV, to the plaintiff, who allegedly stole DirecTV's cable signal. Quoting from the Fifth Circuit's decision in *Coastal States Marketing, Inc.* v. *Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983), *Sosa* held:

> "Given that petitioning immunity protects joint litigation, it would be absurd to hold that it does not protect those acts reasonably and normally attendant upon effective

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[3] Plaintiffs assert that the "extortionate and fraudulent" nature of Cablevision's conduct is "further evidence[d]" by the fact that, whereas the company sends investigators into bars and restaurants in order to determine whether the owners are actually using the decoders, it does not send investigators into private homes. Even to state that point is to refute it: Obviously, Cablevision cannot send investigators into private homes to snoop around. Instead, once Cablevision has evidence of purchase, sufficient to state a *prima facie* case, it relies on discovery to determine whether the decoder was used. Plaintiff Calabrese, for one, should applaud this approach: Cablevision dismissed the action against her when discovery did not produce evidence of use. 3AC ¶ 63. Would plaintiffs actually prefer a legal regime in which Cablevision were permitted to send investigators into private homes?

[4] See also *DirecTV, Inc* v. *Wyman*, No. 03-CV-70889 (PK) (E.D. Mich. Oct. 17, 2003) (*Wyman* Rep. & Rec.) (attached as Ex. E), adopted by *DirecTV, Inc* v. *Wyman*, No. 03-70889 (VAR) (E.D. Mich. Dec. 4, 2003) (attached as Ex. F).

> litigation * * *. 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. This is the position taken by most of the courts that have considered the question."

Ex. A at 3 (citing also *Primetime 24*, 219 F.3d at 100). Pre-litigation activities are immunized if they are "incidental to protected litigation." *Matsushita*, 974 F. Supp. at 359. "[C]onduct is 'incidental to' litigation if it could render the underlying prosecution moot." *Sosa*, Ex. A at 4. As in *Sosa*, "the demand letters in this case are clearly 'incidental to' litigation because if a recipient were to comply with the letter, the possibility of prosecution would become moot" (Ex. A at 5 (internal quotations omitted)) – indeed, this occurred in the case of plaintiff Schiff (3AC ¶ 120-122). See also *Matsushita*, 974 F. Supp. at 359 ("[A]cts incidental to protected litigation – * * * such as sending letters threatening court action – are entitled to immunity to the same extent as the related litigation."); *Personette*, Ex. B at 11 ("The acts of DirecTV in sending out pre-suit letters and making threats of litigation, which form the basis of [plaintiffs'] claims, are the type of litigation activities covered by the *Noerr-Pennington* doctrine."); *Taylor* Rep. & Rec., Ex. C at 9 ("[T]he alleged communications by DirecTV and Hughes were all part and parcel of their attempt to seek redress in the courts[.]").

C. Plaintiffs make no pretense that the 3AC alleges the sham exception to *Noerr-Pennington*. All they say in this connection is that Cablevision "start[ed] legal proceedings without regard to the merits[.]" Opp. 24-25. But there is scarcely a whiff in the 3AC alleging that Cablevision's lawsuits were "objectively baseless," or that Cablevision had an improper "subjective motivation" – the essential elements of the sham exception to immunity. *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus , Inc* , 508 U.S. 49, 60 (1993). With respect to the first element, Cable-vision clearly "could realistically expect success on the merits" (*ibid.*) of its claims

against plaintiffs; indeed, Cablevision *has been successful* on the merits in lawsuits raising identical claims supported by identical proof. See *CSC Holdings, Inc.* v. *Hussain*, No. CV 01-3782 (WDW) (E.D.N.Y. Feb. 28, 2003) (Mem. Ex. C.2); *Maffucci*, Mem. Ex. C.1. Courts also regularly hold that decoders have no legitimate function. See, *e g*, *DirecTV, Inc.* v. *Karpinsky*, No. CV 02-73929 (GCS), slip op. 3 (E.D. Mich. Jul. 31, 2003) (attached as Ex. G) (holding that evidence of possession, disputed by the defendant, was sufficient for the fact-finder to infer a violation of the Act); *Cablevision Sys* v. *Flores*, 2001 WL 761085, at *3 (S.D.N.Y. July 6, 2001) (Mem. Ex. C.7); *Time Warner Cable* v. *Barbosa*, 2001 WL 118608, at *3 (S.D.N.Y. Jan. 2, 2001) (Mem. Ex. C.6); *Time Warner Cable* v. *Barnes*, 13 F. Supp. 2d 543, 546 (S.D.N.Y. 1998); *Cablevision Systems Corp.* v. *Muneyyirci*, 876 F. Supp. 415, 418-19 (E.D.N.Y. 1994).[5] In light of the evidence gathered by Cablevision, and the state of the law, Cablevision's decision to pursue plaintiffs for violating the Act manifestly was objectively reasonable.[6] See *Taylor* Rep. & Rec., Ex. C at 11 ("'Taylor states that he purchased an item of electronic equipment from White Viper Technologies. This fact is sufficient to give DirecTV an objective basis for a lawsuit.'") (quoting *DirecTV, Inc.* v. *Milliman*, No. 02-74829 (AC), slip op. 16 (E.D. Mich. Aug. 26, 2003) (attached as Ex. H)).

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[5] Plaintiffs deride these holdings as nothing more than "spoon-fed" by Cablevision's counsel (Opp. 6 n.10) – an epithet plaintiffs evidently believe extends equally to *this* Court's holding in *Hussain*. But we have found no cases holding otherwise, and plaintiffs cite none. *V Cable, Inc.* v. *Guercio*, 148 F. Supp. 2d 236, 242-43 (E.D.N.Y. 2001), avails plaintiffs nothing; that case was a suit alleging unlawful distribution of decoders, and Cablevision was unable to prove that the decoders were distributed within the plaintiff's territory. *Id.* at 242. And *Cablevision* v. *Sollitto*, 109 F. Supp. 2d 84 (D. Conn. 2000), dealt only with the Connecticut law limitation period for conversion.

[6] Plaintiffs twice draw the inapt comparison between the decoders and a firearm: "Defendants' accusations are the same as finding an invoice for a gun with a person's name on it, and then suing the person for illegal use of a firearm." Opp. 2 n.4; see *id.* at 25 n.28. But unlike decoders, firearms *do* have a lawful purpose.

The 3AC makes clear that plaintiffs also cannot meet the second element of the sham exception to *Noerr-Pennington* – subjective intent. Indeed, the 3AC confirms that Cablevision's subjective intent in pursuing litigation was to secure settlements and money damages (¶¶ 21-38), not to impose on plaintiffs the costs of the litigation process. Documents referenced in the 3AC demonstrate that when Cablevision settled cases with the plaintiffs it was guided by the objective of securing relief. See Mem. Exs. A.1 and A.2 (settlements provided that plaintiffs will not "engag[e] in the unauthorized reception and interception * * * of [Cablevision's] programming"). Plaintiffs did not allege, and do not argue, that Cablevision "did not seek the end for which it petitioned." *Video Int'l Prod., Inc.* v. *Warner-Amex Cable Comm'ns, Inc.*, 858 F.2d 1075, 1083 (5th Cir. 1988). See also *Sosa*, Ex. A at 3 n.1 (holding that a pre-litigation demand letter "on its face, dispels any concerns that DirecTV's contemplated litigation would have been an abuse of the judicial process").

II. Plaintiffs' Other Arguments Do Not Save Their Individual Claims

Apart from the Petition Clause – which is fatal to *all* of the claims in this case – plaintiffs' remaining arguments are independently, and multiply, flawed.[7]

A. The releases signed by named plaintiffs Reel and Gevanter (3AC ¶ 31), which released Cablevision from liability for "any and all claims" (Mem. Ex. A.1 at 3, A.2 at 1), require dismissal as to those plaintiffs. Plaintiffs argue now that the releases were obtained by fraud and are

[7] To a certain extent, our challenges to some of plaintiffs' individual claims have asked this Court to revisit aspects of its prior ruling. Not surprisingly, plaintiffs seek to insulate those rulings from any further consideration by invoking Fed. R. Civ. P. 60(b) (as if we were seeking relief from a final judgment) and Local Rule 6.3 (as if we were filing a motion for reconsideration). Opp. 9-10. Obviously, we are doing neither: We are moving to dismiss an *amended complaint* under Rule 12(b)(6), as is our right. True, the Court's 8/13/03 Memorandum Opinion remains law of the case – but this does not prevent the Court from revisiting its holdings. "Law of the case directs a court's discretion, it does not limit the tribunal's power." *Arizona* v. *California*, 460 U.S. 605, 618 (1983).

therefore unenforceable (Opp. 10) – but these allegations do not appear in the 3AC. Fraudulent inducement is a separate claim which a plaintiff must affirmatively plead. See *Sokolow, Dunaud, Mercadier & Carreras LLP* v. *Lacher*, 747 N.Y.S.2d 441, 446 (N.Y. App. Div. 2002). This failure is dispositive.

B. Plaintiffs' failure sufficiently to plead mail and wire fraud necessitates dismissal of their civil RICO claim. First, plaintiffs have failed to identify a single false statement made by Cable-vision. Even if, as plaintiffs allege (3AC ¶ 24), the pre-litigation letters were ambiguous – indeed, even if they were *intentionally* ambiguous – that would not render them *false* within the meaning of the mail and wire fraud statutes. Plaintiffs utterly fail to respond to our argument, based on *Bronston* v. *United States*, 409 U.S. 352, 361 (1973), and *United States* v. *Watts*, 72 F. Supp. 2d 106, 116 (E.D.N.Y. 1999) (holding that the *Bronston* defense applies to a false statements prosecution), that even intentional ambiguity cannot create liability for false statements; the statement alleged must literally be false. Mem. 14. In any event, the statements at issue are not the slightest bit ambiguous, nor do plaintiffs say how they are.[8] These deficiencies are fatal to the fraud claims (and the RICO counts for which fraud is a predicate act). As we contended in our opening brief (at 15 n.9), plain-tiffs cite no case – including *Schmuck* v. *United States*, 489 U.S. 705, 715 (1989) – in which mail or wire fraud was pleaded without *some* allegation of falsity. In *Schmuck*, although the specific statement on which federal jurisdiction was based was not a falsehood, there were false statements made as part of the scheme. 489 U.S. at 711-12. Even more, litigation activity cannot constitute mail and wire fraud; if plaintiffs truly have a complaint about Cablevision's

[8] Plaintiffs' allegations of "intentional[] ambigu[ity]," like the bulk of their allegations, are conclusory in nature. "While the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice." *Leeds* v. *Meltz*, 85 F.3d 53, 56 (2d Cir. 1996) (citing cases).

institution of lawsuits, they should sue for malicious prosecution. See *Auburn Med. Center, Inc* v. *Andrus*, 9 F. Supp. 2d 1291, 1297 (M.D. Ala. 1998).

C. Plaintiffs' new allegations – indistinguishable from those rejected by the Supreme Court in *Jones* v. *United States*, 529 U.S. 848, 855 (2000), as insufficient to confer federal jurisdiction – do not cure their failure to plead a Hobbs Act violation. Although plaintiffs add some further allegations in their *brief* (Opp. 18) – concerning businesses in which some putative class members may have engaged; or out-of-state banks with which some putative class members may have dealt – none of these allegations appears in the 3AC (see ¶ 132), and for that reason they cannot be considered on a motion to dismiss. Finally, as we showed in our opening brief, Cablevision's litigation conduct was not *wrongful*, and for that additional reason the Hobbs Act predicate must fail. Mem. 17-19.

D. Plaintiffs no longer argue that 18 U.S.C. §§ 875, 876, and 880 are RICO predicates, and do not dispute that their RICO conspiracy claim falls with their substantive RICO claims.

E. Plaintiffs fail to address the most pertinent precedent regarding their investment-injury claim. Judge Weinstein's opinion in *Blue Cross & Blue Shield, Inc* v. *Philip Morris, Inc.*, 113 F. Supp. 2d 345, 384 (E.D.N.Y. 2000), establishes that a plaintiff does not state a claim under 18 U.S.C. § 1962(a) merely by alleging that income from prior predicate acts is used to facilitate the commission of future predicate acts. Plaintiffs make exactly those insufficient allegations. 3AC ¶¶ 140-145.

F. Plaintiffs' state-law claims also must be dismissed. The fraud claim fails because plain-tiffs fail to allege (1) any falsehood in the letters or (2) any detrimental reliance. Mem. 21-22. Plain-tiffs' unjust enrichment claim fails (1) because Cablevision did not act wrongfully, and (2)

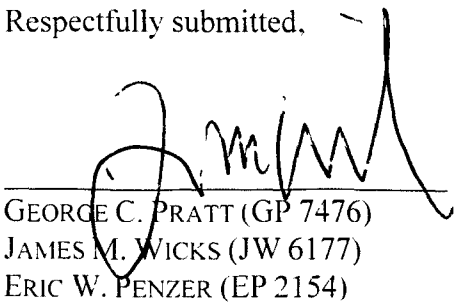
because the settlements were based on contracts. Mem. 23. And plaintiffs' deceptive business practices claims fail for a lack of allegations that Cablevision's conduct (1) was "consumer oriented" (apart from the conclusory statement in 3AC ¶ 168); (2) was misleading in a material way, and (3) was the cause of any harm to plaintiffs. Mem. 23-24.

CONCLUSION

For the foregoing reasons, as well as those stated in our opening brief, the Court should dismiss the 3AC in its entirety, with prejudice.

Dated: March 15, 2004

Respectfully submitted,



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