IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

HAROLD PEERENBOOM,
Plaintiff,

CIVIL DIVISION "AI"
CASE NO.: 2013-CA-015257

v.

ISAAC ("IKE") PERLMUTTER,
LAURA PERLMUTTER, and
JOHN/JANE DOES 1 TO 10,
Defendants.
_____/

ISAAC PERLMUTTER, and
LAURA PERLMUTTER,
Counterclaim Plaintiffs,

vs.

HAROLD PEERENBOOM,
WILLIAM DOUBERLEY,
CHUBB & SON, a division of
FEDERAL INSURANCE COMPANY,
JULIE HOWENSTINE, and
SPECKIN FORENSICS, LLC, d/b/a
SPECKIN FORENSIC LABORATORIES,
Counterclaim Defendants.
_____/

ORDER GRANTING IN PART AND DENYING IN PART THE COUNTER-DEFENDANTS' MOTIONS TO DISMISS THE COUNTERCLAIM AND DISMISSING THE COUNTERCLAIM IN PART

THIS MATTER came before the Court on Plaintiff's Motion to Dismiss Counterclaim; Counter-Defendant William Douberley, Esq.'s Motion to Dismiss Counterclaim; Chubb & Son, a Division of Federal Insurance Company's Motion to Dismiss with Prejudice the Counterclaim Filed by Isaac ("Ike") Permutter and Laura Perlmutter, all filed on September 16, 2016; and Speckin Forensics LLC's and Julie Howenstine's Motion to Dismiss Third Party Complaint filed on September 30, 2016 (collectively "motions to dismiss"). The Court has carefully considered

the motions to dismiss, the Counterclaim, Counter-Plaintiffs Isaac and Laura Perlmutter's ("the Perlmutters") Response in Opposition to the Motions to Dismiss filed by Counterclaim Defendants, Counter-Defendant Chubb & Son's ("Federal")[1] Reply, the argument of counsel, the court file and relevant case law, and is otherwise fully advised in the premises.

FACUTAL AND PROCEDURAL BACKGROUND[2]

Counter-Defendant Harold Peerenboom ("Peerenboom") sued the Perlmutters in October, 2013, for claims arising out of arising out of an alleged hate-mail campaign against Peerenboom and others. Counter-Defendant William Douberley ("Douberley") is an attorney employed by Counter-Defendant Federal who previously represented Peerenboom in the matter of *Kaye-Dee Sportswear, Inc. and Karen Donnelly v. Monique Matheson, et. al.,* case number 50-2011CA006192 ("*Kay-Dee Sportswear* litigation"). The *Kay-Dee Sportswear* litigation involved a dispute separate and apart from the present litigation.

Peerenboom had been the subject of an extensive hate-mail campaign during the time of the *Kay-Dee Sportswear* litigation and had identified the Perlmutters as potential culprits. In an attempt to implicate the Perlmutters in this scheme, Peerenboom enlisted the help of the Counter-Defendants to collect the Perlmutters' DNA to have it tested and compared with the hate mail at issue. Peerenboom saw the *Kay-Dee Sportswear* litigation—a lawsuit through which the Perlmutters had tangential involvement—as an opportunity to surreptitiously collect the Perlmutters' DNA.

Peerenboom, through his attorney Douberley, issued a subpoenas *duces tecum* for the deposition of the Perlmutters in the *Kay-Dee Sportswear* litigation. A deposition was held on

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[1] Chubb & Son is not a legal entity but rather a division of Federal Insurance Company.

[2] This section reflects the Counterclaim's allegations taken as true. The Court makes no comment as to the actual accuracy of the allegations in the Counterclaim.

February 27, 2013. The Counterclaim states that this entire deposition was, in actuality, a ruse created by the Counter-Defendants who were conspiring together to collect the Perlmutters' DNA. At the deposition, the Perlmutters handled certain documents that were provided by a representative of Counter-Defendant Speckin Forensic Laboratories, LLC ("Speckin"). These documents were made of a material that was able to capture the Perlmutters' genetic material after they were handled. Peerenboom, Douberley, and Speckin's representative retained these documents after the deposition. Peerenboom, Douberley, and Speckin's representative also collected plastic water bottles and a bottle cap left at the deposition by the Perlmutters.

After collecting the items from the deposition, the Counter-Defendants attempted to implicate the Perlmutters in the hate-mail campaign through testing the items for DNA to compare with the hate mail. The items in question were sent to several different testing facilities. The results of these tests, though, exculpated the Perlmutters from involvement in the campaign against Peerenboom. The Counterclaim explains that despite these exculpatory results, Speckin (including its employee, Counter-Defendant Julie Howenstine ("Howenstine")) reinterpreted and distorted the results of these reports to cast a negative light on the Perlmutters. Speckin also issued a report that relied on only one of numerous tests that concluded the Perlmutters could not be excluded as potential perpetrators of the letter campaign. The Counterclaim states that the reports and analyses conducted by and released through Speckin are false and misleading. The Counterclaim states Peerenboom disseminated these reports to others, including law enforcement officials, prosecutors, and the press. The Counterclaim also states that the Counter-Defendants intentionally withheld and otherwise destroyed evidence of the DNA collection scheme in an attempt to conceal it from the courts.

On July 12, 2016, the Perlmutters filed the instant Counterclaim. In it, they accuse all Counter-Defendants of being involved in a civil conspiracy to steal the Perlmutters' genetic information in order to implicate them in the hate-mail campaign against Peerenboom. Specifically, the Perlmutters seek relief for eight counts: Count I: Conversion as to all Counter-Defendants; Count II: Civil Remedy for Theft as to all Counter- Defendants; Count III: Abuse of Process as to Peerenboom, Douberley, and Federal; Count IV: Defamation as to all Counter-Defendants; Count V: Intentional Infliction of Emotional Distress as to all Counter-Defendants; Count VI: Invasion of Privacy – Intrusion and Publication of Private Facts as to all Counter-Defendants; Count VII: Third-Party Spoliation as to Douberley, Federal, Howenstine, and Speckin; and (h) Count VIII: Civil Conspiracy as to all Counter-Defendants. The motions to dismiss followed.

LEGAL ANALYSIS AND RULINGS

The Counter-Defendants all seek dismissal of the Counterclaim. The question to be answered on a motion to dismiss is "whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested." *Cintron v. Osmose Wood Preserving, Inc.*, 681 So. 2d 859, 860-61 (Fla. 5th DCA 1996). In conducting this analysis, all reasonable inferences must be drawn in favor of the non-movant. *Republic Servs. of Fla. v. Workers Temporary Staffing, Inc.*, 123 So. 3d 650, 653 (Fla. 4th DCA 2013). "[I]f the analysis of a claim is factually intensive, it is better addressed on a summary judgment motion, or at trial, but certainly not on a motion to dismiss." *Chodorow v. Porta Vita, Ltd.*, 954 So. 2d 1240, 1242 (Fla. 3d DCA 2007).

The motions to dismiss seek dismissal of the Counterclaim's eight counts based on failures to state causes of action. Counter-Defendants also seek to dismiss the Counterclaim

premised on several procedural arguments. The Court addresses the procedural issues first before exploring each of the Counterclaim's individual counts.

A. The Proper Pleading of the Counterclaim and Personal Jurisdiction

Before proceeding to the Counterclaim's merits, the Court first addresses two arguments raised by the Counter-Defendants: (1) that the Counterclaim is actually a third-party complaint and whether that requires its dismissal and (2) that the Court lacks personal jurisdiction over Counter-Defendant Howenstine.[3] For the reasons set forth below, the Court rejects the first argument and finds merit in the second.

1. <u>The Counterclaim is properly pleaded as a counterclaim and not a third-party complaint and dismissal as to Federal on that basis is inappropriate.</u>

Federal asserts that the Perlmutters' case against them cannot proceed because it is not a plaintiff in Peerenboom's lawsuit against the Perlmutters. According to Federal, this means that the case must be dismissed and that, if anything, the action can only be pleaded as a third-party complaint. Federal's argument is counter to Florida Rule of Civil Procedure 1.170(h), which states in relevant part that "[w]hen the presence of parties other than those to the original action is required to grant complete relief in the determination of a counterclaim . . . they shall be named in the counterclaim . . . and be served with process and shall be parties to the action thereafter . . . ." Plainly Federal's status as a non-party to Peerenboom's lawsuit is not, in and of itself, grounds for dismissal of the Counterclaim. Federal disputes this conclusion by arguing that Rule 1.170(h) is inapplicable because the Counterclaim is "unrelated to the original action."

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[3] The Counter-Defendants also argued that the Counterclaim was improperly filed without leave of court. This argument is correct. *See* Fla. R. Civ. P. 1.170(e), (f). As indicated at the Court's hearings on the motions to dismiss, leave of court should be sought—and will be granted—before any further amendment to the Counterclaim is permitted. *See Fuente v. S. Ocean Transp., Inc.*, 933 So. 2d 651, 654 (Fla. 3d DCA 2006) (noting "refusal to grant leave to assert a counterclaim would be an abuse of discretion if the counterclaim were compulsory").

(Federal Reply 4.) To the contrary, a counterclaim is compulsory, thereby triggering Rule 1.170(h), when "it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . ." Fla. R. Civ. P. 1.170(a). Peerenboom's lawsuit against the Perlmutters is premised on an alleged hate-mail campaign orchestrated by the Perlmutters. (*See generally* Fourth Am. Compl.) The Counterclaim arises out of that same transaction, as the Perlmutters argue the Counter-Defendants have committed tortious acts in attempting to implicate the Perlumtters in that same alleged campaign. The Court rejects Federal's arguments on this point.[4]

2. The counts against Howenstine are dismissed for lack of personal jurisdiction.

Howenstine argues dismissal is proper because this Court lacks personal jurisdiction to resolve the Perlmutters' claims against her. In an affidavit filed with her motion to dismiss, Howenstine states that she is an employee for Speckin in their East Lansing, Michigan office and has lived in Michigan since 1967. (Speckin Mot. Ex. 1.) Howenstine states that she has never lived in Florida, never conducted any business in Florida, and has only traveled to Florida for business reasons twice in the last three years. (*Id.*) Howenstine states that she did not attend the *Kay-Dee Sportswear* deposition at issue in the Counterclaim and has not attended any proceedings of any kind regarding the Perlmutters' suit.[5] (*Id.*)

In *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989), the Supreme Court of Florida set forth a two-step inquiry for determining whether a Florida court has personal jurisdiction over a non-resident defendant. First, the court must determine whether the plaintiff

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[4] For the reasons set out in this section, the Court also rejects Speckin and Howenstine's characterization of the Counterclaim as a third-party complaint.

[5] The Court finds that these facts render section 48.193(2), Florida Statutes, inapplicable to this case. This Order therefore applies the test for "specific" jurisdiction outlined in section 48.193(1) to determine whether there is personal jurisdiction over Howenstine.

has alleged sufficient jurisdictional facts to bring the action within the ambit of Florida's long-arm statute, section 48.193, Florida Statutes. *Id.* If so, the court must then inquire into whether the non-resident defendant possesses sufficient minimum contacts with Florida to satisfy constitutional due process requirements. *Id.* "Both parts must be satisfied for a court to exercise personal jurisdiction over a non-resident defendant." *Am. Fin. Trading Corp. v. Bauer*, 828 So. 2d 1071, 1074 (Fla. 4th DCA 2002). "The inquiry under the statutory prong of *Venetian Salami* is not whether the tort actually occurred, but whether the tort, as alleged, occurred in Florida." *NHB Advisors, Inc. v. Czyzyk*, 95 So. 3d 444, 448 (Fla. 4th DCA 2012). The operative question in determining whether the tort as alleged occurred in Florida is whether "the nonresident defendant 'committed *a substantial aspect* of the alleged tort in Florida.'" *Id.* (quoting *Watts v. Haun*, 393 So. 2d 54, 56 (Fla. 2d DCA 1981)) (emphasis added).

The Court finds the Perlmutters have not satisfied the *Venetian Salami* test in pleading that this Court has personal jurisdiction over Howenstine. The Counterclaim asserts that Howenstine was a co-conspirator with the other Counter-Defendants, but at no point is Howenstine's specific role made clear. Instead, as pleaded, it appears that all of Howenstine's actions are imputed onto actions by Speckin. By way of example, paragraphs 82 through 86 discuss the perpetrator of the purportedly defamatory reports as "Speckin (including Howenstine)." It is not sufficient in this instance to plead that Howenstine merely worked for Speckin or otherwise had a general role in the conspiracy alleged in the Counterclaim. Instead, the Perlmutters are required to detail the "specific aspect" of the conspiracy in Florida Howenstine committed. *See NHB Advisors, Inc.*, 95 So. 3d at 448. Absent this detail, the Court lacks personal jurisdiction over Howenstine and so the Counterclaim must be dismissed as to her.

The Perlmutters' counterarguments on this point must be rejected. The Perlmutters assert the fact that they have successfully stated a cause of action for conspiracy among some of the Counter-Defendants alone is sufficient to bring Howenstine under the Court's jurisdiction. This argument is mistaken. It is true that "if a plaintiff has successfully alleged a cause of action for conspiracy among the defendants to commit tortious acts toward the plaintiff . . . then all of the conspirators are subject to the jurisdiction of Florida . . . ." *NHB Advisors, Inc.*, 95 So. 3d at 448. But "a court will decline to apply the co-conspirator theory to extend jurisdiction over nonresident if the plaintiff fails to plead with specificity any facts supporting the existence of the conspiracy and provides nothing more than vague and conclusory allegations regarding a conspiracy involving the defendants." *Id.* As explained in detail below, the Perlmutters have stated a cause of action for civil conspiracy as to Peerenboom, Douberley, Federal, and Speckin. But the Perlmutters' allegations as to the Howenstine are conclusory and lacking in detail as to her role in the purported scheme to steal the Perlmutters' genetic information. This lack of detail precludes application of the co-conspirator theory and so the Perlmutters' argument must be rejected. Because the Court finds that the Counterclaim fails to sufficiently plead personal jurisdiction over Howenstine, the Counterclaim as it relates to her is dismissed.

Aside from these procedural objections, the Counter-Defendants all argue the Perlmutters' Counterclaim must be dismissed in its entirety. The Court addresses the propriety of dismissing the Counterclaim by discussing each count in turn below.

B. Count I - Conversion

The Counter-Defendants first seeks dismissal of the Perlmutters' count for conversion. A properly pleaded cause of action for conversion alleges "the exercise of wrongful dominion or control over property to the detriment of the rights of the actual owner." *DePrince v. Starboard*

Cruise Servs., Inc., 163 So. 3d 586, 597 (Fla. 3d DCA 2015). A plaintiff must plead "facts sufficient to show ownership of the subject property and facts that the other party wrongfully asserted dominion over that property." *Edwards v. Landsman,* 51 So. 3d 1208, 1213 (Fla. 4th DCA 2011).

The Perlmutters' conversion claim asserts the Counter-Defendants asserted wrongful dominion "of the genetic information encoded in [the Perlmutters'] genetic material" when they participated in the conspiracy to collect the Perlmutters' DNA at the *Key-Dee Sportswear* deposition. (Countercl. ¶¶ 115-20.) The Counter-Defendants seeks dismissal of this cause of action because they claim the collection of DNA, by law, cannot constitute conversion. The Counter-Defendants also argue that even if there is a property right in genetic information, the count must be dismissed for failure to allege demand. Finally, Counter-Defendant Douberley argues there are insufficient facts to state a cause of action for conversion against him.

1. <u>A property right exists in the Perlmutters' genetic information.</u>

Implicit in the Counter-Defendants' argument against the Perlmutters' conversion count is the question of whether genetic information such as DNA constitutes "property" for purposes of common law conversion. No binding authority has definitively answered this question and so the Court must rely on persuasive authority to resolve the issue. In *In re Corbin's Estate*, the Third District Court of Appeal observed that a cause of action for conversion can lie where there is a wrongful taking of "intangible interests;" in that case, interests in a business venture. 391 So. 2d 731, 732 (Fla. 3d DCA 1980). In coming to this conclusion, the Third District noted that though conversion is typically limited to cases involving tangible chattel, there may be situations where such a limitation is inappropriate. *Id.* at 732 n.1. The *Corbin's Estate* court found such a situation exists when the defendant "has dispossessed the [plaintiff] of a bundle of rights not

immediately reducible to tangible form, and has done so in such fashion that restitution may well be an inadequate remedy . . . ." *Id.*

Courts throughout the country have observed the important privacy interest one has in his or her genetic information. *See, e.g.*, *Norman-Bloodsaw v. Lawrence Berkley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) ("One can think of few subject areas more personal and more likely to implicate privacy interests than that of one's . . . genetic make-up."); *United States v. Davis*, 657 F. Supp. 2d 630, 649-50 (D. Md. 2009) (observing difference between genetic material and genetic information when concluding criminal defendant retained a privacy interest in his DNA). Though examined with less frequency than in the context of privacy, courts have also observed that a property right exists in genetic information. *See, e.g.*, *Midwest Oilseeds, Inc. v. Limagrain Genetics Corp.*, 231 F. Supp. 2d 942, 953-54 (S.D. Iowa 2002) ("Genetic information can be property, and, therefore, can form the basis for a common law conversion claim."). *But see Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064, 1075 (S.D. Fla. 2003) (rejecting argument that a property right exists in genetic information).

In light of the above, the Court finds a property right exists in the Perlmutters' genetic information thereby rendering dismissal inappropriate. The Perlmutters plainly retain important intangible rights to their genetic information. The authority discussed above makes this clear—at the very least, one possesses important privacy interests in such information. The wrongful dominion of this interest is an intrusion that would not necessarily be remedied adequately by restitution. As *Corbin's Estate* did with business interests, the Court finds an extension of conversion's definition of property to one's intangible rights in his or her genetic information is therefore appropriate. As noted earlier, this conclusion is not novel. *See Midwest Oilseeds*, 231 F. Supp. 2d at 953-54. Further, Florida law itself already recognizes a property right in one's

DNA in limited circumstances. *See* § 760.40(2)(a), Fla. Stat. (stating the results of a DNA test, "whether held by a public or private entity, are exclusive property of the person tested").[6] While the Court recognizes section 760.40(2)(a) deals with civil rights and disclosure of DNA test results—not conversion—the Court finds it significant that the legislature has recognized *some* property right exists in genetic information. This result is consistent with Florida courts' acceptance of conversion for other intangible pieces of "property." *See, e.g.*, *Warshall v. Price*, 629 So. 2d 903, 905 (Fla. 4th DCA 1993) (finding property right sufficient to state a cause of action for conversion in copy of patient list where original remained on computer). In sum, the Perlmutters retained a property interest in their genetic information for purposes of a common law action for conversion.

The Counter-Defendants' arguments against this result must be rejected. As a threshold matter, Counter-Defendants rely on cases regarding genetic *materials* for the proposition that the Perlmutters lack a property interest in their genetic *information*. *See, e.g.*, *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479 (Cal. 1990) (finding genetic material is not "property" for purposes of conversion). These cases are inapplicable to the question of whether genetic *information* constitutes property for purposes of conversion. Counter-Defendants also ask the Court to apply the holding of *Greenberg*, which specifically determined no property right exists in genetic information for purposes of conversion. 264 F. Supp. 2d at 1076. *Greenberg*, though, relied on cases interpreting the conversion of genetic materials, not genetic information—a significant

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[6] The Counter-Defendants incorrectly characterize the Perlmutters' conversion count—and at times the entire Counterclaim—as a private action under section 760.40, Florida Statutes. This is a mischaracterization of the Counterclaim. As pleaded, the Perlmutters have not sought any private relief under the statute, and for good reason—the statute allows for no such cause of action. Because the Perlmutters' claims exist independent of the statute, the Counter-Defendants arguments are rejected to the extent they seek dismissal premised on the Perlmutters' Counterclaim allegedly being an action under section 760.40.

distinction. *Id.* at 1075. *Greenberg* is also factually distinct from the one at bar in that there, the plaintiffs voluntarily provided tissue to a researcher to find a cure for Canavan disease and sued when the researcher commercialized its findings for profit against plaintiffs' wishes. *Id.* at 1066. These facts factored in the *Greenberg* court's decision, as in distinguishing contrary case law, the court noted the cases "d[id] not involve voluntary donations to medical research." *Id.* at 1075. As *Greenberg* is not binding authority and is distinguishable from this case, the Court declines to follow its reasoning and rejects the Counter-Defendants' arguments otherwise.[7]

2. Demand for return of the genetic information is unnecessary to state a cause of action for conversion in this case.

The Counter-Defendants argue that even if genetic information is property for purposes of conversion, the count must be dismissed for failure to allege any demand was made for the return of the genetic information. In support, Counter-Defendants rely on *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 500 (Fla. 3d DCA 1994), for the proposition that failure to allege a demand for the return of converted property was made is fatal to a cause of action for conversion. While this general proposition is true, "demand and refusal are unnecessary where the act complained of amounts to a conversion regardless of whether a demand is made." *Columbia Bank v. Turbeville*, 143 So. 3d 964, 969 (Fla. 1st DCA 2014) (quoting *Mayo v. Allen*, 973 So. 2d 1257, 1259 (Fla. 1st DCA 2008)). As pleaded in this case, the Counter-Defendants' actions would be conversion even if the Perlmutters demanded the return of their genetic

[7] Counter-Defendants also argue that the Perlmutters are improperly attempting to pursue a conversion action based on voluntarily abandoned items, such as water bottles, that the Counter-Defendants collected genetic information from. The Court rejects this characterization of the count. Notwithstanding that the Perlmutters assert the Counter-Defendants collected genetic information from items that were not voluntarily discarded, (*see, e.g.*, Countercl. ¶¶ 60, 62), the Court finds the Perlmutters' allegation that the Counter- Defendants took DNA from abandoned items is clearly distinguishable from a claim that the Counter-Defendants converted the actual items themselves.

information—the Counter-Defendants have exerted wrongful dominion over the Perlmutters' DNA and have done so to their detriment through the purported defamatory reports and through implying the Perlmutters are a part of a hate-mail campaign against Peerenboom. This fact remains true regardless of whether the genetic information is returned and so the Court finds there is no need for the Perlmutters to plead demand. This argument is rejected.

3. The Counterclaim pleads sufficient facts to allow for a cause of action for conversion against Douberley.

Counter-Defendant Douberley makes the unique argument that this claim against him must be dismissed because "no allegation is made that [he] took DNA or anything else from the Counter-Plaintiffs." (Douberley Resp. ¶ 23.) This is incorrect. The Perlmutters have alleged that Douberley was personally involved in the secret collection and taking of the Perlmutters' genetic information. (Countercl. ¶¶ 56, 60.) The Perlmutters allegations against Douberley, as pleaded, show he was critical in Peerenboom's efforts to convert the Perlmutters' genetic information. As this Court is required to take those allegations as true, dismissal against Douberley is inappropriate.[8]

As the Court finds the Perlmutters had a property right in their genetic information, the Court finds they have stated a cause of action for conversion. The Perlmutters have pleaded in their Counterclaim that the Counter-Defendants took their genetic information through surreptitious means at the *Kay-Dee Sportswear* deposition and that they used this information to

[8] Douberley also claims that this count should be dismissed against him on the basis of the litigation privilege. This argument is premised on the idea that the alleged conversion both occurred "during the course of a judicial proceeding" and also "has some relation to the proceeding." *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606, 608 (Fla. 1994). The Court finds that converting the property of another is not related to a deposition and therefore finds the privilege does not require dismissal of the Counterclaim as pleaded. Douberley remains free to raise this defense—along with other arguments—at summary judgment after discovery.

the Perlmutters' detriment. As pleaded, this satisfies the elements of conversion and so the Court declines dismissal against the Counter-Defendants on this count.

C. Count II - Civil Theft

The Counter-Defendants next seek dismissal of the Perlmutters' count for civil theft.[9] "In order to establish an action for civil theft, the claimant must prove the statutory elements of theft, as well as criminal intent." *Gersh v. Cohen*, 769 So. 2d 407, 409 (Fla. 4th DCA 2000). The statutory elements of theft are:

> A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
>
> (a) Deprive the other person of a right to the property or a benefit from the property.
>
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

§ 812.014(1), Fla. Stat. Criminal intent is defined as the intent to deprive another person of his or her property. *Country Manors Ass'n, Inc. v. Master Antenna Sys., Inc.*, 534 So. 2d 1187, 1191 (Fla. 4th DCA 1988).

The Perlmutters' have stated a cause of action for civil theft. The Counterclaim alleges that the Counter-Defendants intentionally obtained the Perlmutters' genetic information without their permission and did so for their own use. (Countercl. ¶¶ 121-128.) This is sufficient to state a cause of action for civil theft. While the Counter-Defendants challenge the sufficiency of the pleaded facts as to criminal intent, the Court is required to take the allegations in the Counterclaim as true for purposes of a motion to dismiss and is not permitted to weigh the

[9] The Court notes that the crux of the Counter-Defendants' argument on this count is that a cause of action for civil theft must be dismissed where no conversion has occurred. As the Court has determined a facially sufficient cause of action for conversion exists, this argument is summarily rejected. This section addresses the Counter-Defendants' remaining arguments.

evidence at this stage of the proceedings. Therefore, the Court must take as true the Counter-Defendants' purported intent to surreptitiously collect the Perlmutters' genetic information and deprive them of its use. (*E.g.*, Countercl. ¶ 40.) Accordingly, the Perlmutters have stated a cause of action for civil theft.

Even if the Perlmutters' civil theft count is properly pleaded, Counter-Defendants argue the count must be dismissed because of the Perlmutters' failure to plead compliance with pre-suit demand requirements under section 772.11, Florida Statutes. Section 772.11(1) states in relevant part:

> [T]he person claiming injury must make a written demand for $200 or the treble damage amount of the person liable for damages under this section. If the person to whom a written demand is made complies with such demand within 30 days after receipt of the demand, that person shall be given a written release from further civil liability for the specific act of theft or exploitation by the person making the written demand.

Even though the Counterclaim does not state the Perlmutters have satisfied this pre-suit demand requirement, the Court finds this is not a sufficient ground for dismissal. "[T]he failure to comply with pre-suit notice requirements should not result in dismissal of a complaint unless notice cannot be given with the limitation period." *Seymour v. Adams*, 638 So. 2d 1044, 1049 n.9 (Fla. 5th DCA 1994). As there has been no indication that even if demand has not yet been made it cannot still be made in the limitation period, the Court finds this is an inappropriate basis for dismissal. While Counter-Defendants remain free to re-raise this argument at summary judgment, they are advised that

> [u]nless it appears on the record that the statute was not complied with *and* the five year statute of limitations established by section 772.17 . . . had expired so that [plaintiff] would be unable to comply with the requirements of the statute, summary judgment is inappropriate on this basis.

Id. at 1049 (emphasis added).

In sum, the Perlmutters have stated a cause of action for civil theft. The Counter-Defendants arguments against this result, procedural or otherwise, are rejected.

D. Count III - Abuse of Process

The Counter-Defendants next seek dismissal of the Perlmutters' count for abuse of process.

> A cause of action for abuse of process contains three elements: (1) that the defendant made an illegal, improper, or perverted use of process; (2) that the defendant had ulterior motives or purposes in exercising such illegal, improper, or perverted use of process; and (3) that, as a result of such action on the part of the defendant, the plaintiff suffered damage.

S & I Invs. v. Payless Flea Mkt., Inc., 36 So. 3d 909, 917 (Fla. 4th DCA 2010). The Perlmutters assert Peerenboom, Douberley, and Federal committed abuse of process when they served or caused to be served a subpoenas *duces tecum* for the deposition on the Perlmutters ostensibly to depose them in the *Key-Dee Sportswear* case but in reality to secretly collect their genetic information. (Countercl. ¶¶ 129-33.) The Counter-Defendants, citing to *Scozari v. Barone*, 546 So. 2d 750 (Fla. 3d DCA 1989), argue dismissal of this count is appropriate because there was a valid reason for the process regardless of any genetic information being taken. The Counter-Defendants also argue they are immunized from the cause of action under the litigation privilege.

Counter-Defendants' first argument must be rejected. *Scozari*, a case decided at summary judgment, stands for the proposition that

> [f]or [abuse of process] to exist, there must be a use of the process for an immediate purpose other than that for which it was designed. There is no abuse of process, however, when the process is used to accomplish the result for which it was created, regardless of an incidental or concurrent motive of spite or ulterior purpose.

546 So. 2d at 751. As a threshold matter, *Scozari* is of limited value at the motion to dismiss stage. More critically, as alleged in the Counterclaim, the Counter-Defendants issued the

subpoenas *duces tecum* "for the *primary ulterior purpose* of ensuring that the Perlmutters' genetic material could be collected under controlled conditions . . . ." (Countercl. ¶ 131 (emphasis added).) As pleaded in the Counterclaim, it is clear that the immediate purpose of the challenged process was not the purpose for which it was designed. To the extent the Counter-Defendants dispute this conclusion they raise arguments that are best raised at a later stage of the proceedings when the Court is not required to take all allegations in the Counterclaim as true.

The Counter-Defendants' litigation privilege argument must also be rejected. While the litigation privilege applies to abuse of process claims, "a claimant may . . . pursue a claim for an abuse of process when the claim is based on actions taken outside of a judicial proceeding *or on actions that are taken during a judicial proceeding but which are unrelated to the judicial proceeding*." *LatAm Invs., LLC v. Holland & Knight, LLP*, 88 So. 3d 240, 243 (Fla. 3d DCA 2011) (emphasis added). Plainly the secret collection of genetic materials and information is unrelated to a deposition in a civil lawsuit. The allegations in the Counterclaim, taken as true, show that this privilege does not mandate dismissal of the abuse of process claim. The Counter-Defendants' arguments regarding dismissal of the Perlmutters' claim for abuse of process are rejected.

E. Count IV - Defamation

Counter-Defendants next seek dismissal of the Perlmutters' count for defamation. The elements for defamation are "(1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory." *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008). The Perlmutters allege Counter-Defendants defamed them when they published or otherwise caused to be

published false records, including "findings concerning the Perlmutters' genetic material[ ] and false reports that the Perlmutters offered to settle this civil action for substantial amounts of money . . . ." (Countercl. ¶ 135.) The Perlmutters assert these publications were published intentionally, were made with the malicious intent to defame them, and are otherwise defamatory *per se*. (Countercl. ¶¶ 136-40.) The Court finds that the Perlmutters have stated a cause of action as to some—but not all—of the Counter-Defendants as detailed below.

1. The Perlmutters have not stated a cause of action as to Douberley and Federal.

Before reaching the merits of Counter-Defendants' arguments regarding the defamation claim, the Court must first address that the Perlmutters have failed to show how Douberley or Federal defamed them at all. While, as noted above, the Perlmutters sufficiently alleged Douberley and Federal were implicit in the purported scheme to secretly take the Perlmutters' genetic material, there has been no allegation that these Counter-Defendants were a part of the actual publication of any false or misleading reports. In coming to this conclusion, the Court notes that the Counterclaim effectively alleges two periods of alleged tortious action—the surreptitious taking of the Perlmutters' genetic information and the creation of false, defamatory reports as a result of the taking. While the Counterclaim sufficiently implicates Douberley and Federal in the former, it is silent as to their participation in the latter. The Court therefore finds the Perlmutters have failed to state a cause of action for defamation against Douberley and Federal as to this cause of action.

2. The Perlmutters have stated a cause of action for defamation as to the rest of the Counter-Defendants.

The remaining Counter-Defendants dispute the sufficiency of the Perlmutters' defamation claim. As a threshold matter, the parties dispute whether the Perlmutters are public or private figures for purposes of determining the correct standard of defamation necessary for

this case. The Perlmutters assert in their Counterclaim that they are private figures. (Countercl. ¶¶ 41, 43.) At the motion to dismiss stage, this Court is required to take all allegations in the Counterclaim as true, a task that requires accepting the Perlmutters' assertion that they are not public figures. *See Dockery v. Fla. Democratic Party*, 719 So. 2d 9, 11 (Fla. 2d DCA 1998) ("On a motion to dismiss, the trial court was required to accept the plaintiff's allegations that he was not a public figure."). Accordingly, the Court proceeds by assuming the Perlmutters are private figures. To the extent the Counter-Defendants argue otherwise, their arguments should be raised at the summary judgment stage of the proceedings. *See id.* (noting "the trial court erred in deciding that the plaintiff was a public figure without an evidentiary basis for this ruling").

The Counter-Defendants argue the claim for defamation must be dismissed because the Perlmutters have failed to either attach the purportedly defamatory publications or otherwise provide the actual defamatory words used. "The general rule in Florida is that allegedly defamatory words should be set out in the complaint for the purpose of fixing the character of the alleged libelous publication as being libel per se." *Edward L. Nezelek, Inc. v. Sunbeam Television Corp.*, 413 So. 2d 51, 55 (Fla. 3d DCA 1982). This "set out" requirement "does not necessarily require that the statements be set out verbatim," especially "where the statements may not easily be retained because they were made orally either in conversation or by radio or television broadcast." *Id.*

Under the standard of cases such as *Edward L. Nezelek, Inc.*, the Court finds that dismissal is inappropriate. Contrary to the Counter-Defendants' assertions, the case law requires neither that the pleader attach the actual offending publication[10] nor that the pleader provide the actual defamatory language. Instead, the operative question is whether the pleader has "state[d]

[10] This requirement is logical particularly where, as alleged by the Perlmutters in their response, the publications have not been disclosed to the pleader in question.

the essence of what the alleged defamer said." *Scott v. Bush*, 907 So. 2d 662, 667 (Fla. 5th DCA 2005). The Court finds that standard has been satisfied here—the Perlmutters have alleged that the Counter-Defendants published "false records, reports and findings concerning the Perlmutters' genetic material, and false reports that the Perlmutters offered to settle this civil action for substantial sums of money . . . ." (Countercl. ¶ 135.) The Court finds this pleading sufficiently states the essence of what the alleged defamer has said and therefore sufficiently withstands a motion to dismiss. The Counter-Defendants' arguments otherwise are rejected.[11]

The Counter-Defendants also assert that the defamation claim must be dismissed on the basis of the litigation privilege. Specifically, they argue the Perlmutters have effectively admitted that the alleged defamatory statements "have some relation to" this proceeding and that therefore the statements are absolutely privileged. "Generally, immunity is an affirmative defense that should be pled by the party asserting it, and which may thereafter be considered *after the facts are fleshed out by summary judgment or trial*." *Fariello v. Gavin*, 873 So. 2d 1243, 1245 (Fla. 5th DCA 2004) (emphasis added). The Court declines to recede from the general rule noted in *Fariello*. While the Counter-Defendants assert that this privilege applies because the Perlmutters' defamation claim is "based on a purportedly false statement concerning a 'settlement offer,'" (Peerenboom Mot. 19), the Court notes that the litigation privilege does not bar claims seeking recovery for any statement concerning any reference to a proceeding at all. Rather, the privilege bars claims seeking recovery for statements "made either in front of a judicial officer or in pleadings or documents filed with the court or quasi-judicial body."

[11] The Court recognizes that cases such as *Scott* and *Edward L. Nezelek, Inc.,* involve oral communications rather than, as here, written instances of defamation. Regardless, the Court finds the cases persuasive where, as here, the Perlmutters assert the reports are in the Counter-Defendants' custody. In such a situation, the essence of the communication is sufficient to defeat a motion to dismiss and permit the case to proceed to discovery.

DelMonico v. Traynor, 116 So. 3d 1205, 1217 (Fla. 2013). The Perlmutters' claim does not fall into this category and so the Court rejects the Counter-Defendants' argument. To the extent the Counter-Defendants dispute the nature of the Perlmutters' characterization of the reports, their arguments are better addressed at the summary judgment stage of the proceedings. The Perlmutters can proceed in their action as pleaded against Peerenboom and Speckin.

F. Count V - Intentional Infliction of Emotional Distress

The Counter-Defendants next seek dismissal of the Perlmutters' claim for intentional infliction of emotional distress ("IIED"). A properly pleaded claim for IIED asserts:

> (1) The wrongdoer's conduct was intentional or reckless, that is, he intended his behavior when he knew or should have known that emotional distress would likely result;
>
> (2) The conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community;
>
> (3) The conduct caused emotional distress; and
>
> (4) The emotional distress was severe.

Stewart v. Walker, 5 So. 3d 746, 749 (Fla. 4th DCA 2009). The Perlmutters assert in their Counterclaim that the Counter-Defendants intentionally deprived them of their genetic information through surreptitious means to falsely implicate them in criminal activity and that these actions caused the Perlmutters severe emotional distress. (Countercl. ¶¶ 141-46.) The Counter-Defendants seek dismissal of this claim because the alleged conduct is not sufficiently severe to sustain a claim of IIED and otherwise because it fails to allege physical harm or threats of physical harm.

At the outset, the Court notes the exceedingly high bar a party must meet to adequately plead a cause of action for IIED: "the plaintiff must show conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as

atrocious, and utterly intolerable in a civilized community." *Byrd v. BT Foods, Inc.*, 948 So. 2d 921, 928 (Fla. 4th DCA 2007). Under this high standard, truly intolerable conduct has been found to be offensive or reprehensible but not found to meet IIED's requirement for "outrageous" conduct. For example, in *Williams v. Worldwide Flight SVCS., Inc.*, the Third District Court of Appeal found an employer's repeated uses of racial epithets in front of others and over radio, creation of false disciplinary records to justify termination, false accusations of stealing, and other racial discrimination against an employee did not amount to conduct "outrageous" enough for an IIED claim. 877 So. 2d 869 (Fla. 3d DCA 2004). Similarly, in *LeGrande v. Emmanuel*, the Third District determined a congregational member of a church falsely accusing the minister of stealing in front of the congregation, calling the minister "Satan," and doing so intentionally so as to scandalize and disgrace the minister did not rise to the level of IIED. 889 So. 2d 991 (Fla. 3d DCA 2004). By way of contrast, an insured properly pleaded a claim for IIED where her insurance company had been ordered by an administrative judge to authorize a lung transplant surgery but failed to do so for nine months despite knowing that the insured "could well hasten her demise." *Liberty Mut. Ins. Co. v. Steadman*, 968 So. 2d 592 (Fla. 2d DCA 2007).

The Court agrees with the Counter-Defendants and finds that the Perlmutters' claim for IIED must be dismissed for failure to allege conduct sufficiently outrageous to satisfy the burden of sustaining a claim for IIED. Taking the facts pleaded as true, there can be no doubt that the secret collection and misuse of a person's genetic information is reprehensible conduct. Despite this, the Court does not find the allegations as pleaded arise to the extreme levels necessary to sustain an action for IIED. Simply stated, it is difficult to conclude the Perlmutters' accusations rise to the same level of outrage generated by a case such as *Liberty Mutual*, where a party's

actions were literally a matter of life-and-death. Instead, the Court finds this case to be more akin to *Williams* or *LeGrande*—a situation involving unsavory facts and, at least as pleaded, intentional or malicious conduct made to embarrass and harass a plaintiff. As those cases did not contain sufficient facts to sustain a claim for IIED, the Court finds this case does not either. The Perlmutters' claim for IIED must be dismissed.[12]

G. Count VI - Invasion of Privacy

The Counter-Defendants next seek dismissal of the Perlmutters' invasion of privacy count. Specifically, the Perlmutters seek recovery for two forms of invasion of privacy: intrusion and publication of private facts. Intrusion involves "physically or electronically intruding into one's private quarters." *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1252 n.20 (Fla. 1996). Publication of private facts involves "the dissemination of truthful private information which a reasonable person would find objectionable." *Id.* The Perlmutters assert that the Counter-Defendants intruded on their privacy when the Counter-Defendants secretly gathered the Perlmutters' genetic information for unauthorized testing and misled the court and law enforcement officials about the process. (Countercl. ¶ 151.) The Perlmutters allege that their genetic information was private and is not a legitimate concern to the public. (Countercl. ¶¶ 148-49.) The Counter-Defendants argue the Perlmutters have failed to state a claim for either form of invasion of privacy.

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[12] Because the Court finds dismissal appropriate on grounds of failure to allege sufficient outrageous conduct, there is no need to reach the question of whether physical contact was necessary to sustain a claim of IIED. As the parties disputed this issue in their papers, though, the Court notes that a valid claim for IIED is "normally associated" with physical contact. *Williams*, 877 So. 2d at 870.

1. The Perlmutters have failed to state a cause of action for intrusion.

The Court first agrees that the Perlmutters have failed to state a claim for intrusion. The Counterclaim contains no indication whatsoever that the Counter-Defendants "physically or electronically intrud[ed] into one's private quarters." *See Agency for Health Care Admin.*, 678 So. 2d at 1252 n.20. This requirement refers to "a 'place' where there is a reasonable expectation of privacy . . . ." *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003). This standard requires intrusion into an actual physical place and is satisfied where, for example, a plaintiff's home is invaded. *Guin v. City of Riveria Beach*, 388 So. 2d 604, 606 (Fla. 4th DCA 1980). As alleged, the Perlmutters have failed to show such an intrusion occurred and instead ask the Court to apply a broader definition of intrusion as reflected in the Restatement (Second) of Torts. The broader definition states an intrusion has occurred when one "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs of concerns . . . if the intrusion would be highly offensive to a reasonable person." Restatement (Second) of Torts § 652B (1977). As the Perlmutters concede, though, this definition has not been adopted in Florida courts. *See Bradley v. City of St. Cloud*, No. 6:12-CV-1348-ORL-37TBS, 2013 WL 3270403 at *5 (M.D. Fla. June 26, 2013) (noting "[t]he Florida Supreme Court has not expressly adopted the definition of [intrusion] found in the Restatement (Second) of Torts" while applying narrower definition used in *Ginsberg*). The Court declines to adopt a broader reading of intrusion when the tort has already been sufficiently defined by the Supreme Court of Florida. The Perlmutters' intrusion claim is therefore rejected.

2. The Perlmutters publication claim fails against Douberley and Federal but can proceed as to Peerenboom and Speckin.

As to the issue of publication of private facts, the Court finds that the count as pleaded fails to state a cause of action against Douberley and Federal. The count as pleaded as to Peerenboom and Speckin, though, is sufficient to withstand a motion to dismiss.

a. The Perlmutters have not stated a cause of action for publication of private facts as to Douberley and Federal.

As with the earlier defamation claim, the Perlmutters' cause of action for publication of private facts is deficient as to Douberley and Federal due to the Perlmutters' failure to implicate these Counter-Defendants in the "publication" portion of the tort. While, as noted above, the Perlmutters have successfully pleaded that Douberley and Federal were involved in the unauthorized taking of genetic material from the Perlmutters, there are no allegations regarding their involvement in the publication of the results of that taking. As publication is naturally a requirement for a claim of publication of private facts, the Court finds that the Perlmutters have failed to state a cause of action for publication of private facts as to Douberley and Federal.

b. The Perlmutters have stated a cause of action for publication of private facts as to Peerenboom and Speckin.

The Court rejects the remaining Counter-Defendants' argument for dismissal of the publication of private facts, though, and finds the Perlmutters have properly pleaded a cause of action for the tort. Unauthorized publication of a plaintiff's private medical records is considered publication of private facts sufficient to state a claim for invasion of privacy. *E.g.*, *Doe v. Univision Television Grp., Inc.*, 717 So. 2d 63, 64-65 (Fla. 3d DCA 1998). The Court finds the Counter-Defendants' surreptitious taking of the Perlmutters' genetic material and subsequent, unauthorized publication of their genetic information falls directly into this category of tort. While the Counter-Defendants argue this claim is duplicitous of the Perlmutters'

defamation claim, the Court rejects such a reading. Rather, the claims are inherently different—while the Perlmutters seek to recover under a theory of defamation based on the purportedly false reports published by the Counter-Defendants, the Perlmutters seek to recover under a theory of invasion of privacy for any *true* information regarding their genetic information published by the Counter-Defendants. To the extent the reports contain no truth (or no falsity), these claims can be revisited at the summary judgment stage after discovery.[13] At this time and as pleaded, though, dismissal is inappropriate. The Perlmutters have stated a claim for invasion of privacy as to publication of private facts and so Peerenboom's argument is rejected.

H. Count VII - Third-Party Spoliation

Counter-Defendants seek dismissal of the Perlmutters' third-party spoliation count. The elements of third-party spoliation are:

> (1) existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages.

Continental Ins. Co. v. Herman, 576 So. 2d 313, 315 (Fla. 3d DCA 1990). The Perlmutters assert Douberley, Federal, Howenstine, and Speckin committed third-party spoliation when they knew or should have known that taking the Perlmutters' genetic information in secret and without their authorization would result in a legal suit. (Countercl. ¶¶ 156-57.) The Perlmutters assert these Counter-Defendants therefore had a duty to preserve any evidence of the scheme but

[13] This conclusion is similarly applicable to the remainder of the Counter-Defendants' arguments. For example, while the Counter-Defendants argue that the publication of the Perlmutters' genetic information is not "offensive" so as to rise to the level of an actionable claim for publication of private facts, the Counterclaim asserts otherwise. (*See* Countercl. ¶ 148.) As this Court is required to take the Counterclaim as pleaded as true, the resolutions of such arguments are more appropriate at summary judgment.

that they destroyed critical evidence of the scheme instead, thereby causing the Perlmutters damages. (Countercl. ¶¶ 158-63.)

The Counter-Defendants argue this count should be dismissed first because the Perlmutters' action is actually a claim of first-party spoliation, a tort no longer recognized in Florida. A first-party spoliation claim arises "when the defendant in the spoliation claim is also the defendant in the underlying claim allegedly impaired by the loss or destruction of the evidence." *Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251, 1254 (Fla. 4th DCA 2003) (*Martino I*). *Martino I* held "an independent cause of action for spoliation of evidence is unnecessary and will not lie where the alleged spoliator and the defendant in the underlying litigation are one and the same." *Id.* at 1256. The Florida Supreme Court adopted *Martino I*'s reasoning on appeal. *See Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 347 (Fla. 2005) (*Martino II*) ("Martino has not demonstrated that there is any need to . . . recognize an independent cause of action for first-party spoliation of evidence.").

The Court rejects the Counter-Defendants' argument on this point. The Perlmutters' claim is not for first-party spoliation because, as pleaded, the purported destruction of evidence did not harm the Perlmutters in *their* action against the Defendants, but rather harmed them in *Peerenboom's* lawsuit against the Perlmutters.[14] As the Counterclaim makes clear, the actions of these Counter-Defendants "significantly impaired the Perlmutters' ability to *defend* themselves in the *civil action*." (Countercl. ¶ 162 (emphasis added).) Douberley, Federal, Howenstine and Speckin are not parties to Peerenboom's suit against the Perlmutters. Therefore the Perlmutters'

[14] Federal incorrectly characterizes the operative suit not as Peerenboom's action against the Perlmutters but rather the *Kay-Dee Sportswear* litigation. This misconstrues the Counterclaim, as the Perlmutters' action as pleaded states that the spoliated evidence impaired their ability to defend themselves in the Peerenboom suit, not in any capacity in the *Kay-Dee Sportswear* case. (Countercl. ¶¶ 157-58.)

cause of action seeks relief for the actions of non-parties to an underlying lawsuit. This renders the cause of action properly pleaded and so dismissal on this ground is inappropriate.

Counter-Defendants also argue dismissal is required because the Perlmutters have not alleged there was a statute or contract requiring preservation of the allegedly destroyed evidence. This argument is also rejected. A duty to preserve evidence can arise on bases other than statutes or contracts, particularly when a duty to preserve evidence exists. *See Am. Hospitality Mgmt. Co. of Minn. v. Hettiger*, 904 So. 2d 547, 549 (Fla. 4th DCA 2004) (noting "we have held that a defendant could be charged with a duty to preserve evidence where it could reasonably have foreseen the claim"). The Perlmutters allege such a duty existed in this case. (Countercl. ¶¶ 158-60.) As pleaded, then, a duty existed based on the foreseeability of a civil suit and so the Counter-Defendants' argument on this point is rejected.

Lastly, the Counter-Defendants argue that a cause of action for third-party spoliation is not appropriate until the underlying action is complete. In other words, the Counter-Defendants argue this cause of action cannot proceed until it is shown that the Perlmutters lost in Peerenboom's suit against them and that this defeat was the result of a lack of evidence. The Fourth District has cautioned that "[t]here is little reason to wait for final judgment in the underlying lawsuit before bringing an action for the spoliation of evidence." *St. Mary's Hosp., Inc. v. Brinson*, 685 So. 2d 33, 35 (Fla. 4th DCA 1996). The Court agrees with this principle and sees no reason to dismiss the otherwise properly pleaded count because the underlying lawsuit is not yet completed. Even the Counter-Defendants' proffered case law does not mandate such a result. *See Jiminez v. Cmty. Asphalt Corp.*, 968 So. 2d 668, 672 (Fla. 4th DCA 2007) (noting "courts have held that the proper remedy for bringing claims prematurely is abatement rather than dismissal"). The Perlmutters' cause of action for third-party spoliation is properly pleaded

and so dismissal is inappropriate. The Counter-Defendants' arguments as to this issue are rejected.

I. Count VIII - Civil Conspiracy

Finally, the Counter-Defendants seek dismissal of the Perlmutters' claim of civil conspiracy.

> The elements of a civil conspiracy are: (a) a conspiracy between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts performed pursuant to the conspiracy.

Walters v. Blankenship, 931 So. 2d 137, 140 (Fla. 5th DCA 2006). The Counter-Defendants argue dismissal on this count is appropriate because the Perlmutters have failed to state a cause of action for every other count in their Counterclaim. As discussed in this Order, that is plainly not the case. Similarly, the Counter-Defendants argue that the facts underlying the conspiracy are too conclusory to withstand a motion to dismiss. The Court disagrees—the Counterclaim plainly sets forth facts detailing a conspiracy between the Counter-Defendants to surreptitiously collect the Perlmutters' genetic information through the use of a deposition. The ultimate goal of this conspiracy was the unauthorized collection of the Perlmutters' DNA for use in implicating them as perpetrators of a hate-mail campaign against Peerenboom. The Counterclaim states that the Counter-Defendants each took overt acts in furtherance of this conspiracy. These facts are sufficient to state a cause of action for civil conspiracy.

Counter-Defendants also argue that dismissal of the civil conspiracy count is appropriate because the Counterclaim, as pleaded, fails the "single publication/action rule" through which a litigant is barred from asserting multiple actions "when they arise from the same publication upon which a failed defamation claim is based." *Ovadia v. Bloom*, 756 So. 2d 137, 141 (Fla. 3d DCA 2000). Even though the Court has dismissed the Perlmutters' defamation count as to

Douberley and Federal, the conspiracy count is not dismissed under this rule because the conspiracy outlined in the Counterclaim involves more purportedly wrongful conduct than just defamation. As detailed above, the Perlmutters allege the Counter-Defendants stole their genetic material under the guise of taking a deposition so as to implicate them in the letter-writing campaign against Peerenboom. This is sufficient to state a cause of action for civil conspiracy independent of the Perlmutters' defamation count and so the argument regarding the single publication/action rule is rejected.

CONCLUSION

The Counter-Defendants have challenged the merits of the Counterclaim in its entirety. While many of the Counter-Defendants' arguments are compelling, the Court concludes by noting that the majority of the Counter-Defendants' arguments and relied-upon authority stem from cases brought after summary judgment or trial. These arguments are inappropriate at this time. Instead, this Court is constrained by the fact that all allegations in the Counterclaim must be taken as true. Under that standard, and for the reasons set forth above, the Counterclaim is dismissed in its entirety for lack of personal jurisdiction as to Counter-Defendant Howenstine. Count IV is dismissed as to Douberley and Federal. Count V is dismissed as to all Counter-Defendants. Count VI is dismissed as to all Counter-Defendants to the extent it seeks a cause of action for intrusion. Count VI is dismissed as to Douberley and Federal to the extent it seeks a cause of action for publication of private facts.

Count V and Count VI's cause of action for intrusion are dismissed with prejudice, as the Perlmutters cannot re-plead the facts of this case in such a way as to cure the defects discussed above. *See Depaola v. Town of Davie*, 872 So. 2d 377, 383 (Fla. 4th DCA 2004) (noting dismissal with prejudice is appropriate when "it is clear the pleading cannot be amended so as to

state a cause of action"). The remaining dismissals are without prejudice to the Perlmutters' ability to file an amended counterclaim. *See id.*

Accordingly, it is hereby,

ORDERED that Plaintiff's Motion to Dismiss Counterclaim is **GRANTED IN PART AND DENIED IN PART**. Counts V and VI are **DISMISSED WITH PREJUDICE** as to Counter-Defendant Harold Peerenboom.

It is further **ORDERED** that Counter-Defendant William Douberley, Esq.'s Motion to Dismiss Counterclaim is **GRANTED IN PART AND DENIED IN PART**. Counts IV and VI are **DISMISSED WITHOUT PREJUDICE** and Counts V and VI are **DISMISSED WITH PREJUDICE** as to Counter-Defendant William M. Douberley.

It is further **ORDERED** that Chubb & Son, a Division of Federal Insurance Company's Motion to Dismiss with Prejudice the Counterclaim Filed by Isaac ("Ike") Permutter and Laura Perlmutter is **GRANTED IN PART AND DENIED IN PART**. Counts V and VI are **DISMISSED WITH PREJUDICE** as to Counter-Defendant Chubb & Son, a Division of Federal Insurance Company.

It if further **ORDERED** that Speckin Forensics LLC's and Julie Howenstine's Motion to Dismiss Third Party Complaint is **GRANTED IN PART AND DENIED IN PART**. The Counterclaim is **DISMISSED WITHOUT PREJUDICE** as to Counter-Defendant Julie Howenstine. Counts V and VI are **DISMISSED WITH PREJUDICE** as to Counter-Defendant Speckin Forensics, LLC.

It is further **ORDERED** that Counter-Plaintiffs Isaac ("Ike") and Laura Perlmutter shall have thirty (30) days from the date of this order to file an amended counterclaim not inconsistent with the Court's rulings above.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, on this 23rd day of January, 2017.

MEENU SASSER, CIRCUIT JUDGE

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