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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UMG RECORDINGS, INC., et al.,

Plaintiffs,

vs.

RCN TELECOM SERVICES, LLC, et al.,

Defendants.

and

RCN TELECOM SERVICES, LLC,

Counterclaim Plaintiff,

vs.

UMG RECORDINGS, INC., et al.,

Counterclaim Defendants;

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.,

Counterclaim Defendant;

RIGHTSCORP, INC.,

Counterclaim Defendant.

No. 3:19-cv-17272-MAS-ZNQ

DEFENDANT RCN TELECOM SERVICES, LLC'S OPPOSITION TO RIGHTSCORP, INC.'S MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Over the past ten years, Counterclaim Defendant Rightscorp, Inc. has made millions of accusations of copyright infringement against users of RCN's internet service. Rightscorp does this for profit—it sends notices of copyright infringement in the hopes of extracting settlements from accused infringers, and Plaintiffs pay Rightscorp to generate these notices to pressure ISPs like RCN into terminating the internet access of accused infringers. Now, RCN has learned that Rightscorp has been intentionally destroying every shred of evidence that might be used to assess whether *any* of Rightscorp's allegations were accurate or legitimate.

This conduct is the basis of RCN's claim against Rightscorp under the California Unfair Competition Law ("UCL"), which broadly prohibits "any unlawful, unfair or fraudulent business act or practice." *See* Cal. Bus. & Prof. Code § 17200; Am. Answer & Counterclaims (ECF No. 104). There is no real question that RCN's allegations satisfy this standard. Indeed, faced with the same allegations, Plaintiffs did not even *attempt* to argue that RCN has failed to allege conduct proscribed by the UCL. *See generally* Pls.' Memo. ISO Mot. to Dismiss (ECF No. 122-1).

Through this UCL claim, RCN simply seeks injunctive relief, requiring Rightscorp, Plaintiffs, and the Recording Industry Association of America to (1) preserve all evidence related to any future copyright infringement allegations

directed at RCN's customers and (2) comply with RCN's policy that any such allegation be digitally signed to verify the sender's identity. Because Rightscorp's system will be a focus of the case in any event, RCN's claim for injunctive relief under the UCL does not add any significant new issues to this case.

Rightscorp's motion to dismiss is meritless and should be denied.

FACTUAL BACKGROUND[1]

RCN and Its DMCA Policy

RCN is a general-purpose internet service provider ("ISP") that offers internet access to customers in a number of U.S. markets. Am. Answer & Counterclaims ("AAC"), ¶ 41 (ECF No. 104). RCN merely acts as a conduit, or gateway, for access to the internet. *Id.*, ¶ 42. RCN does not offer any other internet-based products or services to its subscribers—it does not distribute software, host websites, or store content. *Id.*, ¶ 43.

The Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(a), provides "conduit" ISPs like RCN with a defense to copyright infringement claims in certain circumstances. To qualify for the section 512(a) safe harbor, a conduit ISP is required, among other things, to implement a policy for terminating repeat copyright infringers "in appropriate circumstances"—which the DMCA leaves

[1] For ease of reference, RCN restates the Factual Background set forth in its opposition to Plaintiffs' motion to dismiss. *See* ECF No. 135 at 4–10.

undefined. *See* § 512(i)(1)(A). In the industry, these policies are commonly known as "DMCA policies."

There is no law that affirmatively requires conduit ISPs to establish procedures for accepting or responding to copyright infringement allegations directed at users of its network, and the DMCA does not provide for or purport to regulate how content owners should make conduit ISPs aware of copyright infringement issues. *See generally* 17 U.S.C. § 512. Thus, one aspect of a DMCA policy is to establish and publicly communicate how an ISP will receive and respond to such allegations.

RCN—like every other ISP, as far as RCN is aware—receives huge numbers of these accusations by email every year, in some years into the millions. AAC, ¶ 47. In 2016, in connection with its DMCA policy, RCN began publicly informing content owners of how to provide RCN with actionable, proper notice of an instance of alleged copyright infringement on its network. *Id.*, ¶¶ 48–51.

RCN cannot verify whether a given accusation is accurate, either practically (due to the huge volume of accusations it receives) or technically (because RCN cannot examine past activity on its network and has no right to inspect its subscribers' internet-connected devices). *Id.*, ¶¶ 49–50. Thus, so that RCN can at least give itself some comfort that a specific accusation *may* be legitimate, it has certain minimum requirements for copyright infringement notices sent by email.

Id., ¶ 51. Among other things, RCN requires that the email be in a PGP (Pretty Good Privacy) encryption format and digitally signed, which allows RCN to verify that the sender is who they claim to be. *Id.*, ¶¶ 51, 99. This requirement is industry-standard and is observed by virtually every entity that sends a meaningful number of such emails. *See id.* & ¶ 52.

As part of its overall DMCA policy, and subject to the above requirements, RCN has developed and implemented an automated, graduated-response DMCA system that processes copyright infringement complaints. *Id.*, ¶ 53–55. RCN's system ingests emails regarding copyright issues, associates them with a subscriber's account, sends escalating notifications to the subscriber as threshold numbers of complaints are received, and if the complaints continue unabated, triggers permanent termination of the subscriber's account. *Id.*, ¶ 54. In discovery in this case, RCN has produced to Plaintiffs records evidencing all of the subscriber accounts that RCN has terminated pursuant to its DMCA policy.

Rightscorp's "System" for Detecting Copyright Infringement

Since roughly 2011, Defendant Rightscorp, Inc. has been in the business of sending copyright infringement complaints to ISPs, including RCN, ostensibly on behalf of copyright owners. *Id.*, ¶ 67. Rightscorp's emails to ISPs regarding alleged instances of copyright infringement are generated by a software system,

which Rightscorp claims can detect offers to upload copyrighted content over the peer-to-peer file sharing protocol BitTorrent. *Id.*, ¶ 65.

As initially conceived, Rightscorp's business model was to send these notices, extract small settlements (*e.g.*, $20) from accused infringers, and then split the proceeds with the copyright owners. *Id.*, ¶ 68–69. As a result, Rightscorp was incentivized to make huge numbers of accusations, and it developed a reputation for engaging in harassment and other unlawful conduct, such as making illegal robocalls to accused infringers. *Id.*, ¶¶ 69–70.

The concerns that informed RCN's DMCA policy—how to know whether a given complaint is legitimate and from a credible party—are front and center with Rightscorp. Not a single one of Rightscorp's emails to RCN complied with RCN's DMCA policy, specifically the digital signature requirement. *Id.*, ¶¶ 99–100. RCN's DMCA system generated bounce-back emails that informed Rightscorp of RCN's policy, but Rightscorp simply ignored them and continued to send non-compliant emails. *Id.*, ¶ 100.

As detailed in RCN's Counterclaims, there are also many, ***many*** issues with Rightscorp's system, the "notices" it generates, and the "evidence" it collects. *See, e.g.*, *id.*, ¶¶ 76–91, 95, 101–111. Most significantly, Rightscorp systematically destroys all of the data that would show whether an accused infringer actually possessed, *or* was willing to share, the allegedly copyrighted content identified in

Rightscorp's "notices." *Id.*, ¶¶ 82–84. Rightscorp has also destroyed virtually every other category of data or evidence regarding the operation of its system, including (just as a few examples) evidence of how it matched allegedly infringing content with a copyrighted work (*id.*, ¶ 78), evidence of how it identified alleged infringers on RCN's network (*id.*, ¶¶ 79–81), evidence of changes to the criterion governing whether the system flagged conduct as "infringing" (*id.*, ¶¶ 85–86), and evidence of how often Rightscorp was unable to download allegedly infringing content after sending a notice of infringement (which would conclusively demonstrate that the notice was false) (*id.*, ¶¶ 87–90). Put simply, Rightscorp systematically deleted the evidence that would reveal false allegations against RCN's subscribers. *See id.*, ¶¶ 91, 95.

As a result of its deletion efforts, the allegations that Rightscorp has made against RCN's subscribers are entirely conclusory. They contain no evidence of infringement or other verifiable information, and no evidence that the email was sent on behalf of a legitimate rights-holder or concerned a registered U.S. copyright. *Id.*, ¶ 101–108.

At all relevant times, Plaintiffs have known that Rightscorp is spoliating evidence and is refusing to send copyright infringement complaints that comply with RCN's DMCA policy. *Id.*, ¶¶ 94–97, 113–114. Rightscorp has continued to engage in this conduct with Plaintiffs' approval, in violation of Plaintiffs' duties to

preserve relevant evidence, and as part of a concerted effort to inundate RCN with copyright infringement complaints that RCN has no way of verifying or meaningfully evaluating. *See id.*

ARGUMENT

I. RCN HAS STATED A CLAIM FOR VIOLATIONS OF THE UCL

It is telling that Plaintiffs and RIAA did not attempt to dispute that RCN has sufficiently alleged "unlawful, unfair, or fraudulent" conduct in violation of the UCL, California Business & Professions Code § 17200. *See generally* Pls.' Mem. ISO Mot. to Dismiss (ECF No. 122-1). RCN's allegations are plainly sufficient, particularly given that district courts generally refuse to attempt to evaluate the unfairness of a challenged business practice at the pleading stage. *See, e.g.*, *Gianino v. Alacer Corp.*, No. 8:09-cv-1247, 2010 WL 11468710, at *4 (C.D. Cal. Aug. 4, 2010) ("The balancing test required by the unfair business practice prong of section 17200 is fact intensive and is not conducive to resolution at the motion to dismiss phase.").

RCN has alleged that Rightscorp made millions of formal accusations of copyright infringement against users of RCN's network, with the twin aims of obtaining monetary settlements from the accused infringers and forcing RCN to terminate their internet access, while intentionally and systematically destroying all of the "evidence" upon which those accusations were based. RCN has further

alleged that as a result of how Rightscorp designed and operated its system, it is a certainty that some of Rightscorp's allegations were fraudulent, but that it is effectively impossible to identify specific false accusations because of Rightscorp's intentional spoliation of evidence. All the while, Rightscorp has deliberately refused to digitally sign its copyright infringement complaints to verify its identity, even though RCN has repeatedly notified Rightscorp of its noncompliance with RCN's policies.

These allegations are more than sufficient to state a claim under the UCL.

A. Rule 9(b) Does Not Govern RCN's UCL Claim as a Whole.

Rightscorp is wrong to suggest that RCN must plead every aspect of its UCL claim with particularity under Rule 9(b). *See* Rightscorp's Memo. ISO Mot. to Dismiss at 8–9 (ECF No. 136-1) ("Rightscorp's Memo."). Rule 9(b) does not apply because the gravamen of RCN's UCL claims is not fraud.

Rule 9(b) only applies to UCL claims that "allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of [the UCL] claim." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). That is the only circumstance in which a UCL pleading "as a whole must satisfy the particularity requirement of Rule 9(b)." *Id.*

"In other cases, however, a plaintiff may choose not to allege a unified course of fraudulent conduct in support of a claim, but rather to allege some

fraudulent and some non-fraudulent conduct." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104 (9th Cir. 2003). "In such cases, only the allegations of fraud are subject to Rule 9(b)'s heightened pleading requirements." *Id.* "Allegations of non-fraudulent conduct need satisfy only the ordinary notice pleading standards of Rule 8(a)." *Id.* at 1105.

The thrust of RCN's claim is that Rightscorp engaged in unfair conduct under the UCL by inundating RCN with copyright infringement allegations while (1) destroying all of the evidence upon which those accusations were supposedly based and (2) consciously refusing to comply with RCN's requirement that any such notice be digitally signed to verify the sender's identity. AAC, ¶¶ 1–14.

More specifically, if Rightscorp's system functioned as claimed, then Rightscorp obtained data from every accused infringer demonstrating whether they possessed the allegedly infringing music file, and if so, what percentage of the file they possessed. *Id.*, ¶ 82. Rightscorp also obtained data showing whether the accused infringer was offering to upload the file to any third party at the time of the alleged infringement. *Id.* Additionally, when Rightscorp attempted to download infringing content from accused infringers, Rightscorp obtained data identifying specific false allegations (*i.e.*, data reflecting failed download attempts). *Id.*, ¶¶ 89–90. RCN alleges that Rightscorp systematically and intentionally destroyed all of this alleged evidence, for each of the millions of

copyright infringement allegations it has levied against users of RCN's network, making it impossible to verify the legitimacy of any of Rightscorp's notices. *See id.*, ¶¶ 84, 90–91, 95, 97. Rule 9(b) does not apply because proof of these allegations neither requires nor necessarily results in a finding of common law fraud.

Rather, Rightscorp's conduct is unethical and oppressive precisely because it *has prevented* RCN from uncovering instances of fraud. There are compelling reasons to believe that many of Rightscorp's allegations were fraudulent. *See, e.g.*, *id.*, ¶¶ 85–86 (Rightscorp knowingly configured its system in a way that would result in false positives), 101–105 (in its notices of alleged infringement, Rightscorp did not include any evidence of infringement and did not identify a copyright registration number or copyright owner), 106 (Rightscorp alleged types of infringing conduct that its system is unable to detect). However, because Rightscorp has destroyed all of the underlying evidence, there is no way for RCN—or anyone else, for that matter—to assess any particular copyright infringement allegation made by Rightscorp and determine whether it was legitimate.[2]

[2] Unbelievably, Rightscorp contends that RCN cannot state a claim because RCN does not know which of Rightscorp's copyright infringement allegations were false. *See* Rightscorp's Memo. at 11–12. *That is the entire point of RCN's claim*: RCN cannot know which allegations were false, because Rightscorp intentionally destroyed all of the underlying evidence it allegedly obtained.

Separately, Rightscorp's deliberate refusal to comply with RCN's digital signature requirement is an independent species of unfair conduct under the UCL that in no way depends on any finding of fraud. *See* AAC, ¶¶ 51–53, 99–100. Rightscorp offers no explanation of why RCN's allegations on that subject would be subject to Rule 9(b).

Thus, because RCN's UCL claim is not premised on "a unified fraudulent course of conduct," Rule 9(b) does not apply. *See Vess*, 317 F.3d at 1105–06 (Rule 9(b) did not apply to entire complaint because the plaintiff alleged various wrongful conduct that was not alleged to be fraudulent); *McDonald v. Kiloo ApS*, 385 F. Supp. 3d 1022, 1038–39 (N.D. Cal. 2019) (analyzing UCL claims regarding alleged privacy violations and alleged fraudulent nondisclosures separately under Rule 8 and Rule 9(b), respectively); *Oracle Am., Inc. v. TERiX Computer Co.*, No. 5:13-cv-3385, 2014 WL 31344, at *5 (N.D. Cal. Jan. 3, 2014) (Rule 9(b) did not apply because the plaintiff's allegations concerned fraud committed not against the plaintiff, but against the plaintiff's customers).

B. RCN Has Alleged Unfair Conduct in Violation of the UCL.

1. Rightscorp relies on the wrong standard for unfair conduct.

Citing the California Supreme Court's *Cel-Tech* decision, Rightscorp asserts that RCN has failed to allege "unfair conduct" because the UCL requires that actionable unfairness "be tethered to some legislatively declared policy or proof of

some actual or threatened impact on competition." Rightscorp's Memo. at 17 (quoting *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 186–87 (1999)). Rightscorp is wrong. The *Cel-Tech* standard only applies where a party accuses a direct competitor of anticompetitive conduct. *Cel-Tech*, 20 Cal. 4th at 187 n.12 ("This case involves an action by a competitor alleging anticompetitive practices. Our discussion and this test are limited to that context. Nothing we say relates to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law . . . .").

Thus, the *Cel-Tech* standard does not apply here because this is not an action between competitors. *See generally* AAC. To be clear, the focus of an unfair competition claim under the UCL is *unfairness*—it is not necessary that the parties be competitors:

> [U]nder the unfair competition statute, competition between the parties is not a prerequisite to relief. Emphasis is placed upon the word "unfair" rather than on "competition."
>
> As the California courts have explained, the unfair competition statute is not limited to "conduct that is unfair to competitors." Indeed, in defining unfair competition, § 17200 refers to only business acts and practices, not competitive business acts or practices, and the term "embraces *anything* that can properly be called a business practice."

In re Pomona Valley Med. Grp., Inc., 476 F.3d 665, 675 (9th Cir. 2007) (alterations & citations omitted; emphasis in original); *see also People ex rel. Renne v. Servantes*, 86 Cal. App. 4th 1081, 1095 (2001) ("Servantes is simply

incorrect in his assertion that California's Unfair Competition Act prohibits only conduct that is unfair to competitors.") (citations omitted).

Thus, because this is not an action between competitors (and does not need to be), the traditional *State Farm* balancing test for unfair conduct under the UCL applies. Under *State Farm*'s "intentionally broad" balancing test, "[t]he test of whether a business practice is unfair involves an examination of that practice's impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer." *State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal. App. 4th 1093, 1103–04 (1996), *abrogated in part by Cel-Tech*, 20 Cal. 4th 163. The California Supreme Court has clearly stated that this test applies *except* in actions between competitors alleging anticompetitive conduct. *See Zhang v. Superior Court*, 304 P.3d 163, 174 (Cal. 2013) ("[O]ur disapproval of [the *State Farm*] standard [in *Cel-Tech*] was expressly limited to actions between business competitors alleging anticompetitive practices.").

As detailed below, there is no question that RCN has stated a claim under the traditional balancing test for unfair conduct.

2. RCN's allegations state a claim under the traditional UCL balancing test.

Under the UCL, "'[u]nfair' simply means any practice whose harm to the victim outweighs its benefits." *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1044 (9th Cir. 2010) (quotations & citation omitted). Thus, "[a]

business practice . . . may be unfair or fraudulent in violation of the UCL even if the practice does not violate any law." *Olszewski v. Scripps Health*, 69 P.3d 927, 947 (Cal. 2003). Instead, "[a]n unfair business practice is one that either 'offends an established public policy' or is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *McDonald v. Coldwell Banker*, 543 F.3d 498, 506 (9th Cir. 2008) (citations omitted).

Because this balancing test necessarily requires courts to weigh the evidence, district courts rarely attempt to conduct the inquiry at the pleading stage. *See Backus v. Gen. Mills, Inc.*, 122 F. Supp. 3d 909, 929 (N.D. Cal. 2015) ("Courts are reluctant to grant motions to dismiss 'unfair' UCL claims under the balancing test, because the test involves weighing evidence that is not yet properly before the court."); *see also Pemberton v. Nationstar Mortg. LLC*, 331 F. Supp. 3d 1018, 1051 (S.D. Cal. 2018) ("The balancing test should not be a particularly difficult test to satisfy at the motion to dismiss stage."); *Letizia v. Facebook Inc.*, 267 F. Supp. 3d 1235, 1246–47 (N.D. Cal. 2017) (denying motion to dismiss "unfair" UCL claim because the court was "not equipped with enough factual evidence to conduct a proper balancing test"); *Grace v. Apple Inc.*, No. 5:17-cv-551, 2017 WL 3232464, at *15 (N.D. Cal. July 28, 2017) (denying motion to dismiss because the question of whether alleged conduct was "unfair" under the UCL was "a factual determination that cannot be made at this stage of the proceedings"); *Gianino v.*

Alacer Corp., No. 8:09-cv-1247, 2010 WL 11468710, at *4 (C.D. Cal. 2010) ("[F]acts and evidence have not yet been adduced, therefore, the issue of whether Plaintiffs have properly supported their claim under the UCL's unfairness prong is more appropriately considered on a motion for summary judgment.") (citations omitted).

For these reasons, RCN's allegations of unfair conduct likewise cannot be resolved under Rule 12. RCN alleges that Rightscorp made millions of conclusory allegations of copyright infringement against users of RCN's network, and that Rightscorp has shielded the legitimacy of those allegations from scrutiny by destroying any actual evidence of copyright infringement it ever possessed. *See, e.g.*, AAC, ¶¶ 1–14, 76–91, 95, 101. In other words, Rightscorp either engaged in the systematic spoliation of evidence or made millions of utterly baseless accusations—and possibly both. Separately, RCN alleges that Rightscorp engaged in unfair conduct by deliberately refusing to comply with RCN's public-facing policy requiring that any copyright infringement allegations be digitally signed to verify the sender's identity. *See id.*, ¶¶ 51–53, 99–100.

Rightscorp offers no argument or authority that would permit the Court to find these allegations insufficient, as a matter of law and without weighing the underlying evidence, to state a claim for unfair conduct in violation of the UCL. *See, e.g.*, *Gianino*, 2010 WL 11468710, at *4 ("The balancing test required by the

unfair business practice prong of section 17200 is fact intensive and is not conducive to resolution at the motion to dismiss phase."). As noted above, the UCL is "intentionally broad to give the court maximum discretion to control whatever new schemes may be contrived, even though they are not yet forbidden by law." *Servantes*, 86 Cal. App. 4th at 1095; *see also Pirozzi v. Apple, Inc.*, 966 F. Supp. 2d 909, 920 (N.D. Cal. 2013) ("The UCL's coverage is sweeping, and its standard for wrongful business conduct is intentionally broad.") (quotations & citations omitted). Rightscorp's conduct fits squarely within this rubric. *See e.g.*, *Servantes*, 86 Cal. App. 4th at 1095 ("unethical and unscrupulous" practices in operating vehicle towing company were "unfair" under the UCL); *Golan v. Pingel Enters., Inc.*, 310 F.3d 1360, 1370–74 (Fed. Cir. 2002) (false allegations of patent and trademark infringement); *Arce v. Kaiser Found. Health Plan, Inc.*, 181 Cal. App. 4th 471, 489–90 (2010) (systematic breaches of contracts).

Furthermore, Rightscorp has not attempted to offer, and cannot offer, any legitimate justification for intentionally destroying evidence or refusing to comply with RCN's digital-signature requirement. Thus, Rightscorp has not provided the Court with any basis for resolving the UCL balancing test in its favor. *See, e.g.*, *Pemberton*, 331 F. Supp. 3d at 1052 (denying motion to dismiss because "the Court presently has no basis to find that [defendant]'s failure to report deferred interest payments has any utility, let alone utility that outweighs the gravity of the

alleged harm to the [plaintiffs]"); *Backus*, 122 F. Supp. 3d at 930 (denying motion to dismiss because the defendant failed to offer "a meritorious argument regarding the utility of the [challenged] practice").

The Court should therefore deny Rightscorp's motion to dismiss RCN's UCL claim for failure to state a claim.

3. There is no law that authorizes Rightscorp to engage in repeated, systematic spoliation of evidence.

Rightscorp lacks any basis for claiming that "RCN's unfairness claim is expressly prohibited by the UCL's 'Safe Harbor' defense, which exists where the business practice at issue is authorized by statute." *See* Rightscorp's Memo. at 15–16. The "business practices at issue" here are Rightscorp (1) making millions of accusations of copyright infringement while intentionally destroying any evidence that might be used to question the legitimacy of those accusations and (2) deliberately refusing to comply with RCN's digital-signature requirement. *See generally* AAC, ¶¶ 1–14. Rightscorp identifies no statute that authorizes these practices, because there is none.[3] *See* Rightscorp's Memo. at 15–16.

[3] The DMCA's safe harbor for ISPs (a different safe harbor, which provides RCN with a defense to Plaintiffs' copyright infringement claims) is irrelevant to these issues. Rightscorp baldly asserts that "the entire DMCA safe harbor regime for ISPs is premised on ISPs like RCN receiving infringement notices" (Rightscorp's Memo. at 16), but Rightscorp cannot dispute that the DMCA says nothing about the form, content, or nature of such notices. *See* RCN's Opp'n to Pls.' Mot. to Dismiss at 17–21 (ECF No. 135). The DMCA certainly does not authorize content owners or their representatives to destroy evidence.

Relatedly, Rightscorp is wrong to suggest that Rightscorp's systematic, intentional destruction of evidence cannot form the basis of a UCL claim. *See* Rightscorp's Memo. at 13–15. ***First***, Rightscorp offers no authority to that effect, and as discussed above, the balancing test for unfair conduct cannot be resolved on Rightscorp's motion to dismiss. *See supra* Section I.B.2. ***Second***, RCN's claim is not based solely on Rightscorp's spoliation of evidence, but rather on Rightscorp's spoliation of evidence *coupled with* Rightscorp making millions of copyright infringement allegations that directly implicate the spoliated evidence. *See id.* ***Third***, contrary to Rightscorp's claims, a motion for sanctions for spoliation would not provide RCN with a remedy for the conduct at issue here. *See* Rightscorp's Memo. at 13–14. RCN is seeking an injunction requiring Rightscorp to preserve all evidence relating to any future accusations of copyright infringement it may send to RCN, and no such relief is available to RCN under the Federal Rules of Civil Procedure.[4] ***Fourth***, Rightscorp is simply wrong that RCN "does not identify any specific document that RCN claims was deleted." Rightscorp's Memo. at 14. RCN identifies specific categories of data that Rightscorp deleted (*e.g.*, "bitfield" and "choke" data), and RCN alleges that Rightscorp deleted that data with respect to *every* notice of alleged copyright infringement it sent to RCN. AAC, ¶¶ 82, 84,

[4] Moreover, RCN's UCL claim relates to *all* of the notices of copyright infringement Rightscorp has sent to RCN, not only the allegations at issue in this case (*i.e.*, Rightscorp's copyright infringement allegations that ostensibly pertain to the works in suit).

89–91, 95, 97. ***Fifth***, Rightscorp's cited case law regarding marketing statements is not relevant to any issue before the Court. *See* Rightscorp's Memo. at 14–15. Those cases simply hold that the UCL does not permit consumers to challenge marketing statements solely on grounds that the statement lacks scientific substantiation—instead, the plaintiff must prove that the marketing statement was actually false or misleading. *See, e.g.*, *Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1095–96 (9th Cir. 2017). That principle has no application here.

The Court should therefore deny Rightscorp's motion to dismiss.

4. RCN has also stated a claim under the *Cel-Tech* test

As discussed above, the *Cel-Tech* test for unfair conduct under the UCL does not apply because RCN and Rightscorp are not direct competitors. *See supra* Section I.B.1. However, even if the Court were to apply that standard, RCN has still stated a claim under the UCL.

Under *Cel-Tech*, "[w]hen a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." 20 Cal. 4th at 187. In other words, the question

is whether the defendant's alleged conduct is anticompetitive in a manner that implicates the "policy or spirit" of the antitrust laws. *See id.*

Here, RCN's allegations directly implicate the "policy and spirit" of antitrust laws prohibiting sham litigation and other bad faith litigation practices. Specifically, the "sham litigation" exception to the *Noerr-Pennington* doctrine[5] applies in "situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991) (emphasis in original). Thus, for example, a company may violate the antitrust laws by pursuing a baseless patent infringement lawsuit in order to harm a competitor. *See Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1071–72 (Fed. Cir. 1998).

Here, Rightscorp is using bad-faith accusations of copyright infringement, as opposed to actual governmental process, to harm RCN and its customers. But the "policy and spirit" of the sham litigation exception applies because Rightscorp is using the fact of its accusations—and, perhaps even more importantly, the volume of its accusations—as a weapon against RCN. RCN expressly alleges that Rightscorp has made these allegations "not because they are true, but because the

[5] Subject to certain exceptions, the *Noerr-Pennington* doctrine provides "immunity from liability to those who petition the government, including administrative agencies and courts, for redress of their grievances." *See, e.g.*, *Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.*, 806 F.3d 162, 178 (3d Cir. 2015) (citations omitted).

nature and volume of the accusations allow Counterclaim Defendants to use them for the improper purpose of gaining leverage over ISPs." AAC, ¶ 2.

Thus, even if the Court were to apply the *Cel-Tech* test, RCN has still stated a claim for unfair anticompetitive conduct. *Cf. In re Acacia Media Techs. Corp.*, No. 5:05-cv-1114, 2005 WL 1683660, at *4–*5 (N.D. Cal. July 19, 2005) (allegations of bad faith litigation conduct stated a claim under the UCL's unfairness prong). In light of RCN's allegations, the questions of whether Rightscorp acted in bad faith and caused anticompetitive harm cannot be resolved at the pleading stage.

5. RCN's allegations satisfy Rule 9(b), to whatever extent it applies.

Even if the Court were to conclude that RCN's allegations of unfair conduct under the UCL must satisfy Rule 9(b), RCN's allegations are sufficient. RCN alleges that Rightscorp intentionally destroyed the evidence underlying each of the millions of notices of alleged copyright infringement Rightscorp sent to RCN, including the "bitfield" and "choke" data that would show whether the accused infringer actually possessed and was willing to share the copyrighted content at issue. AAC, ¶¶ 82–84. RCN further alleges that Rightscorp destroyed all evidence of instances when it tried and failed to download infringing content from accused infringers, and any evidence that would show the time period in which Rightscorp

configured its system to accuse people of copyright infringement who did not even possess the copyrighted content at issue. *Id.*, ¶¶ 85–90.

Because only Rightscorp would be able to provide more detailed information about the inaccuracies and problems with Rightscorp's notices, Rule 9(b) requires nothing more. *See, e.g.*, *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997) ("[T]he normally rigorous particularity rule has been relaxed somewhat where the factual information is peculiarly within the defendant's knowledge or control."). This is evident from RCN's allegations, which make clear that Rightscorp has shielded its notices from scrutiny by failing to disclose and then destroying all of the data and other evidence upon which they may have been based. *See, e.g.*, AAC, ¶¶ 91, 95, 101. The Court should therefore reject Rightscorp's request for dismissal under Rule 9(b).[6]

C. RCN Has Alleged Fraudulent Conduct in Violation of the UCL.

As discussed above in Section I.A, Rule 9(b) does not govern RCN's UCL claim because the focus of the claim is Rightscorp's unfair business practices, not common law fraud that implicates Rule 9(b). Additionally, however, Rightscorp's argument that RCN has not sufficiently alleged fraud under the UCL is based on

[6] As noted *infra* in Section V, if the Court deemed it necessary, RCN would allege additional facts demonstrating that more detailed information about any alleged fraud is uniquely in Rightscorp's (and/or Plaintiffs') possession or control.

the false premise that the common law standards for pleading and proving fraud apply here. *See, e.g.*, Rightscorp's Memo. at 9–12.

In fact, "the 'fraud' contemplated by section 17200's third prong bears little resemblance to common law fraud or deception." *State Farm*, 45 Cal. App. 4th at 1105. "The test is whether the public is likely to be deceived." *Id.* (citation omitted). "This means that a section 17200 violation, unlike common law fraud, can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage." *Id.*

To the extent the Court concludes RCN has not adequately alleged unfair conduct under the UCL and therefore must sufficiently allege fraudulent conduct to state a claim, RCN has done so. Each year, Rightscorp accuses thousands of users of RCN's internet service of copyright infringement through email "notices" that identify the accused infringer by IP address and threaten litigation if the accused infringer refuses to pay Rightscorp to settle the claim. AAC, ¶¶ 67–69, 97. These allegations are calculated to persuade the recipient that the infringement occurred as alleged and that the recipient is in serious legal jeopardy. *See id.* In fact, however, Rightscorp makes accusations regarding types of copyright infringement it is unable to detect, has no actual evidence that the accused has infringed any copyright, has no authority or ability to pursue litigation for copyright infringement, and can only settle a claim on behalf of one of multiple potential

rightsholders (if any). *Id.*, ¶¶ 69, 91, 95, 103–107. Irrespective of whether Rule 8 or Rule 9(b) applies, these allegations are more than sufficient to show that Rightscorp has engaged and is engaging in conduct that is likely to deceive RCN and the accused infringers. *See also Burlington Coat Factory*, 114 F.3d at 1418 (Rule 9(b) is relaxed "where the factual information is peculiarly within the defendant's knowledge or control").

D. RCN Has Alleged Unlawful Conduct in Violation of the UCL.

All that is necessary to state a claim under the "unlawful" prong of the UCL is allegations that the defendant engaged in a business practice "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *See Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838–39 (1994) (citation omitted). "It is not necessary that the predicate law provide for private civil enforcement." *Id.*

The prohibition on the spoliation of evidence is such "court-made" law. The Federal Rules of Civil Procedure give district courts authority to regulate parties' duties with respect to the preservation of evidence and to sanction parties for destroying or significantly altering evidence, and for failing "to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *See Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 335 (D.N.J. 2004) (citations omitted). RCN's allegations make clear that Rightscorp violated this

"court-made law" by intentionally destroying evidence related to its email notices of alleged copyright infringement, which were sent in anticipation of litigation. *See* Am. Compl. & Counterclaims, ¶ 97.

RCN has therefore stated a claim under the unlawful prong of the UCL, which is an independent ground for denying Rightscorp's motion to dismiss.

E. Rightscorp's Request for "Judicial Notice" Is Meritless.

In arguing for dismissal, Rightscorp asks the Court to "take judicial notice" of "multiple federal courts [finding] Rightscorp's infringement system to be accurate and reliable." *See* Rightscorp's Memo. at 12–13. Rightscorp's request is frivolous.

Neither of the cited opinions resolved any factual issue presented in RCN's UCL claims.[7] Even if they had, RCN would still be entitled to dispute those findings. *See, e.g.*, Fed. R. Evid. 201(b) (only facts "not subject to reasonable dispute" may be judicially noticed). What Rightscorp seeks is not actually judicial notice, but some unrecognized form of collateral estoppel in which RCN would be precluded from litigating issues (ostensibly) decided in different cases in which neither RCN nor Rightscorp was a party. Rightscorp offers no authority for such

[7] The defendant in *Cox* did not raise the same issues with respect to Rightscorp's system and practices. The *Grande* case is still pending in the district court, and issues regarding the reliability and accuracy of Rightscorp's system and notices will be presented at trial.

"judicial notice," because there is none. The Court should therefore reject Rightscorp's request.

II. RCN HAS STANDING UNDER THE UCL

Rightscorp contends that RCN has failed to allege sufficient facts demonstrating standing to bring a UCL claim—namely, causation and injury. As detailed in RCN's opposition to Plaintiffs' motion to dismiss, Rightscorp is wrong. RCN alleges that it "lost money or property as a result of the unfair competition" through the costs it incurred in developing, implementing, and maintaining a system capable of processing the huge volume of copyright infringement allegations sent by Rightscorp, and otherwise through costs incurred in evaluating and attempting to protect itself against Rightscorp's voluminous accusations. *See* RCN's Opp'n to Mot. to Dismiss at 25–30 (citing, *inter alia*, AAC, ¶¶ 54–56, 117) (ECF No. 135); *see also* Cal. Bus. & Prof. Code § 17204. These costs are the direct result of Rightscorp's alleged unfair competition and are therefore plainly sufficient to confer UCL standing. *See id.*

Nevertheless, Rightscorp makes a series of arguments that it claims demonstrate RCN's lack of UCL standing. Each is meritless.

A. Rule 9(b) Does Not Apply.

Rightscorp incorrectly suggests that Rule 9(b) governs RCN's allegations regarding UCL standing. Rightscorp offers no authority for this proposition—the

cases it cites concern different state law claims, not claims alleging unfair and fraudulent conduct under the UCL. *See* Rightscorp's Memo. at 18–19. In any event, even if RCN did have to plead UCL standing with particularity, Rightscorp fails to identify any necessary information that is absent from RCN's counterclaims. *See id.* As discussed above, RCN has alleged facts demonstrating that it "lost money or property as a result of the unfair competition," which is all that is required.

B. RCN Has Alleged Reliance, Assuming It Needs To.

Rightscorp wrongly asserts that RCN has failed to allege reliance on any misrepresentation by Rightscorp. Rightscorp acknowledges, however, that reliance is only necessary for UCL claims that sound in fraud (*see* Rightscorp's Memo. at 19), and as discussed above in Section I.A, RCN's UCL claim is based principally on Rightscorp's "unfair" conduct. *See In re Tobacco II Cases*, 207 P.3d 20, 39 n.17 (2009) ("We emphasize that our discussion of causation in this case is limited to such cases where, as here, a UCL action is based on a fraud theory involving false advertising and misrepresentations to consumers."). Thus, because RCN has stated a UCL claim based on Rightscorp's unfair conduct, this issue is irrelevant.

Furthermore, RCN *has* alleged that it suffered injury by relying on Rightscorp's "notices" of alleged copyright infringement. Irrespective of whether RCN actually forwarded Rightscorp's notices to the accused infringers, RCN still

incurred costs in designing, implementing, and maintaining a system that is capable of taking in and processing the enormous volume of notices RCN receives from Rightscorp. *See* AAC, ¶¶ 54–56, 117. In other words, RCN's system has to be able to process and evaluate Rightscorp's notices *in order to determine* that they should not be forwarded to RCN's customers (because they do not comply with RCN's DMCA policy). *See id.* As such, Rightscorp's claim that RCN has not alleged reliance is simply inaccurate.

C. RCN's Alleged Injury Is Not Outside the Limitations Period.

Rightscorp baselessly suggests that RCN's allegations are time-barred because RCN incurred any costs in "creating" its system more than four years before it filed its UCL claim against Rightscorp. *See* Rightscorp's Memo. at 20–21. Even if true, this would not warrant dismissal because RCN *also* alleges that it suffered injury as a result of costs RCN incurred in continuing to operate and maintain the system. *See* AAC, ¶ 56 ("[T]here are substantial ongoing costs associated with operating and maintaining the System.").

Rightscorp's argument also fails because it assumes and attempts to introduce facts outside the pleadings. *See, e.g.*, *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994) (statute of limitations defense cannot be raised under Rule 12(b)(6) unless "the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly

appears on the face of the pleading"). While it is true that RCN began operating its DMCA system prior to October 2016, it is *not* the case that RCN incurred all costs associated with designing and implementing the system prior to October 2016. In fact, the evidence will show that the design and implementation of the system was an iterative process that continued well after it was first activated. These matters cannot be resolved under Rule 12 because the relevant facts are not apparent from RCN's pleading.

D. RCN Suffered and Continues to Suffer Injury as a result of Rightscorp's Unfair and Fraudulent Conduct.

Rightscorp's contention that RCN did not incur costs in designing, operating, and maintaining its system "as a result of" Rightscorp's conduct cannot be reconciled with RCN's allegations. RCN expressly alleges that the huge volume of notices sent by Rightscorp is what caused RCN to implement the existing system for receiving and processing notices, at substantial expense. *See* AAC, ¶¶ 54–56. Rightscorp is free to pursue a defense that RCN would have incurred the same costs irrespective of Rightscorp's conduct, but that is not what RCN alleges. Rightscorp's argument therefore provides no basis for dismissal.[8] *See also Tobacco II Cases*, 207 P.3d at 40 (even where allegations of reliance are

[8] If anything, Rightscorp's suggestion that the verdict in *Cox* caused RCN to implement its system only supports RCN's allegations of injury. *See* Rightscorp's Memo. at 21. The plaintiff's claims in *Cox* were based on notices sent by Rightscorp, and so if the verdict caused RCN to act, then that means Rightscorp's notices caused RCN to act.

required, "the plaintiff is not required to allege that [the defendant's] misrepresentations were the sole or even the decisive cause of the injury-producing conduct").

E. RCN Is Not Required to Quantify Its Injury to Show Standing.

Rightscorp offers no authority supporting the notion that RCN must quantify the injury attributable to Rightscorp's conduct at the pleading stage. *See* Rightscorp's Memo. at 22. To have standing to seek injunctive relief, all that RCN must allege and prove is that RCN "lost money or property as a result of the unfair competition"—there is no requirement that RCN quantify that injury. *See* Cal. Bus. & Prof. Code § 17204. RCN has met that standard by alleging that the volume of notices sent by Rightscorp caused and causes RCN to incur substantial costs relating to the operation and maintenance of its system. *See* AAC, ¶¶ 54–56. Again, Rightscorp may attempt to dispute that allegation, but Rightscorp's disagreement is no basis for dismissal under Rule 12.

F. RCN Has Not Alleged that It Ignored Rightscorp's Notices.

RCN alleges that it also suffered injury as a result of costs it incurred in evaluating and responding to Rightscorp's copyright infringement allegations. *See* AAC, ¶ 117. RCN misconstrues RCN's allegations in claiming that RCN admits it has ignored Rightscorp's notices since October 2016. *See* Rightscorp's Memo. at 23. While RCN *has not forwarded Rightscorp's notices to its customers* since

October 2016 because Rightscorp's notices have not complied with RCN's DMCA policy, RCN had to continue to process and evaluate the notices to determine that. *See* AAC, ¶¶ 51–53, 99–100.

Thus, the related costs RCN incurred constitute cognizable injury during the four-year limitations period. *See also Aryeh v. Canon Bus. Solutions, Inc.*, 292 P.3d 871, 880 (Cal. 2013) (continuous accrual doctrine applies to UCL claims based on the defendant's repeated violations of continuing duties, triggering a new limitations period for each violation). In any event, there is no reason for the Court to reach this issue because RCN has separately alleged that it suffered injury in connection with the design, implementation, and maintenance of a system capable of processing the huge volume of notices sent by Rightscorp. *See* AAC, ¶¶ 54–56.

G. Rightscorp's Spoliation Argument Is Meritless.

Rightscorp claims that RCN cannot show injury from Rightscorp's spoliation of evidence, because RCN "does not claim that it would have acted differently if Rightscorp had maintained the allegedly destroyed evidence." *See* Rightscorp's Memo. at 25. This argument could only conceivably have merit if RCN's claim were based *solely* on Rightscorp's spoliation of evidence. It is not—RCN's claim is also based on Rightscorp's deliberate refusal to send notices that complied with RCN's DMCA policy. *See, e.g.*, AAC, ¶¶ 99–100.

Additionally, this is yet another improper attempt to litigate the facts on a motion to dismiss. Rightscorp may contend that RCN would have suffered the same injury even if Rightscorp had maintained and provided evidence supporting its copyright infringement allegations, but it is impossible to resolve that factual question under Rule 12. The Court should therefore deny Rightscorp's motion to dismiss.

H. The *Noerr-Pennington* Doctrine Does Not Bar RCN's Claim.

Rightscorp purports to join in Plaintiffs' argument that certain aspects of RCN's alleged injuries are not cognizable under the *Noerr-Pennington* doctrine. *See* Rightscorp's Memo. at 26. RCN incorporates by reference its previous response. *See* RCN's Opp'n to Mot. to Dismiss at 29 (ECF No. 135). As detailed above, RCN has alleged injury sufficient to confer UCL standing—injury that is separate from any legal defense costs caused by Rightscorp's unfair and fraudulent conduct—and *Noerr-Pennington* therefore does not bar RCN's claim. *See id.*

III. RCN'S RIGHT TO RESTITUTION IS NO BASIS FOR DISMISSAL BECAUSE RCN IS SEEKING INJUNCTIVE RELIEF

As detailed in prior briefing, it is irrelevant whether RCN is entitled to restitution because RCN has stated a claim for injunctive relief under the UCL. *See* Cal. Bus. & Prof. Code § 17204; RCN's Opp'n to Mot. to Dismiss at 30–31 (ECF No. 135). Rightscorp's argument regarding RCN's right to restitution therefore provides no basis for dismissal under Rule 12. *See id.*

IV. CONFLICT PREEMPTION DOES NOT APPLY

For the reasons stated previously, RCN's UCL claim is not preempted by the DMCA. *See* RCN's Opp'n to Mot. to Dismiss at 10–25 (ECF No. 135). Rightscorp offers no argument on that subject apart from the naked assertion that it joins Plaintiffs' arguments.

V. IF NECESSARY, LEAVE TO AMEND IS WARRANTED

For the reasons set forth above, if the Court finds that RCN has failed to allege sufficient facts to show unfair, fraudulent, or unlawful conduct under the UCL, to demonstrate standing under the UCL, or to state a claim for injunctive relief, the Court should grant leave to amend. Because this case is in its relatively early stages—with no depositions having been taken, no deadlines for expert discovery or dispositive motions, and no trial date—granting leave to amend is in the interests of justice. *See* Fed. R. Civ. P. 15(a)(2). RCN also incorporates by reference the discussion of amendment in its Opposition to Plaintiffs' Motion to Dismiss (ECF No. 135).

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

For the foregoing reasons, the Court should deny Rightscorp's Motion to Dismiss (ECF No. 136). RCN respectfully requests that the Court hold oral argument concerning the instant Motion to Dismiss.

Dated: January 12, 2021

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