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**UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

ENTTECH MEDIA GROUP LLC,

Plaintiff,

v.

OKULARITY, INC.;  
JON NICOLINI;  
BACKGRID USA, INC.;  
SPLASH NEWS AND PICTURE  
AGENCY, LLC; and  
XPOSURE PHOTO AGENCY, INC.,

Defendants.

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OKULARITY, INC.;  
JON NICOLINI;  
BACKGRID USA, INC.;  
SPLASH NEWS AND PICTURE  
AGENCY, LLC; and  
XPOSURE PHOTO AGENCY, INC.,

Counterclaimants,

v.

ENTTECH MEDIA GROUP LLC,

Counterdefendant.

Case No. 2:20-cv-06298-JWH-Ex

**MEMORANDUM OPINION AND  
ORDER REGARDING:**

**(1) DEFENDANTS' MOTIONS TO  
DISMISS THE THIRD AMENDED  
COMPLAINT [ECF Nos. 65 & 66];**

**(2) DEFENDANTS' MOTION FOR  
SANCTIONS PURSUANT TO  
RULE 11 OF THE FEDERAL  
RULES OF CIVIL PROCEDURE  
[ECF No. 39]; and**

**(3) ORDER TO SHOW CAUSE RE  
SANCTIONS UNDER  
RULE 11(c)(3) OF THE FEDERAL  
RULES OF CIVIL PROCEDURE  
[ECF No. 54]**

## I. INTRODUCTION

1  
2 This copyright case concerns an alleged unlawful scheme devised by  
3 Defendants Okularity, Inc.; Jon Nicolini; Splash News and Picture Agency,  
4 LLC; Xposure Photo Agency, Inc.; and BackGrid USA, Inc.<sup>1</sup> Defendants are  
5 the copyright owners, or agents of the copyright owners, of the works at issue—  
6 photographs of celebrities. Plaintiff ENTTEch Media LLC accuses Defendants  
7 of manipulating the takedown notice procedure of the Digital Millennium  
8 Copyright Act (the “DMCA”), *see* 17 U.S.C. § 512(c), in order to disable  
9 monetized social media accounts and then to demand extortionate sums from  
10 the social media account holders to have their accounts restored. ENTTEch  
11 claims that it was a victim of Defendants’ conspiracy. According to ENTTEch,  
12 Defendants knowingly misrepresented in their takedown notices that they had  
13 exclusive rights in the allegedly infringing material and also knowingly  
14 misrepresented that they considered the possibility of fair use before issuing the  
15 takedown notices, in violation of 17 U.S.C. § 512(f). ENTTEch further alleges  
16 that Defendants’ scheme constitutes a pattern of racketeering activity in  
17 violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”),  
18 18 U.S.C. §§ 1961–1968.

19 Before the Court are three separate but related matters. The first two are  
20 Defendants’ motions: (1) for sanctions against ENTTEch and its counsel,  
21 Robert Tauler and his firm, for violation of Rule 11 of the Federal Rules of Civil  
22 Procedure,<sup>2</sup> and (2) to dismiss ENTTEch’s Third Amended Complaint  
23 pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure<sup>3</sup> (jointly, the  
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25 <sup>1</sup> Defendant Splash News and Picture Agency, LLC, together with Xposure  
26 Photo Agency, Inc., and BackGrid USA, Inc., are collectively referred to herein  
as the “Photo Agencies.”

27 <sup>2</sup> Defs.’ Joint Mot. for Sanctions (including its attachments) (the “Motion  
for Sanctions”) [ECF No. 39].

28 <sup>3</sup> Mot. of the Photo Agencies to Dismiss the Third Amend. Compl. [ECF  
No. 65]; Mot. of Defs. Jon Nicolini and Okularity, Inc., to Dismiss the Third

1 “Motions”). The third matter is the Court’s Order to Show Cause regarding  
2 potential sanctions against ENTTEch and its counsel under Rule 11(c)(3).<sup>4</sup> The  
3 Court conducted a hearing on all of these matters on February 11, 2021.

4 After considering the voluminous papers filed in support and in  
5 opposition to the Motions and the OSC, and the arguments of counsel at the  
6 hearing, the Court (1) **GRANTS in part** and **DENIES in part** Defendants’  
7 Motion to Dismiss; (2) **DENIES** Defendants’ Motion for Sanctions; and  
8 (3) **DISCHARGES** the OSC. The Court explains its ruling below.

## 9 **II. BACKGROUND**

10 An extensive procedural history precedes the Motions and the OSC.

11 ENTTEch filed its original complaint on July 15, 2020.<sup>5</sup> On August 5,  
12 2020, counsel for Defendants notified ENTTEch’s counsel, Robert Tauler, that  
13 Defendants were contemplating several motions, including a motion to dismiss  
14 under Rule 12(b)(6) and a motion for sanctions under Rule 11.<sup>6</sup> Among other  
15 grievances, Defendants objected that the factual contentions in ENTTEch’s  
16 Complaint lacked the requisite legal and evidentiary support—in violation of  
17 Rule 11—particularly ENTTEch’s allegations regarding Defendants’ abuse of  
18 the DMCA takedown notice procedures.<sup>7</sup> Defendants demanded that

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Amend. Compl. [ECF No. 66]; and Defs.’ Joint Mem. of P. & A. in Supp. of  
22 Defs.’ Mots. to Dismiss the Third Amend. Compl. [ECF No. 67] (jointly, the  
23 “Motion to Dismiss”). Unless otherwise indicated, citations herein to the  
24 Motion to Dismiss refer to the Joint Memorandum of Points and Authorities  
25 filed in support of Defendants’ respective motions.

24 <sup>4</sup> See Order to Show Cause Re Sanctions under Rule 11(c)(3) of the Federal  
25 Rules of Civil Procedure (the “OSC”) [ECF No. 54].

25 <sup>5</sup> See generally Compl. [ECF No. 1]. ENTTEch asserted the following four  
26 claims for relief in its original Complaint: (1) Violations of the DMCA;  
27 (2) Violations of RICO; (3) Intentional Interference with Economic Advantage;  
28 and (4) Unfair Competition, Cal. Bus. & Prof. Code § 17200.

27 <sup>6</sup> See Letter from Peter Perkowski to Robert Tauler (Aug. 5, 2020) [ECF  
28 No. 39-13].

28 <sup>7</sup> See *id.* at 1 & 3–6.

1 ENTTEch withdraw its Complaint.<sup>8</sup> ENTTEch filed its First Amended  
2 Complaint five days later.<sup>9</sup>

3 On August 24, 2020, Defendants moved to dismiss ENTTEch’s FAC for  
4 failure to state a claim pursuant to Rule 12(b)(6);<sup>10</sup> ENTTEch opposed.<sup>11</sup> On  
5 September 25, 2020, Defendants filed a joint Motion for Rule 11 Sanctions,<sup>12</sup>  
6 which ENTTEch also opposed.<sup>13</sup> On October 2, 2020, the Court—the  
7 Honorable R. Gary Klausner, presiding—(1) granted Defendants’ motion to  
8 dismiss the FAC, with leave to amend, with respect to ENTTEch’s RICO claim;  
9 and (2) denied Defendants’ motion to dismiss with respect to ENTTEch’s  
10 DMCA claim.<sup>14</sup> A few days later, the action was transferred to this Court by  
11 order of the Chief Judge.<sup>15</sup> ENTTEch filed its Second Amended Complaint on  
12 October 16, 2020.<sup>16</sup> Shortly thereafter, the Photo Agencies filed a Counterclaim  
13 against ENTTEch with respect to the alleged infringing material that was the  
14 target of the DMCA takedown notices.<sup>17</sup>

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<sup>8</sup> See *id.* at 1.

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<sup>9</sup> See First Amend. Compl. (the “FAC”) [ECF No. 23]. ENTTEch asserted two claims for relief in its FAC: (1) Violations of the DMCA; and (2) Violations of RICO.

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<sup>10</sup> Defs.’ Mot. to Dismiss the FAC [ECF No. 26]; Mem. in Supp. of Mot. to Dismiss the FAC [ECF No. 27]; Notice of Joinder in Mot. to Dismiss the FAC [ECF No. 28].

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<sup>11</sup> Pl.’s Opp’n to Defs.’ Mot. to Dismiss the FAC [ECF No. 35].

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<sup>12</sup> See Motion for Sanctions; see also Defs.’ Reply in Supp. of the Motion for Sanctions (the “Sanctions Reply”) [ECF No. 45].

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<sup>13</sup> See Opp’n by Pl. ENTTEch Media Group LLC, Tauler Smith LP, and Robert Tauler, Esq. to Defs.’ Motion for Sanctions (the “Sanctions Opposition”) [ECF No. 42].

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<sup>14</sup> See generally Order Re: Defs.’ Mot. to Dismiss [ECF No. 40].

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<sup>15</sup> See Order of the Chief Judge (#20-156) [ECF No. 43].

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<sup>16</sup> Pl.’s Second Amend. Compl. (the “SAC”) [ECF No. 46].

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<sup>17</sup> See generally Answer to ENTTEch’s SAC and Counterclaim to SAC by Defs. Backgrid, Splash, and Xposure (the “Counterclaim”) [ECF No. 53].

1           Upon review of ENTTEch’s SAC and ENTTEch’s arguments in  
 2 opposition to the Motion for Sanctions, the Court determined that although the  
 3 paper that was the subject of that motion (*i.e.*, the FAC) had been superseded,  
 4 the SAC contained many, if not all, of the challenged allegations.<sup>18</sup> On  
 5 October 28, 2020, pursuant to Rule 11(c)(3) of the Federal Rules of Civil  
 6 Procedure, the Court ordered ENTTEch to show cause regarding sanctions  
 7 under Rule 11.<sup>19</sup> Specifically, the Court determined that it was “appropriate to  
 8 give ENTTEch one more chance to cure (or otherwise to address in a more  
 9 robust manner) the apparent infirmities that Defendants raise[d] in their Motion  
 10 for Sanctions.”<sup>20</sup> The Court, therefore, provided ENTTEch with three options:  
 11 (1) file a notice of withdrawal of the SAC and either a stipulation of dismissal of  
 12 ENTTEch’s claims with prejudice or a motion for dismissal of ENTTEch’s  
 13 claims with prejudice;<sup>21</sup> (2) file a Third Amended Complaint that cured each of  
 14 the allegedly offending allegations in the FAC;<sup>22</sup> or (3) file a Memorandum of  
 15 Points and Authorities, with supporting declarations, explaining why the Court  
 16 should not issue sanctions and setting forth detailed facts demonstrating  
 17 ENTTEch and ENTTEch’s counsel’s reasonable inquiry regarding each of the  
 18 allegedly offending allegations in the FAC.<sup>23</sup>

19           ENTTEch elected option two<sup>24</sup> and filed its Third Amended Complaint  
 20 on November 13, 2020.<sup>25</sup> Defendants responded to the OSC on November 20,  
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22 <sup>18</sup> See OSC 4:1–5:2.

23 <sup>19</sup> See *id.*

24 <sup>20</sup> *Id.* at 4:24–5:2.

25 <sup>21</sup> *Id.* at 5:5–15.

26 <sup>22</sup> *Id.* at 5:17–20.

27 <sup>23</sup> *Id.* at 5:22–6:2.

28 <sup>24</sup> See Decl. of Robert E. Kohn in Resp. to the OSC [ECF No. 60] ¶ 2.

<sup>25</sup> See Third Amend. Compl. (the “TAC”) [ECF No. 57]. ENTTEch asserts two claims for relief in its TAC: (1) Violations of the DMCA; and (2) Violations of RICO.

1 2020.<sup>26</sup> Defendants then requested to cross-examine Mr. Tauler live at the  
2 hearing on the OSC, pursuant to this Court's Local Rules,<sup>27</sup> which ENTTEch  
3 opposed.<sup>28</sup> Defendants filed the instant Motion to Dismiss on November 30,  
4 2020. On December 14, 2020, the Court held a status conference regarding  
5 Defendants' L.R. 7-8 Request and set a schedule for further briefing in response  
6 to the OSC and with respect to Defendants' Motion to Dismiss the TAC.<sup>29</sup>  
7 With regard to Defendants' L.R. 7-8 Request, the Court authorized the parties  
8 to depose their respective opposing declarants, so long as the scope of each  
9 deposition was limited to cross-examination regarding the declarants' testimony  
10 in connection with the Motion for Sanctions and the OSC.

11 Thereafter, the parties timely filed their respective supplemental briefs  
12 regarding the OSC<sup>30</sup> as well as their briefs in connection with Defendants'  
13 Motion to Dismiss.<sup>31</sup> On February 11, 2021, the Court conducted a hearing  
14 regarding the OSC and the Motions.

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19 <sup>26</sup> See Defs.' Joint Mem. of P & A Re the OSC (the "Defs.' OSC  
Response") [ECF No. 63].

20 <sup>27</sup> See Defs.' Request to Cross-Examine Robert Tauler Pursuant to L.R. 7-8  
21 (the "L.R. 7-8 Request") [ECF No. 64].

22 <sup>28</sup> See Pl.'s Obj. to Defs.' L.R. 7-8 Request [ECF No. 68].

23 <sup>29</sup> See Minutes of Video Hearing Re: Status Conference [ECF No. 74].

24 <sup>30</sup> See Pl.'s Resp. to the OSC (the "Pl.'s OSC Response") [ECF No. 77];  
25 Defs.' Joint Reply to the OSC (the "Defs.' OSC Reply") [ECF No. 81]; and  
26 Pl.'s Sur-Reply to the OSC (the "Pl.'s Sur-Reply") [ECF No. 82]. Relatedly,  
27 on February 9, 2021, Defendant Splash News filed a notice of assignment of its  
28 copyrights. See Notice to the Ct. Re Assignment of Splash News and Picture  
Agency LLC's Copyrights (the "Notice of Assignment") [ECF No. 84].  
ENTTEch filed objections to the Notice of Assignment the same day. See Pl.'s  
Objs. to the Notice of Assignment [ECF No. 85].

<sup>31</sup> See Pl.'s Opp'n to the Motion to Dismiss (the "MTD Opposition")  
[ECF No. 78]; and Defs.' Reply in Supp. of the Motion to Dismiss (the "MTD  
Reply") [ECF No. 80].

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### III. DISCUSSION

The analysis of Defendants’ Motion to Dismiss informs the Court’s analysis and conclusion with respect to Defendants’ Motion for Sanctions. Accordingly, the Court will address the Motions in that order.

#### A. The Motion to Dismiss

##### 1. Legal Standard

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims asserted in a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In ruling on a Rule 12(b)(6) motion, “[a]ll allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.” *Am. Family Ass’n v. City & County of San Francisco*, 277 F.3d 1114, 1120 (9th Cir. 2002). Although a complaint attacked by a Rule 12(b)(6) motion “does not need detailed factual allegations,” a plaintiff must provide “more than labels and conclusions.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

To state a plausible claim for relief, the complaint “must contain sufficient allegations of underlying facts” to support its legal conclusions. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). “Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . . .” *Twombly*, 550 U.S. at 555 (citations and footnote omitted). A complaint “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face,” meaning that a plaintiff must plead sufficient factual content to “allow[] the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *see also id.* at 679 (a complaint must contain “well-pleaded facts” from which the Court can “infer more than the mere possibility of misconduct”).

1 Allegations of fraud, however, must be pleaded with particularity.  
2 Fed. R. Civ. P. 9(b). This means that the pleader must “detail with particularity  
3 the time, place, and manner of each act of fraud, plus the role of each defendant  
4 in each scheme.” *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d  
5 397, 405 (9th Cir. 1991) (citing Fed. R. Civ. P. 9(b)); *see Odom v. Microsoft Corp.*,  
6 486 F.3d 541, 553 (9th Cir. 2007). The heightened pleading standard under  
7 Rule 9(b) applies to claims that are “grounded in fraud” or that “sound in  
8 fraud.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1122 (9th Cir. 2009) (quoting  
9 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003)).

10 Furthermore, if the court finds that dismissal of a claim is appropriate, it  
11 must also decide whether to grant leave to amend. The Federal Rules of Civil  
12 Procedure strongly favor granting leave to amend, *see* Fed. R. Civ. P. 15(a);  
13 however, the court has discretion to deny leave if it determines “that the  
14 pleading could not possibly be cured by the allegation of other facts,” *Lopez v.*  
15 *Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Doe v. United States*, 8 F.3d  
16 494, 497 (9th Cir. 1995)).

## 17 **2. ENTTech’s DMCA Claim**

18 The DMCA imposes liability for misrepresenting that copyright  
19 infringement occurred. 17 U.S.C. § 512(f). To state a claim under § 512(f), a  
20 plaintiff must allege facts to show that (1) the defendant knowingly and  
21 materially misrepresented that copyright infringement occurred; (2) a service  
22 provider relied on that misrepresentation; and (3) the plaintiff was injured as a  
23 result. *See id.* The “knowingly” prong of the first element is the focus of the  
24 parties’ arguments.<sup>32</sup>

25 To satisfy the “knowingly” prong, ENTTech must allege sufficient facts  
26 to show that Defendants lacked a subjective good faith belief that the images that  
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28 <sup>32</sup> *See generally* Motion to Dismiss 20:17–22:21; MTD Reply 8:7–10.



1 were the subject of the takedown notices were infringing. *See Lenz v. Universal*  
 2 *Music Corp.*, 815 F.3d 1145, 1154 (9th Cir. 2016) (citing *Rossi v. Motion Picture*  
 3 *Ass’n of Am. Inc.*, 391 F.3d 1000, 1004 (9th Cir. 2004)). In this regard, the Ninth  
 4 Circuit has held that the DMCA “requires consideration of fair use prior to  
 5 sending a takedown notification . . . .” *Id.* In other words, a defendant in a  
 6 § 512(f) claim cannot maintain that it formed a subjective good faith belief of the  
 7 plaintiff’s copyright infringement if the defendant did not consider fair use.  
 8 This Court previously held that ENTTEch adequately pleaded its DMCA  
 9 claim<sup>33</sup> based upon ENTTEch’s allegations that Okularity “automatically  
 10 generates [and submits] DMCA notices without considering . . . fair use.”<sup>34</sup>  
 11 The Court reasoned that those allegations, if true, were enough to constitute  
 12 “lack of subjective good faith belief because if Okularity failed to consider fair  
 13 use, it could not have formed a good faith belief that the images were  
 14 infringing.”<sup>35</sup>

15 In the instant Motion to Dismiss, Defendants contend that dismissal of  
 16 the DMCA claim is appropriate for two related reasons. Defendants’ arguments  
 17 are as follows:

- 18 • In its TAC, ENTTEch alleges that the DMCA takedown notices are
- 19 automatically *generated*, but ENTTEch does not allege that the notices are
- 20 automatically *submitted* (as ENTTEch alleged in its previous pleadings).
- 21 Therefore, the TAC does not support an inference that Okularity’s process does
- 22 not include any infringement or fair use analysis.<sup>36</sup>

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 26 <sup>33</sup> See Order Re Defs.’ Motion to Dismiss 6–8.

27 <sup>34</sup> *Id.* at 7 (citing FAC ¶¶ 15, 27, 40, & 37).

28 <sup>35</sup> *Id.*

<sup>36</sup> See Motion to Dismiss 20:24–21:8.

1 • By alleging that “many or all of the DMCA notices contained identical  
2 verbatim discussion of infringement and fair use . . . ,”<sup>37</sup> ENTTEch effectively  
3 admits that Okularity “did in fact conduct infringement and fair-use analysis  
4 before submitting DMCA takedown notices.”<sup>38</sup> In this regard, each takedown  
5 notice contains a multi-paragraph legal analysis of fair use with respect to the  
6 allegedly infringing work.<sup>39</sup> However, the fair-use analysis contained in the  
7 takedown notices is identical for each of the allegedly infringing works.<sup>40</sup>

8 ENTTEch’s allegation that the DMCA notices contained an analysis of  
9 infringement and fair use presents a question of first impression with respect to  
10 the standard for pleading a claim under § 512(f). Is it sufficient for ENTTEch to  
11 allege that, notwithstanding the takedown notices’ explicit and extensive fair-  
12 use analysis, Defendants did not *actually* or *sufficiently* consider fair use before  
13 issuing the takedown notices? At first blush, the fact that the DMCA takedown  
14 notices contain fair-use analyses—even if those analyses are identical and *pro*  
15 *forma*—seems to satisfy the requirement to “consider” fair use before issuing a  
16 takedown notice. *See Lenz*, 815 F.3d at 1154. The presence of the purported  
17 fair-use analysis in each takedown notice also distinguishes this case from *Lenz*  
18 where the plaintiff alleged that the defendant did not consider fair use at all. *Cf.*  
19 *id.*

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<sup>37</sup> TAC ¶ 15.

24 <sup>38</sup> Motion to Dismiss 21:9–21:11; *see also id.* at 21:11–22:21. Thus, according  
25 to Defendants, the Court should disregard ENTTEch’s conclusory allegation  
26 that “Okularity submits these [DMCA takedown] notices without any of the  
analysis required by the DMCA.” Motion to Dismiss 21:23–25 (quoting TAC  
¶ 15).

27 <sup>39</sup> *See, e.g.*, Counterclaim, Ex. C [ECF No. 53-13] at ECF p. 4. Exhibit C to  
the Counterclaim contains the takedown notices transmitted by Defendants.

28 <sup>40</sup> *Compare, e.g., id.* at ECF p. 4, *with id.* at ECF pp. 8, 10, 12, & 14.

1 Is ENTTEch required to allege *additional* facts, in view of the appearance  
2 that Defendants considered fair use?<sup>41</sup> For example, must ENTTEch allege  
3 evidentiary facts concerning Defendants’ analytical process or subjective state of  
4 mind (the type of facts which, in most cases, are not available to a plaintiff before  
5 discovery is taken)? Does the *Iqbal/Twombly* plausibility standard require  
6 ENTTEch to aver its *own* analysis of fair use to support an inference that  
7 Defendants merely paid “lip service” to the consideration of fair use?<sup>42</sup> *Cf. id.*  
8 at 1163. Having considered these questions, the Court concludes that  
9 ENTTEch’s allegations in the TAC are sufficient at this stage of the litigation.

10 Although *Lenz* involved a motion for summary judgment, that decision is  
11 nevertheless instructive with respect to the issue presently before the Court.  
12 *Lenz* supports the conclusion that the question of whether a copyright owner  
13 formed a subjective good faith belief that an alleged infringer’s copying of the  
14 work did not constitute fair use is, in most instances, a factual issue that is not  
15 appropriate for resolution on a motion to dismiss. “Because the DMCA  
16 requires consideration of fair use prior to sending a takedown notification,” the  
17 Ninth Circuit held that “a jury must determine whether [the defendant’s]  
18 actions were sufficient to form a subjective good faith belief about the [allegedly  
19 infringing] video’s fair use or lack thereof.”<sup>43</sup> *Id.* at 1154. In response to the  
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21 <sup>41</sup> In this regard, because § 512(f) “does not require an exacting  
22 consideration of fair use principles,” Defendants contend that ENTTEch is  
23 required to plead a lack of subjective good faith, supported by sufficient factual  
24 allegations plausibly to show the same. MTD Reply 7:24–25; *see also id.* at 7:4–5.  
25 Defendants argue that § 512(f) requires only “so much consideration [of fair  
26 use] as to form a subjective good-faith belief” and “only the complete failure to  
27 consider fair use—and the knowledge that one failed to do so when submitting  
28 the DMCA takedown notice—has previously been found to violate this  
standard.” *Id.* at 7:25–28.

26 <sup>42</sup> *Cf., e.g.,* Motion for Sanctions 7:10–12 (“[H]ad Tauler reviewed  
27 ENTTEch’s infringements himself, he would have seen that fair use is not a  
28 plausible legal argument for any of the 34 unauthorized uses.”).

28 <sup>43</sup> The Court *makes no finding* that would preclude a future motion for  
summary judgment, by any party, in this case. In *Lenz*, the Ninth Circuit  
explained that “[a] copyright holder who pays lip service to the consideration of

1 arguments in the dissenting opinion regarding the propriety of granting  
2 summary judgment, the *Lenz* panel majority explained that the relevant question  
3 was “whether the analysis [the defendant] did conduct of the [alleged infringing  
4 material] was sufficient, not to conclusively establish as a matter of law that the  
5 . . . use of the [copyrighted material] was fair, but to form a subjective good faith  
6 belief that the video was infringing on [the] copyright.” *Id.* at 1154 n.3.

7 Therefore, because it is generally a factual issue whether the analysis that  
8 the defendant did conduct of the alleged infringing material was sufficient, *see*  
9 *id.*, it necessarily follows that to plead a claim under § 512(f), it is enough for  
10 ENTTEch to allege that Defendants did not consider fair use (sufficiently or at  
11 all) before issuing the takedown notices. And that is exactly what ENTTEch  
12 alleges here. Requiring ENTTEch to allege more would effectively impose a  
13 heightened pleading standard, *see* Fed. R. Civ. P. 9(b), and no authority holds  
14 that claims under § 512(f) must be pleaded with particularity.<sup>44</sup> Thus, although  
15 it may be advisable for a plaintiff like ENTTEch to aver additional facts (such as  
16 its own analysis of fair use) to support the allegation that a defendant’s fair use  
17 analysis was merely *pro forma*, the Court cannot conclude that ENTTEch is  
18 required to plead such facts in order to state a plausible claim for relief under  
19 § 512(f).

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22 fair use by claiming it formed a good faith belief ***when there is evidence to the***  
23 ***contrary*** is still subject to § 512(f) liability.” *Lenz*, 815 F.3d at 1154–55  
24 (emphasis added) (citing cases denying summary judgment of § 512(f) claims  
25 where there was evidence in the record to suggest the defendant did not form a  
26 good faith belief). In this regard, the plaintiff in *Lenz* submitted evidence that  
the defendant “did not form any subjective belief about the video’s fair use—  
one way or another—because it failed to consider fair use at all, and knew that it  
failed to do so.” *Id.* at 1154. The presence of such evidence, therefore,  
precluded summary judgment. *Id.* This case, in contrast, is still in its initial  
stages.

27 <sup>44</sup> Moreover, this Court previously held that ENTTEch’s claim under  
28 § 512(f) does not turn upon allegations of fraud and, therefore, that ENTTEch is  
not required to plead its DMCA claim with particularity. *See* Order Re Defs.’  
Motion to Dismiss 6.

1 Based upon the foregoing, the Court finds that ENTTEch sufficiently  
2 pleaded its DMCA claim. Therefore, the Court **DENIES** Defendants’ Motion  
3 to Dismiss with respect to ENTTEch’s DMCA claim.

4 **3. ENTTEch’s RICO Claim**

5 In its TAC, ENTTEch alleges that Defendants formed an enterprise that  
6 engages in a pattern of racketeering activity to harm ENTTEch in violation of  
7 RICO. Defendants argue that the *Noerr-Pennington* doctrine<sup>45</sup> bars ENTTEch’s  
8 RICO claim.<sup>46</sup> In its Opposition, ENTTEch acknowledges this Court’s previous  
9 ruling that the DMCA takedown notices constitute petitioning activity for the  
10 purpose of the *Noerr-Pennington* doctrine.<sup>47</sup> Accordingly, ENTTEch’s argument  
11 is limited to whether the sham litigation exception to the *Noerr-Pennington*  
12 doctrine applies in this case.<sup>48</sup>

13 Under that exception, a party cannot claim the protections of the  
14 *Noerr-Pennington* doctrine if it engaged in a “sham” litigation. *See Octane*  
15 *Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556 (2014). To assert  
16 the sham litigation exception, ENTTEch must allege that Defendants’  
17 transmittal of the DMCA notices—the petitioning conduct—was both  
18 (1) objectively baseless; and (2) subjectively improper. *Id.*; *see also Prof’l Real*  
19 *Est. Inv’rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 62 (1993). In this  
20 regard, the Ninth Circuit has held that *Noerr-Pennington* immunity “is not a  
21 shield for petitioning conduct that, ‘although ostensibly directed toward  
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23 <sup>45</sup> *See E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127  
24 (1965); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

25 <sup>46</sup> Defendants also argue that ENTTEch fails to plead its RICO claim with  
26 particularity. However, because the Court finds that the *Noerr-Pennington*  
27 doctrine bars ENTTEch’s RICO claim, and that the sham litigation exception to  
28 that doctrine does not apply, the Court need not reach Defendants’ second  
argument.

<sup>47</sup> MTD Opposition 8:15–21.

<sup>48</sup> *Id.*

1 influencing governmental action, is a mere sham to cover what is actually  
2 nothing more than an attempt to interfere directly with the business  
3 relationships of a competitor.’” *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 934 (9th  
4 Cir. 2006) (citation omitted).

5 ENTTEch contends that Defendants’ transmittal of the DMCA takedown  
6 notices was objectively baseless because: (1) Defendants did not have exclusive  
7 ownership of some of the allegedly infringing photographs and, therefore,  
8 Defendant Okularity (through Defendant Nicolini) did not have a good faith  
9 basis for believing that it was acting on behalf of the “owner of an exclusive  
10 right,”<sup>49</sup> *see* 17 U.S.C. § 512(c)(3)(A)(vi); and (2) no reasonable litigant in  
11 similar circumstances would have claimed damages in the amount claimed by  
12 Defendants in connection with the alleged infringement.<sup>50</sup> The Court is not  
13 persuaded.

14 ENTTEch’s argument that Defendants did not have exclusive rights in  
15 the allegedly infringing material is not supported by sufficient allegations, such  
16 as facts to show that Defendants assigned their rights or granted an exclusive  
17 license. Moreover, Defendants pleaded in their Counterclaim that they own the  
18 copyrights rights for all of the photos at issue. The Court also is not persuaded  
19 that the broad exposure of the photos on the internet supports an inference that  
20 any Defendant has relinquished its exclusive rights in any of the photos. The  
21 allegation that the photos were “widely distributed,” credited as true, does not  
22 necessarily mean that Defendants relinquished their exclusive ownership of the  
23 works. And there are insufficient facts alleged to support any inference to the  
24 contrary.

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<sup>49</sup> *See id.* at 9:19–10:15.

28 <sup>50</sup> *See id.* at 10:16–23; *see also* TAC ¶ 23.

1           Accordingly, the Court concludes that ENTTEch has not demonstrated  
2 that Defendants’ transmittal of the DMCA takedown notices was objectively  
3 baseless. Because the Court finds that ENTTEch failed to demonstrate  
4 objective baselessness, the Court need not address whether Defendants’ claims  
5 were subjectively improper. *See White v. Lee*, 227 F.3d 1214, 1232 (9th Cir.  
6 2000) (“[o]bjective baselessness is the *sine qua non* of any claim that a particular  
7 lawsuit is not deserving of First Amendment protection”).

8           In sum, ENTTEch’s RICO claim is barred by the *Noerr-Pennington*  
9 doctrine. Furthermore, because ENTTEch has already amended its RICO  
10 claim, to no avail, the Court finds that granting ENTTEch leave to amend again  
11 would be futile. The Court, therefore, **GRANTS** Defendants’ Motion to  
12 Dismiss ENTTEch’s RICO claim **without leave to amend**.

### 13 **B. The Motion for Sanctions and the OSC**

#### 14 **1. Legal Standard**

15           The Federal Rules of Civil Procedure authorize a district court to impose  
16 sanctions against any “attorney, law firm, or party” who signs a pleading that is  
17 not well grounded in fact, is not warranted by existing law, is not made in good  
18 faith, or is brought for an improper purpose. *See Fed. R. Civ. P. 11(b) &(c)*;  
19 *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1131 (9th Cir. 2002). Rule 11 imposes an  
20 affirmative duty upon counsel to investigate the law and the facts before filing.  
21 *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987). This duty  
22 requires a reasonable inquiry. *See G.C. & K.B. Investments*, 326 F.3d 1096, 1109  
23 (9th Cir. 2003). The subjective intent of the filing attorney is irrelevant; the  
24 standard is objective “reasonableness,” viewed from the perspective of a  
25 competent attorney admitted to practice before the district court. *See id.* In  
26 cases where “the complaint is the primary focus of Rule 11 proceedings, a  
27 district court must conduct a two-prong inquiry to determine (1) whether the  
28 complaint is legally or factually baseless from an objective perspective, and (2) if

1 the attorney has conducted a reasonable and competent inquiry before signing  
2 and filing it.” *Christian*, 286 F.3d at 1127 (quotation marks omitted).

3 Finally, as a general rule, “Rule 11 should not be used to raise issues as to  
4 the legal sufficiency of a claim or defense that more appropriately can be  
5 disposed of by a motion to dismiss, a motion for judgment on the pleadings, a  
6 motion for summary judgment, or a trial on the merits.” 5A CHARLES ALAN  
7 WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. § 1335 (4th ed. 2020  
8 update).

## 9 2. Analysis

10 As detailed in the procedural background section of this Order, with  
11 respect to the issue of sanctions under Rule 11, there are two matters pending:  
12 (1) Defendants’ Motion for Sanctions; and (2) the Court’s OSC re Sanctions.  
13 These matters have been the subject of extensive briefing and oral argument.  
14 The Court recognizes that the parties’ arguments are detailed and nuanced. For  
15 the present purposes, however, the Court will focus on only the critical points.  
16 The fundamental question before the Court is whether the challenged  
17 allegations are objectively baseless. That question turns upon whether  
18 Mr. Tauler and his law firm, Tauler Smith LLP, conducted a reasonable inquiry  
19 to support ENTTech’s allegations regarding Defendants’ process for issuing the  
20 DMCA takedown notices and, in particular, ENTTech’s allegations that  
21 Defendants did not consider fair use before they issued the takedown notices.

22 In their Motion for Sanctions, Defendants contend that Mr. Tauler and  
23 his law firm failed to make a reasonable inquiry and ignored evidence and  
24 information provided by Defendants regarding ENTTech’s DMCA claim and  
25 RICO claim. The thrust of Defendants’ argument<sup>51</sup> relates to pre-litigation  
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27 <sup>51</sup> Defendants organize the allegedly offending allegations within different  
28 categories. However, the broader question of whether Rule 11 was violated  
turns upon whether ENTTech’s allegations—concerning Defendants’



1 communications between Mr. Tauler and Defendants and their counsel. In the  
2 course of those communications, Defendants advised Mr. Tauler that  
3 (1) Mr. Nicolini conducted an analysis of fair use with respect to each alleged  
4 infringement before transmitting the respective DMCA takedown notices;<sup>52</sup> and  
5 (2) the DMCA notices were not automatically submitted without human  
6 intervention.<sup>53</sup> To support these assertions, Defendants provided Mr. Tauler  
7 with a spreadsheet purporting to show that Mr. Nicolini reviewed each alleged  
8 infringement before transmitting the takedown notices and screenshots of the  
9 allegedly infringing photos.<sup>54</sup> Defendants therefore contend that ENTTEch's  
10 allegations contradicting this information run afoul of Rule 11.

11 The Court's analysis with respect to the *Lenz* decision, which is discussed  
12 in the preceding section, is dispositive of whether sanctions are warranted.  
13 Because the Court finds that it is generally a factual issue whether the  
14 Defendants' analysis of the alleged infringing material was sufficient, *see Lenz*,  
15 815 F.3d at 1154 n.3, the Court cannot conclude that the challenged allegations  
16 are objectively baseless under Rule 11. The parties have strong disagreements  
17 with respect to the inquiry that is required under these circumstances.  
18 However, Defendants' arguments effectively ask this Court to rule on the merits  
19 of ENTTEch's DMCA claim, which is not appropriate in the context of a  
20 motion under Rule 11 at this stage of the litigation. Similarly, notwithstanding  
21 the Court's decision to dismiss 's RICO claim with prejudice, in view of the  
22 broad standard set forth in *Lenz*; the nature of Defendants' process for  
23 generating DMCA takedown notices; and the parties' differing views with  
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25 \_\_\_\_\_  
26 analytical process and process for transmitting the takedown notices—are  
frivolous.

27 <sup>52</sup> See Motion for Sanctions 7:3–9:10.

28 <sup>53</sup> See *id.* at 9:11–10:4.

<sup>54</sup> See *id.* at 7:18–8:11.

1 respect to the disputed facts of this case, the Court concludes that it was not  
2 objectively unreasonable for ENTTEch to pursue a RICO theory of liability.  
3 Accordingly, Defendants’ Motion for Sanctions is **DENIED**,<sup>55</sup> and the Court’s  
4 OSC is **DISCHARGED**.

5 The Court also finds that Defendants’ Motion for Sanctions was not  
6 objectively baseless. Therefore, ENTTEch’s counterdemand for attorneys’ fees  
7 in defense of Defendants’ Motion for Sanctions<sup>56</sup> is **DENIED**.

8 The issues in this case are hotly contested, and, in the Court’s view, the  
9 parties’ have engaged in extremely aggressive litigation tactics. Nevertheless,  
10 based on the present record, the Court cannot find that ENTTEch, or  
11 Mr. Tauler, or Tauler Smith LLP, or any party, has run afoul of Rule 11.

#### 12 **IV. CONCLUSION**

13 For the reasons set forth above, the Court hereby **ORDERS** as follows:

14 1. Defendants’ Motion to Dismiss ENTTEch’s RICO claim is  
15 **GRANTED, without leave to amend**. Defendants’ Motion to Dismiss  
16 ENTTEch’s DMCA claim is **DENIED**.

17 2. Defendants are **DIRECTED** to file their respective pleadings in  
18 response to ENTTEch’s Third Amended Complaint on or before March 24,  
19 2021.

20 3. Defendants’ Motion for Sanctions is **DENIED**.

21  
22 <sup>55</sup> Defendants complain about the resources that they have been required to  
23 expend in defense of ENTTEch’s § 512(f) claim—which they regard as without  
24 merit—particularly in view of their copyright infringement Counterclaim—  
25 which they regard as having great merit. *See* Motion for Sanctions 15:7–17:16 &  
26 19:1–4; Defs.’ OSC Response 14:5–16:2. If Defendants are correct—if  
27 ENTTEch has indeed infringed Defendants’ copyrights—then Defendants have  
powerful potential remedies under the Copyright Act. *See, e.g.*, 17 U.S.C. § 505;  
28 *see also Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 557–59 (9th Cir. 1996) (a district  
court’s discretion to award prevailing attorneys’ fees under § 505 may be  
influenced by a number of factors, including “the plaintiff’s culpability in  
bringing or pursuing the action”).

<sup>56</sup> *See* Sanctions Opposition 15:25–28.

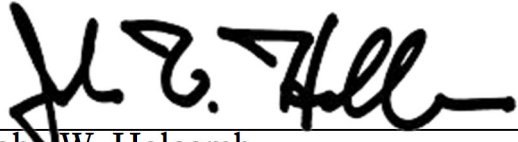
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4. ENTTech’s request for attorneys’ fees in connection with its defense against Defendants’ Motion for Sanctions is **DENIED**.

5. The Court’s OSC is **DISCHARGED**.

**IT IS SO ORDERED.**

Dated: March 10, 2021

  
\_\_\_\_\_  
John W. Holcomb  
UNITED STATES DISTRICT JUDGE