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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

REDBOX AUTOMATED RETAIL, LLC, Plaintiff, v. BUENA VISTA HOMEENERTAINMENT, INC., DISNEY ENTERPRISES, INC., LUCASFILM LTD, LLC, MVL FILM FINANCE LLC, AND MOVIES ANYWHERE LLC, Defendants.	Case No. CV 18-00677 DDP (AGRx) **ORDER RE: DEFENDANTS' MOTION TO DISMISS** [Dkt 58]

Presently before the court is Defendants Buena Vista Home Entertainment, Inc., Disney Enterprises, Inc., Lucasfilm Ltd. LLC, MVL Film Finance LLC, and Movies Anywhere, LLC (collectively, "Disney")'s Motion to Dismiss Plaintiff's First Amended Complaint ("FAC"). Having considered the submissions of the parties and heard oral argument, the court grants the motion in part, denies the motion in part, and adopts the following Order.

I. Background[1]

[1] The general factual background underlying this dispute is (continued...)

Disney is a major movie production studio. (FAC ¶ 34.) Disney's market share of movies rented or sold for home entertainment is greater than 50%. (Id. at ¶¶ 34-35.) Plaintiff Redbox Automated Retail, LLC ("Redbox") rents and sells movies on DVD and Blu-Ray discs via automated self-service kiosks, which are located in grocery stores, fast-food restaurants, and other locations throughout the country. (Id. at ¶¶ 25-29.) Redbox generally acquires its stock of Disney movies by purchasing them at retail outlets such as big-box stores and grocery stores. (Id. at ¶ 45.) Redbox often bought Disney movies as part of a "Combo Pack," which includes a DVD, a Blu-ray disc, and a digital movie that can be accessed with a code contained within the Combo Pack. (Id. at ¶ 46.) Each digital movie code can only be redeemed once, through one of two Disney websites (the "redemption websites"). (Id. at ¶ 47.)

In summer 2017, Redbox began selling the digital movie codes from its kiosks. (Id.) Soon after, Redbox alleges, Disney began pressuring distributors into refusing to sell retail copies of Disney titles to Redbox. (Id. at ¶¶ 49-56.) Disney also includes statements on Combo Pack packaging and on the digital movie codes representing that the components of Combo Packs cannot be rented or transferred separately. (Id. at ¶ 60.) The redemption websites also represent that Disney owns "[a]ll digital movie codes," which can only be redeemed by a person (or family member) who obtains the

[1] (...continued)
laid out in more detail in this Court's orders in a closely related case before this Court, Disney Enterprises, Inc., et al. v. Redbox Automated Retail, CV 17-08655 DDP ("Redbox I"). The relatively brief recitation of the facts herein is based upon Redbox's FAC in this case.

code as part of a Combo Pack, and that the codes may not be sold separately. (Id. at ¶¶ 61-62.) Redbox alleges that these representations are false because, as a purchaser of a Disney Combo Pack, Redbox has an unfettered right to dispose of the DVDs, Blu-rays, and digital movie codes contained within the Combo Packs. (Id. at ¶¶ 64-65.)

Redbox alleges that Disney's actions and misrepresentations have stifled competition and dissuade consumers from purchasing digital movies from Redbox. (FAC ¶¶ 92, 94.) The FAC alleges causes of action for declaratory relief, copyright misuse, tortious interference with prospective economic advantage, false advertising under both state and federal law, unfair competition, and state and federal antitrust violations. Disney now moves to dismiss all claims.

II. Legal Standard

A complaint will survive a motion to dismiss when it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)(quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). When considering a Rule 12(b)(6) motion, a court must "accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff." Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint need not include "detailed factual allegations," it must offer "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal,556 U.S. at 678. Conclusory allegations or allegations that are no more than a statement of a legal conclusion "are not entitled to the assumption of truth." Id. at 679. In other words, a pleading that merely offers "labels and conclusions," a "formulaic recitation of the elements," or "naked assertions" will not be sufficient to state a claim upon which relief can be granted. Id. at 678 (citations and internal quotation marks omitted).

"When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief." Id. at 1950. Plaintiffs must allege "plausible grounds to infer" that their claims rise "above the speculative level." Twombly, 550 U.S. at 555-56. "Determining whether a complaint states a plausible claim for relief" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679.

III. Discussion

A. Antitrust Claims

Disney argues that Redbox has not adequately alleged an antitrust violation. Section 1 of the Sherman Antitrust Act prohibits contracts, combinations, and conspiracies that unreasonably restrain trade.[2] 15 U.S.C. § 1; Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012). Some restraints, typically horizontal agreements between competitors, are unreasonable *per se*. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018). All other restraints must be analyzed under the "rule

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[2] The parties agree that federal cases interpreting the Sherman Act are applicable to claims under California's Cartwright Act. See, e.g. Pecover v. Elecs. Arts Inc., 633 F. Supp. 2d 976, 984 (N.D. Cal. 2009); Marin Cty. Bd. of Realtors, Inc. v. Palsson, 16 Cal. 3d 920, 925 (1976).

of reason." Id.; Brantley, 675 F.3d at 1197. "In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007). To state a Section 1 claim under the rule of reason, a plaintiff must allege (1) an agreement, conspiracy, or combination between two or more entities that (2) the entities intend to harm or restrain trade and (3) actually injures competition with (4) resulting "antitrust injury" to the plaintiff. Brantley, 675 F.3d at 1197.; Auto. Sound Inc. v. Audiovox Elec. Corp., No. 12-762, 2012 WL 12892938, at *3 (C.D. Cal. Dec. 3, 2012).

1. Relevant Market

Generally, to demonstrate injury to competition, a plaintiff "must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly." Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991). "Without a definition of the market, there is no way to measure the defendant's ability to lessen or destroy competition." Am. Express, 138 S.Ct. at 2285 (internal alteration and quotation marks omitted). The relevant market is the "area of effective competition," including, where applicable, different products or services that serve as substitutes for each other. Id.; Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir. 1988) ("The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand."). The market, which must include a geographical component, must also be a product market, and cannot be defined by reference to consumers. Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1045 (9th Cir. 2008). Although the validity of an alleged market may present issues of fact, courts may dismiss antitrust complaints if the relevant market definition alleged is "facially unsustainable." Newcal, 513 F.3d at 1038.

The instant complaint alleges that Disney is restraining trade in "the nationwide market for rentals and sales of movies on DVD, Blu-ray and digital platforms for home entertainment" (the "home movie" market). (FAC ¶ 29.) Disney argues that this definition is facially implausible because it fails to include economic substitutes, including cable television, digital streaming services such as Netflix, content platforms such as YouTube, and special events, such as the Olympics. (Motion at 10.) Disney further argues that the FAC fails to allege why such alternatives are not adequate substitutes for home movies. (Id.)

Although the issue is a close one, this Court concludes that the alleged market is not so facially implausible as to warrant dismissal at the pleading stage. Although Disney may, on summary judgment, be able to demonstrate that cable tv, streaming services, and the like are reasonably interchangeable with home movies, in the court's experience, that is not necessarily so. A DVD, for example, can be viewed with little more than an inexpensive disc player and a video screen. The supposed substitutes proposed by Disney, in contrast, generally require additional equipment, such as a cable box or receiver, some sort of internet capability and equipment, such as a modem or router, or, in the case of broadcast television, a digital tuner.[3] Furthermore, unlike the products in the alleged market, the proposed alternatives appear to require some sort of monthly or ongoing subscription, such as in the case of Netflix or cable television, or must be viewed at set times, as in the case of live sports or special events like the Olympics.[4] Although the FAC does not explain why specific alternatives such as cable tv and Netflix are not reasonable substitutes for home

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[3] Cases like Flash Elecs., Inc. v. Universal Music & Video Distribution Corp. and Redbox Automated Retail LLC v. Universal City Studios LLLP found markets such as "the whole distribution market for 'sell-through' and rental movie videos and DVDS" and "the market for new release DVDs," respectively, to be facially plausible. Flash, 312 F. Supp. 2d 379, 392 (E.D.N.Y. 2004); Universal City Studios, No. CIV. 08-766RBK, 2009 WL 2588748, at *1 (D. Del. Aug. 17, 2009). These cases, which were decided a decade or more ago, are not particularly instructive in this era of "smart" devices, particularly in light of Redbox's inclusion of "digital platforms" in the alleged relevant market. Indeed, with the increased prevalence of connected TVs and other devices, even the hardware distinctions discussed above may become decreasingly relevant. Whether that is already the case, however, or whether "digital platforms" are part of the same market as DVDs and Blu-ray discs in the first instance, are questions best resolved at the summary judgment stage.

[4] It bears noting that the cost of certain of the proposed alternatives, such as premium cable tv, may significantly exceed the cost of home movies. Granted, "the scope of the relevant market is not governed by the presence of a price differential between competing products." Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1274 (9th Cir. 1975) This is not to say, however, that price is necessarily completely irrelevant. Even where two products serve the same function, the price differential may be so great that the "commercial reality" is that the products do not share a cross-elasticity of demand or compete with each other. See Int'l Boxing Club of N. Y., Inc. v. United States, 358 U.S. 242, 250 (1959) (quoting United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956) ("[The relevant] market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.")); Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1376 (9th Cir. 1989) (20 percent price differential demonstrates low cross-elasticity of demand) (discussing Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 713 (7th Cir. 1979).

movies, it does allege that DVDs, Blu-rays, and "digital movies generally require or can be used with equipment different from that needed for games, books, and other forms of home entertainment," and that there is no cross-elasticity of demand between the identified products and "games, books, and other forms of home entertainment." (FAC ¶ 31.) Compare UGG Holdings, Inc. v. Severn, No. CV04-1137-JFW FMOX, 2004 WL 5458426, at *4 (C.D. Cal. Oct. 1, 2004) (finding inadequately pleaded market where plaintiff made no allegations or arguments as to why potential alternatives were not substitutes and failed to allege lack of cross-elasticity of demand). The relevant market allegations here are sufficient to survive a motion to dismiss.

2. Market Power

Disney also argues that Redbox's claims fail because Redbox has failed to allege that Disney possesses market power in the market for home movies. A plaintiff can show anticompetitive effect in a relevant market either through direct proof of actual adverse effects or indirectly, through "proof of 'market power' plus some evidence that the challenged restraint harms competition." Am. Express, 138 S.Ct. at 2284; F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 460–61 (1986) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.") (internal quotations omitted); Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1448 (9th Cir. 1988) ("Because market definition and market power are merely tools designed to uncover competitive harm, proof of 'actual detrimental effects, such as a reduction of output, can obviate the need ... [for] elaborate market analysis.'") (quoting Indiana Fed'n of Dentists, 476 U.S. at 460-61).[5]

Market share is the starting point for assessing market power. Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 925 (9th Cir. 1980). The Ninth Circuit has found that an allegation that a defendant controls sixty five percent of the relevant market is sufficient to allege market power. Id.; see also Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1206 (9th Cir. 1997) ("Courts generally require a 65% market share to establish a prima facie case of market power."); Lucas v. Citizens Commc'ns Co., 409 F. Supp. 2d 1206, 1220 (D. Haw. 2005).[6] Here, the FAC alleges that Disney's share of the home movies market is something "greater" than fifty percent. (FAC ¶¶ 34-35.) Even if true, however, that fact is not sufficient to establish Disney's market

[5] Although the Ninth Circuit stated in Newcal that "a plaintiff must allege that the defendant has market power within a relevant market," the court made no mention of Oltz, nor suggested that a plaintiff must allege market power even in the face of direct evidence of anticompetitive effect. The Ninth Circuit's reasoning in Oltz is consistent with the Supreme Court's recent decision in American Express and earlier decision in Indiana Federation of Dentists. An entity that lacks market power cannot act with anticompetitive effect. Proof of such effect demonstrates that the entity possessed the requisite power in the first instance. See, e.g., Todd v. Exxon Corp., 275 F.3d 191, 206 (2d Cir. 2001) (explaining that actual evidence of adverse effects on competition is a "strong indicator" of market power that renders any further showing of market power unnecessary).

[6] The Ninth Circuit has also suggested that, in the context of an attempted monopolization claim under Section 2 of the Sherman Act, a lower market share may, depending on other factors, suffice. Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1438 (9th Cir. 1995) (finding 44 percent share sufficient).

power in the home movies market. Image Tech. Servs., 125 F.3d at 1206. Redbox nevertheless argues, as the FAC alleges, that Disney has "a dominant position" in the home movies market due to the "unique strength of the Disney brand." (FAC ¶¶ 36-37.) Such conclusory assertions, however, are not entitled to a presumption of truth. Furthermore, Redbox does not cite, and this court is not aware of, any authority for the proposition that general brand strength demonstrates market power in a particular market.[7] Although brand strength may be relevant in certain cases where a single-brand market is alleged, that is not the case here, as Redbox emphatically points out.[8] See Newcal, 513 F.3d at 1046; Datel Holdings Ltd. v. Microsoft Corp., 712 F. Supp. 2d 974, 986 (N.D. Cal. 2010). The court therefore agrees that the FAC does not adequately allege that Disney possesses market power in the home movies market.

3. Anticompetitive Effect

[7] Some courts have discussed brand strength as a potential barrier to entry in the context of monopolization claims, separate and apart from market power. See, e.g., Intergraph Corp. v. Intel Corp., 3 F. Supp. 2d 1255, 1276 (N.D. Ala. 1998) (vacated on other grounds, 195 F.3d 1346, 1363 (Fed. Cir. 1999)); Com. of Pa. v. Russell Stover Candies, Inc., No. CIV. 93-1972, 1993 WL 145264, at *15 (E.D. Pa. May 6, 1993); cf. Rebel Oil, 51 F.3d at 1439-41.

[8] Redbox does not allege a relevant market in either Disney-branded products or Disney-branded movies. Indeed, Redbox takes exception to Disney's effort, such as it is, to characterize Redbox's FAC as alleging any single-branded market. (Opp. at 20 n. 9.) Claims based upon the existence of any such market would likely be difficult to sustain. See Streamcast Networks, Inc. v. Skype Techs., S.A., 547 F. Supp. 2d 1086, 1094 (C.D. Cal. 2007) ("Courts have consistently refused to consider one brand to be a relevant market of its own when the brand competes with other potential substitutes." (internal quotation omitted)).

The question remains, however, whether Redbox has sufficiently alleged actual anticompetitive effects.[9] If so, further indications of market power may not be required. Indiana Fed'n of Dentists, 476 U.S. at 460-61; Oltz, 861 F.2d at 1448; Todd, 275 F.3d at 206. With respect to anticompetitive effects, the FAC alleges that Disney's misconduct "harms other rental outlets that provide a less expensive alternative for viewing Disney content," "directly affects other low-cost rental options[, . . . and] reduces output and raises prices for consumers," and that Disney's "limitation on the numbers of copies available for purchase will hurt 'Mom and Pop rental companies' as well." (FAC ¶¶ 6, 80, 58.) Redbox also alleges that, as a result of Disney's actions, many Redbox customers "are unable to turn to other retailers for Disney titles." (FAC ¶ 77 (emphasis added).) The FAC further states that "Redbox's inability to purchase adequate numbers of Disney movies therefore represents an absolute reduction in output in this market." (FAC ¶ 78 (emphasis added).)

As discussed above, however, anticompetitive effects can only be measured by reference to a particular market. Am. Express, 138 S.Ct. at 2285. The relevant market at issue here, as discussed above, is the home movie market for "rentals and sales of movies on DVD, Blu-ray and digital platforms." Redbox's allegations

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[9] Disney's arguments, like some of the cases in this subject area, appear to conflate injury to competition with antitrust injury. (See, e.g., Mot. at 8:22; Reply at 2:27-28 (quoting In re Webkinz Antitrust Litig., 695 F. Supp. 2d 987, 997 (N.D. Cal. 2010)).) "[I]n order to state a claim successfully, plaintiffs must allege both that defendant's behavior is anticompetitive and that plaintiff has been injured by an anti-competitive aspect of the practice under scrutiny." Brantley, 675 F.3d at 1200 (internal quotations omitted). The latter element is referred to as "antitrust injury" or "antitrust standing." Id. at 1197.

regarding anticompetitive effects in the market for "Disney titles" are therefore irrelevant. The FAC includes no allegations about anticomptetitive effects in the relevant, broader market for home movies generally.[10] Neither does the FAC allege any concrete, non-conclusory allegations about how retailers other than Redbox are harmed by Disney's refusal to deal with Redbox. See Brantley, 675 F.3d at 1198 ("[P]laintiffs must plead an injury to competition beyond the impact on the plaintiffs themselves."). Indeed, "[a] manufacturer may choose those with whom it wishes to deal and unilaterally may refuse to deal with a distributor or customer for business reasons without running afoul of the antitrust laws."[11] Dimidowich v. Bell & Howell, 803 F.2d 1473, 1478 (9th Cir. 1986).

Because Redbox has not adequately alleged either that Disney possesses market power in the market for home movies or that Disney's actions have had actual anticompetitive effects in that market, its antitrust claims are dismissed, with leave to amend.

B. Declaratory Relief

The FAC's first cause of action for "Declaratory Relief" seeks a declaration that certain language on Disney's Combo Pack

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[10] Even assuming the reference to reduced output and higher consumer prices refers to that broader market, "allegations that an agreement has the effect of reducing consumers' choices or increasing prices to consumers does not sufficiently allege an injury to competition." Brantley, 675 F.3d at 1202.

[11] The Ninth Circuit did recognize, however, that a vertical combination might violate antitrust laws where a manufacturer coerces a distributor into adhering to resale restraints. Dimidowich, 803 F.3d at 1478. Although the FAC here does make several conclusory references to coercive conduct, it provides no specifics as to how Disney coerced distributors into involuntarily refusing to sell to Redbox, notwithstanding allegations that Disney harassed Redbox itself.

packaging and websites is unenforceable. (FAC ¶¶ 105.) Specifically, the FAC identifies terms stating that Disney owns "all digital movie codes," that codes "are not for sale or transfer, and that "digital codes are authorized for redemption only by an individual who obtains the code as part of a combinations disc + code package . . ., or by a family member of that individual." (FAC ¶¶ 61, 99, 100.) Although the first cause of action does not itself specify why these terms are allegedly unenforceable, the declaratory relief claim appears to be based upon allegations that the terms are unconscionable. (FAC ¶¶ 65, 70.) Disney argues that, assuming that to be the case, the FAC nevertheless fails to allege the elements of an unconscionability defense.

Under California law, a contract is invalid if it is both procedurally and substantively unconscionable. Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 114 (2000). Procedural unconscionability "concerns the manner in which the contract was negotiated and the respective circumstances of the parties at that time." Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778, 783 (9th Cir. 2002). A procedural unconscionability analysis looks to two factors:(1) oppression, which focuses on bargaining power disparity and the resulting absence of meaningful choice, and (2) surprise, which turns on whether operative terms are hidden in lengthy forms drafted by the party seeking to enforce the contract. Id. "A contract is substantively unconscionable when it is so unjustifiably one-sided that it 'shock[s] the conscience.'" Chavarria v. Ralphs Grocery

Co., 733 F.3d 916, 923 (9th Cir. 2013) (quoting Parada v. Superior Court, 176 Cal. App. 4th 1554, 1573 (2009)).

Notwithstanding conclusory allegations that "the contract terms" are unconscionable, the FAC here does not adequately allege procedural or substantive unconscionability. Although the FAC makes no explicit mention of procedural unconscionability, it does allege that contractual terms restricting the transfer of digital codes only arise after consumers have already purchased the codes. (FAC ¶ 110.) This allegation of surprise, Redbox argues, is sufficient to satisfy the procedural unconscionability element of the defense. The court disagrees. As the FAC acknowledges, the Combo Pack boxes, which consumers encounter before they ever reach the websites, state that "codes are not for sale or transfer." (FAC ¶ 99.) It is not plausible, therefore, that consumers are surprised when they see similar terms on the redemption websites.

Redbox's argument regarding substantive unconscionability is also unavailing. Redbox contends that the website terms are substantively unconscionable because, by requiring "consumers to certify that they did not purchase the codes separately, even if they had already done so," the terms "effectively result[] in a forfeiture because consumers cannot redeem the Code without making a false certification." (Opp. at 8:19.) Even on the face of the FAC, however, that allegation is simply untrue, at least as it applies to purchasers of Combo Packs, whose certifications would be accurate and truthful. Insofar as Redbox refers to its own customers, or other purchasers of standalone codes, Redbox cannot plausibly seek to lay any lack of prior disclosure, or resulting "forfeiture," at Disney's feet. The website terms are consistent with the box-top disclosure that "codes are not for sale or transfer." The redemption websites' subsequent elaboration on that theme does not appear to require any consumer to forfeit any right he or she possessed, let alone shocks the conscience. To the extent standalone code purchasers, who never have any interaction with Disney or exposure to Disney packaging at the point of purchase, are frustrated in their efforts to redeem the purchased code, that frustration would appear to be a product of Redbox's packaging decisions and the nature of Redbox's characterization of the rights being conveyed.[12] Redbox's declaratory relief claim is, therefore, dismissed, with leave to amend.

C. Copyright Misuse

Disney also argues that Count Two of the FAC, which alleges copyright misuse, must be dismissed. As an initial matter, courts are split on the question whether copyright misuse may be brought as an affirmative claim, as opposed to as a defense. See, e.g., Amaretto Ranch Breedables, LLC v. Ozimals, Inc., 790 F. Supp. 2d 1024, 1033 (N.D. Cal. 2011); KTS Karaoke, Inc. v. Sony/ATV Music Publ'g LLC, No. CV1200014MWF, 2014 WL 12567169, at *3 (C.D. Cal. Jan. 14, 2014). This court need not address the split, however, because even assuming that copyright misuse can be brought as an affirmative claim, Redbox does not sufficiently allege misuse.

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[12] Redbox's substantive unconscionability argument does not discuss first sale doctrine issues, but appears to rely upon them, at least implicitly. If the first sale doctrine guaranteed Redbox the right to transfer digital codes, Redbox would certainly have a stronger claim of substantive unconscionability. As explained below, however, and in great detail in the related Redbox I case, the first sale doctrine is not applicable here. See Section III(C) and note 13, infra; Redbox I, Dkt. 74, 120.

This Court addressed the copyright misuse issue in great detail in two orders in the related case, and will not re-hash that entire discussion here. (Redbox I, Dkt. 74, 120.) In short, copyright misuse is an affirmative defense that "prevents copyright holders from leveraging their limited monopoly to allow them control of areas outside the monopoly," and extends to any situation implicating "the public policy embodied in the grant of a copyright." A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1026 (9th Cir. 2001). Redbox alleges that Disney engaged in copyright misuse by (1) burdening consumers' ability to sell the physical movie disc components of Combo Packs by imposing restrictive license terms on the download codes, (2) impinging upon distributors' first-sale rights by preventing downstream sales to Redbox, and (3) restricting the resale of digital codes without purchasers' assent. (FAC ¶¶ 109-112.) None of these theories is viable.

First, the license terms applicable to download codes allow Combo Pack purchasers and recipients to enjoy digital access regardless whether they keep or dispose of the physical discs. Digital access is conditioned not on possession of physical discs, but on the manner in which the redeemer acquired the download code. A Combo Pack owner who disposes of the discs is left with the same digital access rights he or she always enjoyed. Nor is a consumer who wishes to access a digital Disney movie required to purchase discs. As the FAC acknowledges, consumers can access movies digitally through services such as iTunes. (FAC ¶ 10.)

Second, an agreement between Disney and its distributors to forbid downstream sales to Redbox does not infringe upon the distributors' first sale rights.[13] "That the purchasers of copyrighted goods can agree to limit their commercial conduct through contract is undeniable." Estate of Graham v. Sotheby's, Inc., 178 F. Supp. 3d 974, 983 (C.D. Cal. 2016), *reversed in part on other grounds by* Close v. Sotheby's, Inc., 894 F.3d 1061 (9th Cir. 2018), (citing United States v. Wise, 550 F.2d 1180, 1187 n. 10 (1977) ("If the vendee breaches an agreement not to sell [a] copy, he may be liable for the breach but he is not guilty of infringement.")); see also Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 997 (C.D. Cal. 2006) ("The right to exclude is inherent in the grant of a copyright; a copyright is not improperly expanded simply because the owner has exercised his or her power to exclude.").

Lastly, Redbox's argument that the restrictions on the sale of re-sale codes are imposed without the assent of purchasers appears to rely upon the first sale doctrine.[14] As explained in Redbox I, however, the first sale doctrine is inapplicable to digital codes. The first sale doctrine applies to "particular" copies that exist in the material world. See 17 U.S.C. § 101; Redbox I, Dkt. 74 at 19-24. Here, no such physical object exists when a standalone code is transferred, or prior to the time that that code is redeemed and the copyrighted work is fixed onto the downloader's physical hard

[13] The first sale doctrine allows the "owner of a particular copy or phonorecord lawfully made under [the Copyright Act] . . . to sell or otherwise dispose of the possession of that copy or phonorecord," without the permission of the copyright holder. UMG v. Augusto, 628 F.3d 1175, 1180 (9th Cir. 2011) (quoting 17 U.S.C. § 109(a)); Bobbs-Merrill Co. v. Strauss, 210 U.S. 339, 341 (1908).

[14] See note 13, above.

drive. Restrictions on resales of digital codes do not, therefore, face the same first sale doctrine obstacles that would apply to similar restrictions on physical discs. Accordingly, Redbox's copyright misuse claim is dismissed, with leave to amend.[15]

D. Tortious Interference

Disney also seeks to dismiss Redbox's claim for tortious interference with prospective economic advantage. An intentional interference with prospective economic relations claim requires (1) an economic relationship between plaintiff and a third party with the probability of future economic benefit to the plaintiff, (2) defendant's knowledge of that relationship, (3) defendant's intentional, independently wrongful act to disrupt the relationship, (4) actual disruption, and (5) economic harm to the plaintiff. Marsh v. Anesthesia Serv. Med. Group. Inc., 200 Cal.App.4th 480, 504 (2011) (citing Korea Supply v. Lockheed Martin Corp., 29 Cal.4th 1134, 1153 (2003)). Disney argues, essentially, that Redbox has not alleged any wrongful acts.

Redbox alleges that Disney has harassed Redbox employees in retail stores and "coerced" distributors into refusing to sell to Redbox, including by stating, falsely, that Redbox cannot legally resell download codes.[16] (FAC ¶ 50, 52-56, 119.) As discussed above, however, there is nothing inherently improper with Disney entering into restrictive agreements with its distributors.

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[15] Redbox's position regarding standing to assert a copyright misuse claim also appears to be rooted in the first sale doctrine.

[16] Redbox's argument with respect to Disney's statements regarding the legality of Redbox's business model is largely premised on the same arguments Redbox raises in support of its copyright misuse claim. That claim, however, is not viable, as discussed above.

Dimidowich, 803 F.3d at 1478; Estate of Graham, 178 F. Supp. 3d at 983. Although the FAC does allege that Disney "coerced" its distributors into entering into restrictive agreements, those allegations are conclusory. So too are Redbox's allegations of "harassment." Although the FAC does allege some specific conduct, such as "confronting" Redbox employees in retail stores, the FAC does not allege how such conduct was unlawful.

Redbox also premises its interference claims upon Disney's allegedly false statements, namely Disney's assertions "that Redbox's rental and sale of products included in Disney Combo Packs, and in particular the digital movie codes, are unauthorized and illegal." (FAC ¶ 119.) Under the Noerr-Pennington doctrine, however, parties are immune from liability for claims, including state law tort claims, related to litigation conduct. Theme Promotions, Inc. v. News Am. Mktg. FSI, 546 F.3d 991, 1006-07 (9th Cir. 2008). That privilege extends to "conduct incidental to a lawsuit" or "ancillary to litigation." Id. at 1006; Thomas v. Hous. Auth. of Cty. of Los Angeles, No. CV04-6970 MMM (RCX), 2005 WL 6136440, at *12 (C.D. Cal. June 3, 2005); see also EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp., 711 F. Supp. 2d 1074, 1082 (C.D. Cal. 2010) (finding website announcements and communications with licensees within the ambit of Noerr-Pennington protection). The statements alleged here are no more than a recitation to Disney distributors and website viewers of Disney's litigation position here and in Redbox I. Because the FAC does not adequately allege any wrongful acts, Redbox's tortious interference claim are dismissed, with leave to amend.

E. False Advertising

Disney also contends that Redbox has not sufficiently alleged claims for false advertising premised upon either (1) Disney's litigation-related statements or (2) the terms stated on Combo Pack boxes and Disney's websites. With respect to the former, the parties' discussion is duplicative of the Noerr-Pennington issue discussed above, and Redbox's false advertising claims fail for the reasons stated above. As to the latter, Disney argues that Redbox lacks statutory standing to assert false advertising claims on the basis of any of the alleged misrepresentations on Combo Pack boxes or Disney websites.

Standing under California's False Advertising law is limited to "any person who has suffered injury in fact and has lost money or property as a result of" a defendant's alleged misrepresentations. Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 321 (2011) (quoting California Business & Professions Code § 17535). Most courts have interpreted the FAL's "as a result of" language to require that Plaintiffs "allege their own reliance on the alleged misrepresentations, rather than the reliance of third parties." L.A. Taxi Coop., Inc. v. Uber Techs., Inc., 114 F. Supp. 3d 852, 866-67 (N.D. Cal. 2015). Here, Redbox does not allege that it relied upon any of the terms displayed on Disney Combo Pack boxes or websites. Rather, Redbox alleges that consumers who might otherwise have purchased download codes from Redbox saw Disney's misrepresentations and then refrained from purchasing codes from Redbox on the basis of those misrepresentations. Such consumer reliance, absent Redbox's own actual reliance, is insufficient to confer statutory standing under California's false advertising law.

See Youngevity Int'l, Corp. v. Smith, 224 F. Supp. 3d 1022, 1031 (S.D. Cal. 2016).

Statutory standing under the Lanham Act, however, is broader. The Lanham Acts permits suits "by 'any person who believes that he or she is likely to be damaged' by a defendant's false advertising." Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 129 (2014) (quoting 15 U.S.C. § 1125(a)). A Lanham Act plaintiff need only show that (1) his interests fall within the "zone of interests" protected by the statute and (2) his injuries are proximately caused by a violation of the statute. Id. at 129, 132; Obesity Research Inst., LLC v. Fiber Research Int'l, LLC, 165 F. Supp. 3d 937, 946 (S.D. Cal. 2016). Disney argues that the FAC fails to allege the latter of these elements.

The FAC alleges that Disney falsely states that Disney owns all download codes, which can only be redeemed by recipients of Combo Packs and cannot be transferred separately. (FAC ¶¶ 60-62, 99-100, 127-128.) These misrepresentations, Redbox alleges, deceive consumers "into believing that Redbox does not have title to the components of Combo Packs it has purchased and therefore that consumers may not lawfully purchase those components from Redbox."[17] (FAC ¶132.) Nowhere, however, does the FAC allege that consumers who purchase a standalone download code from Redbox ever see Disney's original Combo Pack packaging or know that Redbox obtains its code products from Disney Combo packs. The court

[17] These allegations are sufficient to satisfy the particularity requirement of Federal Rule of Civil Procedure 9(b). See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107 (9th Cir. 2003); Bobbleheads.com, LLC v. Wright Bros., Inc., 259 F. Supp. 3d 1087, 1095 (S.D. Cal. 2017).

therefore agrees that, to the extent Redbox's Lanham Act standing is predicated upon Disney's Combo Pack statements, Redbox has not adequately alleged that those statements proximately cause Redbox's loss of sales.

The issue is closer, however, with respect to alleged misrepresentations made on Disney websites. Although Redbox consumers do not ever encounter Disney's Combo Pack packaging, code purchasers cannot redeem download codes without viewing Disney's redemption website terms, including representations that Disney owns the download codes and that codes cannot be redeemed by standalone purchasers. (FAC ¶ 100.) Disney argues that these representations cannot lead to lost sales for Redbox unless a consumer "determines that Redbox is engaged in unlawful conduct . . . and decides not to buy additional Codes from Redbox . . . ." (Reply at 24:24-25.) That appears, however, to be precisely what Redbox alleges. (<u>See</u> FAC ¶ 132 ("Consumers are likely to be deceived into believing that Redbox does not have title to the [download codes] it has purchased and therefore that consumers may not lawfully purchase those components from Redbox.") Redbox has, therefore, alleged statutory standing under the Lanham Act.

IV. Conclusion

For the reasons stated above, Disney's Motion to Dismiss is GRANTED, in part and DENIED, in part. The motion is denied with respect to the Fourth and Sixth Causes of Action.[18] The motion is granted with respect to all other claims. Accordingly, the First,

[18] Disney acknowledges that Redbox's Sixth Cause of Action for unfair competition rises or falls with the remainder of Redbox's claims. Because Redbox's Lanham Act claim survives, so too does its unfair competition claim under California Business .

Second, Third, Fifth, Seventh, and Eighth Causes of Action are DISMISSED, with leave to amend. Any amended complaint shall be filed with twenty one days of the date of this Order.

IT IS SO ORDERED.

Dated: July 17, 2019

Dean D. Pregerson

DEAN D. PREGERSON
United States District Judge