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12 *Individually and on Behalf of Others Similarly Situated*

13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 John Blaha, individually and on behalf of
16 others similarly situated,
17 Plaintiff,
18 v.
19 Rightscorp, Inc., a Nevada corporation,
f/k/a Stevia Agritech Corp.; Rightscorp,
20 Inc., a Delaware corporation; Christopher
Sabec; Robert Steele; Craig Harmon;
21 Dennis J. Hawk; BMG Rights
Management (US) LLC; Warner Bros.
22 Entertainment Inc.; and John Does 1 to 10,
23 Defendants.
24

Case No.: 2:14-cv-9032-DSF-(JCGx)

Assigned to: Hon. Dale S. Fischer
United States District Judge

Referred to: Hon. Jay C. Gandhi
United States Magistrate Judge

**PLAINTIFF’S OPPOSITION TO
DEFENDANTS’ SPECIAL
MOTION TO STRIKE AND TO
DISMISS THE SECOND CAUSE
OF ACTION**

Hearing:
Date: May 11, 2015
Time: 8:30 a.m.
Place: Courtroom 840
Before Judge Fischer

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I. INTRODUCTION AND SUMMARY

Although state law rules such as California’s anti-SLAPP law and litigation privilege normally should be observed by federal courts sitting in diversity, such state law rules have no application to claims arising under federal law. *See, e.g., Hilton v. Hallmark Cards*, 599 F.3d 894, 901 (9th Cir. 2010) (“a federal court can only entertain anti-SLAPP special motions to strike in connection with state law claims”); *Restaino v. Bah (In re Bah)*, 321 B.R. 41, 46 (B.A.P. 9th Cir. 2005) (holding that the anti-SLAPP statute does not apply to federal claims); *Summit Media LLC v. City of L.A.*, 530 F. Supp. 2d 1084, 1094 (C.D. Cal. 2008) (Lew, J.) (“[T]he [state] anti-SLAPP statute does not apply to federal question claims in federal court because such application would frustrate substantive federal rights.”); *Oei v. N Star Capital Acquisitions, LLC*, 486 F. Supp. 2d 1089, 1098 (C.D. Cal. 2006) (Morrow, J.) (“It is well settled that the Supremacy Clause of the United States Constitution grants Congress the power to preempt state and local laws. [Citation]. As a result, it is equally well settled that the California litigation privilege does not apply to federal causes of action, including FDCPA claims.”)

Here, this Court sits in exercise of federal question jurisdiction, because the first claim for violations of the Telephone Consumer Protection Act (“TCPA”)¹ is clearly federal, and the second claim for abuse of process is also pled as “arising under” federal law. First Amended Complaint (“FAC”) (ECF No. 22) at ¶¶ 19-21. Although California law “creates [Plaintiff’s] cause of action” for abuse of process, the cause of action still “arise[s] under the laws of the United States” because the FAC “establishes that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties.” *See* FAC ¶ 20; quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983); accord *Food Lion, Inc. v. United Food &*

¹ The TCPA (47 U.S.C. § 227) claim has not been challenged on the pleadings.

1 *Commercial Workers Int'l Union*, 1993 WL 410024 at *2, 1993 U.S. Dist. LEXIS
2 14669, (D. S.C. July 21, 1993) (holding that abuse of process claim arose under
3 federal law because it required the court to analyze ERISA § 510 in order to
4 determine whether prior proceedings amounted to an abuse of process).

5 More specifically, this Court is now being asked to decide (arguably, for a
6 second time)² the very federal question that Rightscorp³ has spent the last 2-3 years
7 trying to avoid: the (im)propriety of issuing DMCA Section 512(h)⁴ subpoenas to
8 “conduit” ISPs. Rightscorp and the other defendants abused the *federal* legal
9 process, by issuing 140+ *federal* subpoenas, which were clearly invalid under
10 *federal* precedents⁵ applying a *federal* statute on a subject (copyright) where *federal*
11 law is meant to preempt the field. Moreover, Rightscorp knew the subpoenas it was
12 issuing were invalid under existing law. *See* RFJN B at 9-10 (October 2012 motion
13 to quash Rightscorp subpoena explaining that DMCA subpoenas cannot be issued to
14 conduit ISPs); RFJN F at 8-10 (September 2014 motion to quash Rightscorp
15 subpoena explaining same thing). Yet, when it was presented with opportunities to
16 argue for a change in controlling federal law, Rightscorp repeatedly declined to do
17 so, preferring instead to retreat in the face of any opposition, so as to live another
18 day and keep on issuing sham DMCA subpoenas. RFJN B at 38 (2012 notice that
19 Rightscorp did not oppose Telscape’s motion to quash); RFJN F at 95 (email from
20 _____

21 ² *See* Notice of Related Cases filed in this action (ECF No. 4); *see also* the
22 accompanying exhibits to the Request for Judicial Notice (“**RFJN**”) B at 40.

23 ³ There are actually two “Rightscorp, Inc.” defendants. One is a Delaware entity and
24 the other a Nevada entity. They are referred to herein collectively as “**Rightscorp**”.

25 ⁴ 17 U.S.C. § 512 was added to the Copyright Act in 1996 as part of the Digital
26 Millennium Copyright Act (“**DMCA**”). Section 512 relates to the so-called DMCA
27 “safe harbors,” which protect Internet Service Providers (“**ISPs**”) from intermediary
28 liability for copyright infringement, provided they “take down” infringing content.

⁵ *See, e.g., Recording Indus. Assoc. of Am. v. Verizon Internet Svcs., Inc.*, 351 F.3d
1229, 1236-39 (D.C. Cir. 2003) (“**RIAA**”); *In re Charter Commc 'ns, Inc.*, 393 F.3d
771, 776-78 (8th Cir. 2005) (“**Charter**”).

1 Rightscorp’s lawyer Dennis Hawk, “formally withdraw[ing]” Rightscorp’s subpoena
2 to Grande on Sep. 8, 2014); RFJN G at 4 (new DMCA subpoena initiated by Dennis
3 Hawk to a conduit ISP, the very next day, Sep. 9, 2014); RFJN J at 35-41
4 (Rightscorp withdrawing subpoena on Nov. 21, 2014, after motion to quash).

5 In sum, plaintiff’s second cause of action for abuse of process arises under
6 federal law because it requires the determination of a substantial federal question in
7 dispute between the parties. Specifically, this Court must decide whether Rightscorp
8 abused the legal process by maliciously issuing 140+ sham subpoenas that were
9 unlawful under federal precedent applying DMCA Section 512(h). Accordingly,
10 since this Court is exercising federal question jurisdiction only, the California anti-
11 SLAPP law and litigation privilege do not apply and the instant motion must be
12 denied on those grounds.

13 Finally, even if the anti-SLAPP law did apply, and even if speculative
14 invoicing amounted to protected first amendment activity in connection with a
15 public issue (which it does not), plaintiff still has a reasonable probability of
16 prevailing on the merits. For evidence that Rightscorp systematically used the
17 DMCA Section 512(h) procedure “for a purpose it was not designed to achieve,”⁶
18 the Court need look no farther than the court records that are the subject of the
19 accompanying request for judicial notice. RFJN A to L. For the same reasons, the
20 Rule 12(b)(6) portion of the instant motion must also be denied, because the FAC
21 properly states a claim for abuse of process as to all defendants.⁷

22
23
24
25
26 ⁶ California Civil Jury Instruction, No. 1520, “Abuse of Process,” at ¶ (2).

27 ⁷ Since defendants mainly focus on the anti-SLAPP part of their motion (ECF No.
28 30-1 at pp. 1-19), the material factual citations in this opposition refer to admissible
evidence. However, the legal arguments are the same under both standards.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Dennis Hawk, acting “on behalf of Rightscorp and the copyright owners it represents” initiated 142 miscellaneous proceedings in this Court to obtain DMCA Section 512(h) subpoenas. *See, e.g.*, RFJN A at 4-9; Exhibit D to FAC.

On October 15, 2012, an ISP who received a ‘trial balloon’ subpoena from Rightscorp, Telscape Communications, Inc. (“**Telscape**”) filed a motion to quash. RFJN B at 5-37. The brief in support of the motion to quash cited to RIAA and Charter, and explained why the subpoena was invalid. RFJN B at 9-10. Rightscorp did not oppose the motion. RFJN B at 38. Accordingly, on November 8, 2012, this Court issued an order noting that no opposition had been timely filed, so “The Court deems the lack of opposition to be consent to the motion. Local Rule 7-12; *see also Ghazali v. Moran*, 46 F.3d 52 (9th Cir. 1995); *Brydges v. Lewis*, 18 F.3d 651, 652 (9th Cir. 1993). The motion to quash is GRANTED.” RFJN B at 40.

Starting in early 2014, Rightscorp redoubled its subpoena-issuing efforts, obtaining a variety of new DMCA Section 512(h) subpoenas from the Clerk of this Court. Exhibit D to FAC. Included among the subpoenas Rightscorp obtained was one to Imon Communications, LLC (plaintiff John Blaha’s ISP) issued May 7, 2014 (RFJN C at 4-7), one to Grande Communications Networks, LLC (“**Grande**”) issued August 6, 2014 (RFJN D at 4-7), and one to Greenfield Communications, Inc. on August 14, 2015 (RFJN E at 4-7).

Starting around July of 2014, Mr. Blaha began receiving multiple pre-recorded and/or artificial voice telephone messages to his cellular telephone number, pressuring him to “settle” claims of alleged infringement⁸ with Rightscorp. FAC ¶¶ 56-64. This was consistent with Rightscorp’s business model (RFJN L at 17 *et seq.*)

⁸ Rightscorp notes repeatedly that Mr. Blaha supposedly “does not dispute” that he infringed the copyrighted material that was the subject of Rightscorp’s notices. Mot. Br. 3:3-5, 4:15-17. Yes he does. He just had no reason to do so in the FAC, since that issue is irrelevant to the class claims alleged.

1 and with the experience of other putative class members (Original Complaint ¶¶ 37-
2 44) (alleging similar calls made to original lead plaintiff Karen “Jeanie” Reif).

3 On September 9, 2014, Grande filed a comprehensive motion to quash in the
4 Western District of Texas. RFJN F at 4-88. One business day after Grande file this
5 motion, Mr. Hawk wrote Grande’s counsel stating,

6 “Although we have had considerable success in obtaining compliance
7 by ISP’s [*sic*] across the country, it appears that you will counsel your
8 clients to deny our client’s requests which we believe are in full
9 compliance with the DMCA. Accordingly, we will seek alternative
10 remedies available to our client and hereby formally withdraw our
subpoena.”

11 RFJN F at 95. Grande then filed an “advisory” to the court apprising it of the
12 withdrawal of the subpoena (RFJN F at 90-96), and the court closed the case (RFJN
13 F at 97).

14 The next day, Mr. Hawk issued new subpoenas, including one to Birch
15 Communications, Inc. f/k/a CBeyond Communications, LLC (“**CBeyond**”). RFJN
16 G at 4-7. Mr. Hawk, once again on behalf of Rightscorp and its clients, issued
17 another subpoena to Ellijay Telephone Co. (“**Ellijay**”) on October 14, 2014. RFJN
18 H at 4-7. Rightscorp continued issuing DMCA subpoenas until November 11, 2014
19 (just before this case was filed). RFJN K at 4-7; *see also* Exhibit D to FAC.

20 On October 17, 2014, CBeyond filed another comprehensive motion to quash
21 (and for sanctions) challenging a Rightscorp subpoena, this time in the Northern
22 District of Georgia. RFJN I at 7-77. On November 12, 2014, Ellijay filed yet
23 another motion to quash (and for sanctions) challenging a Rightscorp subpoena,
24 again in the Northern District of Georgia. RFJN J at 5-34.

25 On November 20, 2014, Rightscorp and Ellijay agreed to⁹, and then on the
26 _____

27 ⁹ It appears agreement was reached to withdraw the Ellijay subpoena as of Nov. 20,
28 2014, per the date on the Certificate of Service attached thereto, but that the
document was not actually e-filed until the next day. *See* RFJN J at 40.

1 next day actually did file, a consent motion withdrawing the subpoena and taking the
2 motion to quash and for sanctions off calendar. RFJN J at 35-41.

3 On November 21, 2014, this class action lawsuit was then filed naming as
4 defendants both of the Rightscorp entities, as well Rightscorp's officers Christopher
5 Sabec, Robert Steele, and Craig Harmon, and Rightscorp's outside counsel who
6 issued the DMCA subpoenas Dennis J. Hawk. *See* Complaint, ECF No. 1, at 1. The
7 original complaint asserted causes of action for violations of the TCPA, abuse of
8 process, and for violations of the Fair Debt Collection Practices Act ("FDCPA") and
9 California's Rosenthal Fair Debt Collection Practices Act. *Id.*

10 On December 18, 2014, for the first time in any forum, Rightscorp opposed a
11 motion to quash one of its subpoenas, in the *CBeyond* case in Georgia. RFJN I at
12 78-104. According to Rightscorp, the two Circuit Courts of Appeals to have
13 considered the "conduit" ISP issue, which both specifically rejected Rightscorp's
14 position (*RIAA*, 351 F.3d at 1236; *Charter*, 393 F.3d at 776-78) and every district
15 court decision since then, which have all followed those Courts of Appeals, are all
16 wrong. *See* RFJN I at 139-140 (district court's order quashing subpoena but
17 denying sanctions, noting that "Rightscorp neglects to point out" that the two district
18 court cases it relied upon "were overturned by the court in *RIAA* and do not
19 constitute prevailing legal authority," and that the reasoning of *RIAA* and *Charter*
20 courts has been "uniformly adopt[ed]" by federal district courts since then).

21 After counsel here met and conferred about various issues in January and
22 February, the complaint was amended, with defendants consent, to drop the FDCPA
23 and Rosenthal Act claims, and the prior lead plaintiffs were also replaced by Mr.
24 Blaha. In addition, Rightscorp's two largest clients, BMG Rights Management (US)
25 LLC, and Warner Bros. Entertainment Inc. were added as defendants in the amended
26 complaint. FAC at p. 1. The instant anti-SLAPP motion (ECF No. 30), as well as a
27 motion to dismiss for lack of personal jurisdiction by defendant Harmon followed.
28

III. ARGUMENT

(a) **Elements of the Tort of Abuse of Process**

As once noted by New York’s highest court, Dean Prosser described the tort of abuse of process as “a form of extortion” and he listed a “subpoena for the collection of a debt” as a quintessential example of the kind of thing that can give rise to a claim for abuse of process. See *Williams v. Williams*, 23 N.Y.2d 592, 596 & fn1 (NY Ct. App. 1969); quoting Prosser, Torts [3d ed.], pp. 877-878; accord Dobbs, The Law of Torts § 438, pp. 1235-36 (2000) (listing misuse of subpoena as kind of process giving rise to abuse of process claim). “[T]he essence of the tort lies in the misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice.” *Woodcourt II Limited v. McDonald Co.*, 119 Cal. App.3d 245, 252 (1981).

The Ninth Circuit set forth the elements of a claim for abuse of process under California law as follows,

“To succeed in an action for abuse of process, a litigant must establish that the defendant (1) contemplated an ulterior motive in using the judicial process, and (2) committed ‘a willful act in the use of th[at] process not proper in the regular conduct of the proceedings.’”

Estate of Tucker ex rel. Tucker v. Interscope Records, Inc., 515 F.3d 1019, 1037 (9th Cir. 2008), quoting *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal. 3d 1157, 1168 (1986); accord *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1057 (2006) (same formulation).

To parse what qualifies as “a willful act in the use of [legal] process not proper in the regular course of the proceedings,” reference to the Restatement of Torts and California Civil Jury Instructions (which cites the Restatement) are helpful. “One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.” Restatement 2d. (Torts) § 682. That formulation is echoed in California Civil Jury Instruction which puts the

1 claim in terms of use of an intentional use of a legal procedure for an “improper
2 purpose that the procedure was not designed to achieve.” California Civil Jury
3 Instruction, No. 1520, “Abuse of Process,” at ¶ (2).

4 In a seminal abuse of process case relied upon heavily by defendants, the
5 California Supreme Court followed Prosser and explained,

6 ““The essential elements of abuse of process, as the tort has developed,
7 have been stated to be: first, an ulterior purpose, and second, a willful
8 act in the use of the process not proper in the regular conduct of the
9 proceeding. Some *definite act* or threat *not authorized by the process,*
10 *or aimed at an objective not legitimate in the use of the process,* is
11 required; and there is no liability where the defendant has done nothing
more than carry out the process to its authorized conclusion, even
though with bad intentions.” [emphasis altered].

12 *Spellens v. Spellens*, 49 Cal. 2d 210, 231 (1957); quoting Prosser on Torts, (2d ed.)
13 p. 667; accord *Ion Equipment Corp. v. Nelson*, 110 Cal. App. 3d 868, 876 (1980)
14 (“[A]n improper purpose may consist in achievement. . .of a result not within [the]
15 legitimate scope [of the legal process used].”).

16 Accordingly then, it seems fairly straightforward that the use of a subpoena in
17 a manner that is unauthorized, or that goes beyond the subpoenas “legitimate scope,”
18 or for an illegitimate purpose, is an actionable abuse of process. To put it in terms of
19 the plain language of the relevant California Jury Instruction (which is probably the
20 clearest formulation of them all), it amounts to an abuse of process when a subpoena
21 is used for a purpose that it was not designed to achieve. Thus, if Rightscorp
22 obtained and willfully served subpoenas for the ulterior purpose of having “conduit”
23 ISPs identify third parties accused of past infringement, but Section 512(h) does not
24 allow subpoenas to be used for that purpose, a claim for abuse of process is stated.
25 (As explained in the next section, such is precisely the case here.)

26 In defiance of *Rusheen*, *Spellens*, *Estate of Tucker*, and just about every other
27 authority that has ever addressed the topic, defendants erroneously contend that,

28 “the mere utilization of legal process that one is not entitled to invoke

1 does not give rise to a derivative action for abuse of process (Mot. Br.
 2 at 9:14-15). . . the relevant inquiry in an abuse of process claim is not
 3 whether the process was validly issued, but whether it was abused (*Id.*
 at 11:8-10).”

4 Taking this seemingly absurd argument even farther, defendants continue,

5 “Plaintiff[] [has a] complete misunderstanding of the elements of a
 6 claim for abuse of process under California law. Whether a party has
 7 tortiously [*sic*] abused process hinges on how the party threatened to
 8 use the process or misused the process after it was obtained. ***Whether a***
 9 ***party is legally entitled to invoke the process giving rise to the abuse***
 of process claim is legally irrelevant.” [emphasis altered].

10 Mot. Br. at 18:22-27. According to defendants, it is *completely irrelevant* that they
 11 had no legal basis to issue the DMCA subpoenas. That sounds wrong. And it is.

12 What seems to have defendants tied up in knots is the fairly straightforward
 13 proposition that a claim for abuse of process can arise even where the legal process
 14 in question was validly issued.¹⁰ In such a case, the use of the process only becomes
 15 *tortious* when there is some quasi-extortionate or otherwise improper action after the
 16 issuance of the process.¹¹ In such a case, it may well be irrelevant that the legal
 17 process was validly issued; the tortious conduct occurs after the legal process is
 18 issued. But it is *always* going to be highly relevant to an abuse of process claim if
 19 the legal process in question was *invalidly* issued. In the latter case, the process is
 20 potentially tortious *ab initio*; the use of the process is itself the overt act, and the
 21 ulterior motive is the improper purpose for which the process is employed.

22 _____
 23 ¹⁰ See, e.g., *Board of Education of Farmingdale Union Free Sch. Dist. v.*
 24 *Farmingdale Classroom Teachers Ass'n*, (“***Farmingdale***”) 38 N.Y.2d 397, 343
 25 N.E.2d 278, 380 N.Y.S.2d 635 (1975) (subpoenas commanding attendance of 87
 26 teachers to appear at first day of trial to be witnesses were validly issued, but claim
 27 for abuse of process was properly stated because it was alleged this was done for
 improper purpose, namely, paralyzing normal operations of the schools).

28 ¹¹ This is what the *Spellens* court was getting at in the passage relied upon by
 defendants. See Mot. Br. at 9:22-10:16.

1 Thankfully, the First Circuit added some clarity on this issue in Simon v.
 2 Navon, 71 F.3d 9, 15 (1st Cir. 1995). There, the First Circuit explained that
 3 although malicious prosecution is typically only available after a lawsuit ends, and
 4 abuse of process claims typically arise after a suit has been properly filed:

5 “The abuse tort is given a wider berth, however, and courts typically
 6 will recognize such a claim, regardless of timing, if a plaintiff can show
 7 an improper use of process ‘for an immediate purpose other than that
 8 for which it was designed and intended,’ Restatement (2d) of Torts §
 9 682, at 475 (1977). See W. Page Keeton, et al., Prosser and Keeton on
 10 The Law of Torts § 121, at 898 (5th ed. 1984) (*cases requiring an act
 11 after process has issued ‘probably stand only for the narrower
 12 proposition that there must be an overt act and that bad purpose alone
 13 is insufficient’*).

14 Fn 6. When abuse of process is based on conduct subsequent to
 15 initiation of the lawsuit, the requirement of an ‘act’ of abuse typically
 16 would be satisfied by showing use of the individual legal process in an
 17 improper manner. *See, e.g., [Farmingdale, 38 N.Y.2d at 343].”*

18 Simon, 71 F.3d at 15 & fn6. [Emphasis added].

19 Here, the DMCA Subpoenas were used for an “immediate purpose other than
 20 that for which [the DMCA subpoenas] were designed and intended.” As explained
 21 in Simon, and by Keeton and Prosser, no more is required to state a claim. However,
 22 even if an additional overt act in furtherance of the improper purpose were required,
 23 Rightscorp did overt acts here, repeatedly, when it served the DMCA subpoenas on
 24 ISPs, and some of those ISPs made returns on the subpoenas. *See* RFJN I at 131, ¶
 25 3) (sworn declaration from Rightscorp’s COO confirming that at least 17 different
 26 ISPs made returns, identifying at least 1,224 people, after being served by
 27 Rightscorp with DMCA subpoenas). Further, consistent with the focus of the
 28 Rightscorp business model, after obtaining personal and transactional information
 for putative class members, Rightscorp began contacting those people to pressure
 them to enter into “settlements.” *See* RFJN L at 17, et seq. (investor presentation
 filed with SEC, explaining that Rightscorp’s whole business model involves
 pressuring alleged infringers to pay “settlements”). The ulterior motive is essentially

1 written into Rightscorp's business plan. In short, Rightscorp has "misuse[d] the
2 [subpoena] power of the court[, in] an act done in the name of the court and under its
3 authority for the purpose of" extorting people to pay \$20 settlements. *See*
4 *Woodcourt II*, 119 Cal. App.3d at 252.

5 Defendants next argue that a claim for abuse of process may never arise in
6 response to discovery abuse and that the DMCA subpoenas issued were mere
7 discovery instruments, which is also flatly incorrect on both counts. First, the clerk-
8 stamped, claim-initiating DMCA subpoenas Rightscorp issued and then served here
9 are no mere discovery items; they were issued by and bore the seal of this Court.
10 *See, e.g.*, Exhibit RFJN A at 5. Second, it is actually fairly well-settled that misuse
11 of both subpoenas and other discovery mechanisms may give rise to claims for
12 abuse of process. *See, e.g.*, *Gonzalez-Rucci v. United States INS*, 539 F.3d 66, 71
13 (1st Cir. 2008) ("abuse of process claims 'typically cover [] challenges to the legal
14 action's procedural components,' such as subpoenas or discovery mechanisms.");
15 *Gen. Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297, 310 (3d Cir. 2003)
16 ("the word process. . . includ[es] discovery proceedings, the notice of depositions and
17 the issuing of subpoenas."); *Bidna v. Rosen*, 19 Cal. App. 4th 27, 40 (1993) ("abuse
18 of process claims typically arise for improper or excessive attachments or improper
19 use of discovery.")

20 To arrive at their faulty conclusion, defendants misread *Flores v. Emerich &*
21 *Fike*, 416 F. Supp. 2d 885, 907 (E.D. Cal. 2006) (Wanger, J.). Here is the whole
22 relevant passage in context:

23 "These conclusory allegations are insufficient to establish that the Fike
24 Defendants willfully used 'process not proper in the regular conduct of
25 the proceedings.' At most, they suggest a violation of civil discovery
26 rules. Such a violation, *on its own*, does not constitute an abuse of
27 process. Moreover, there were adequate remedies to enforce the
28 discovery rules in the prior case. It is impermissible to sue for prior
violations of discovery rules in a subsequent lawsuit. There are any
number of legitimate (i.e., not improper) reasons why documents

1 initially not disclosed might later be provided in discovery. This is the
2 nature of civil litigation.”

3 *Id.* [Emphasis added]. The *Flores* court was correct insofar as discovery violations
4 *alone* do not automatically create a claim for abuse of process. But it is equally
5 clear that where a subpoena or discovery violation of some sort is coupled with an
6 improper purpose or other overt act—which were absent in *Flores*—then a claim for
7 abuse of process will indeed lie. Neither *Flores*, nor the other inapposite case relied
8 upon by defendants,¹² should be read to suggest otherwise.

9 **(b) Per “Uniformly Adopted” Federal Precedent, Rightscorp Used the**
10 **DMCA Section 512(h) Subpoena Procedure For a Purpose It Was Not**
11 **Designed to Achieve**

12 As noted above, the key question in evaluating plaintiff’s claim for abuse of
13 process is whether Rightscorp used the 140+ DMCA Section 512(h) subpoenas for a
14 purpose they were not designed to achieve. On this point, the valid “uniformly
15 adopt[ed]”¹³ federal legal precedents are remarkably clear: what Rightscorp has been
16 doing (systematically, one might add) is contrary to the purpose of 17 U.S.C. §
17 512(h) and has never been allowed.

18 While interpretation of Section 512(h) was once an interesting question of
19 first impression, things have been well-settled for a decade, since *RIAA* and *Charter*
20 were decided by the Courts of Appeals. See *Recording Indus. Assoc. of Am. v.*
21 *Verizon Internet Svcs., Inc.*, 351 F.3d 1229, 1236-39 (D.C. Cir. 2003) (“*RIAA*”)
22 (Section 512(h) inapplicable where Internet service provider acted as conduit for
23 alleged peer-to-peer file sharing between Internet users); *In re Charter Commc 'ns.*

24
25 ¹² Defendants also cite to *Warren v. Wasserman, Comden & Casselman*, 220 Cal.
26 App. 3d 1297, 1301 (1990), but that case merely held that because the plaintiff’s
27 claim for abuse of process “is based on the premise that the continued prosecution of
28 the underlying action was the misuse of process,” which is malicious prosecution,
not abuse of process, so “the court correctly sustained the demurrer.” *Id.*

¹³ RFJN I at 140 (order from N.D. Ga. quashing Rightscorp DMCA subpoena).

1 Inc., 393 F.3d 771, 776-78 (8th Cir. 2005) (“Charter”) (finding that Section 512(h)
 2 does not authorize the issuance of subpoenas to ISPs acting as mere conduits for
 3 communications between Internet users and vacating order issued by district court
 4 enforcing improperly issued Section 512(h) subpoenas); In re Subpoena to Univ. of
 5 N.C. at Chapel Hill, 367 F. Supp. 2d 945, 952-53 (M.D. N.C. 2005) (following
 6 RIAA and Charter); Interscope Records v. Does 1-7, 494 F. Supp. 2d 388, 391 (E.D.
 7 Va. 2007) (same); Maximized Living, Inc. v. Google, Inc., 3:11-mc-80061, 2011 WL
 8 6749017 at *5-6, 2011 U.S. Dist. LEXIS 147486 (N.D. Cal. December 22, 2011)
 9 (same); Well Go USA, Inc. v. Unknown Participants in Filesharing Swam Identified
 10 by Hash: B7FEC872874D0CC9B1372ECE5ED07AD7420A3BBB, 4-12-cv-963,
 11 2012 WL 4387420 at *1, 2012 U.S. Dist. LEXIS 137272, (S.D. Tex. Sept. 25, 2012)
 12 (same); In re Subpoena Issued to Birch Communications, Inc. f/k/a CBeyond
 13 Communications, LLC, N.D. Ga. No. 1:14-cv-3904, 1/16/15, RFJN I at 139-140
 14 (quashing subpoena, noting that reasoning of RIAA and Charter has been “uniformly
 15 adopt[ed]” in all the subsequent decisions, and that Rightscorp relies on no
 16 “prevailing legal authority” at all to supports its argument).

17 Aside from RIAA and Charter themselves, perhaps the most helpful treatment
 18 of the topic comes from Magistrate Judge Laporte of the Northern District of
 19 California in Maximized Living. Following RIAA and Charter, the court held,

20 **“that § 512(h) does not authorize issuance of a subpoena to obtain the**
 21 **identifying information as to past infringement** in light of the plain
 22 language and purpose of the DMCA, especially its ‘notice and take-
 down provisions’ to which the subpoena power is integrally related. . .

23 This Court agrees with the reasoning of RIAA and holds that the
 24 subpoena power of § 512(h) is limited to currently infringing activity
 25 and does not reach former infringing activity that has ceased and thus
 26 can no longer be removed or disabled. Most importantly, the plain
 27 language of the statute describes notification requirement strictly in the
 28 present tense: ‘Identification of the material that is claimed to be
 infringing or to be the subject of infringing activity and that is to be
 removed or access to which is to be disabled.’ § 512(c)(3)(A)(iii)

1 [emphasis omitted]. Further, past infringing activity that has been
 2 removed by the infringer cannot be susceptible to the notice and take
 down provisions of the DMCA. *RIAA*, 351 F.3d at 1237.”

3 *Maximized Living, Inc. v. Google, Inc.*, *supra*, at *15-16 [emphasis altered].

4 Ignoring these precedents, defendants contend that “it is absurd to suggest that
 5 Defendants use of DMCA subpoenas to identify anonymous infringers is misuse of
 6 Section 512(h).” Mot. Br. At 10:20-22. In support of their position, defendants cite
 7 to precisely one district court case construing Section 512,¹⁴ which is inapposite,
 8 because it deals with a non-“conduit” ISP, and to the *Charter* dissenting opinion,
 9 which has been unfalteringly rejected over the ten years since *Charter* was decided.

10 The principal case relied upon by defendants, *Signature Mgmt.*, is actually a
 11 good example of the kind of situation where a DCMA Section 512(h) subpoena
 12 would be appropriate, because it involved an ISP that was hosting content still
 13 available online. *Signature Mgmt.*, 941 F. Supp. 2d at 1152. The ISP subpoena
 14 recipient defendant in that case, Automattic, Inc., is the company that runs the
 15 popular Wordpress blogging platform, which makes thousands (if not millions) of
 16 different web pages accessible to the public via the Internet.¹⁵ *See id.* at 1148. The
 17 real party in interest was an unknown person using the pseudonym “Amthrax,” who
 18 managed a Wordpress blog/website which contained speech sharply critical of
 19 Signature Mgmt. and which also displayed and made available a digital version of a
 20 copyrighted textbook owned by Signature Mgmt. *Id.* Accordingly, *Signature Mgmt.*
 21 is inapposite, because there the ISP, Automattic, had the power to “take down”
 22 disputed content which was still available online at the Wordpress blog; in other
 23 words, the ISP was not a mere “conduit” for already-concluded data transmissions.

24 What Rightscorp has done here is not new; the RIAA tried the exact same
 25 thing in the early 2000’s. Specifically, the RIAA issued DMCA Section 512(h)

26 _____
 27 ¹⁴ Mot. Br. 10:23; quoting *Signature Mgmt. Team, LLC v. Automattic, Inc.*, 941 F.
 Supp. 2d 1145, 1152 (N.D. Cal. 2013) (“***Signature Mgmt.***”) (Spero, MJ).

28 ¹⁵ See <http://en.wikipedia.org/wiki/WordPress>

1 subpoenas to ISPs in an effort to try and identify Internet users who could then
 2 potentially be sued for copyright infringement based on their alleged use of file
 3 sharing software to infringe on copyrighted content. But the D.C. Circuit said ‘no’
 4 to that plan in *RIAA*. As explained by Judge Laporte, and as Rightscorp has argued
 5 again here,

6 According to the RIAA, the purpose of § 512(h) being to identify
 7 infringers, a notice should be deemed sufficient so long as the ISP can
 8 identify the infringer from the IP address in the subpoena. 351 F.3d at
 9 1236. The court of appeals rejected this broad reading of the statute,
 10 finding that ‘the defect in the RIAA's notification is not a mere
 11 technical error; nor could it be thought ‘insubstantial’ even under a
 12 more forgiving standard.’ *Id.* The court held: ‘The RIAA's notification
 13 identifies absolutely no material Verizon could remove or access to
 14 which it could disable, which indicates to us that § 512(c)(3)(A)
 15 concerns means of infringement other than P2P file sharing.’ *Id.* . . .

16 In *In re Charter Communications, Inc., Subpoena Enforcement*
 17 *Matter*, 393 F.3d 771, 776-77 (8th Cir. 2005), the Eighth Circuit agreed
 18 with the D.C. Circuit on the issue of whether § 512(h) authorizes a
 19 subpoena on an ISP which only transmits, but does not store, the
 20 allegedly infringing material. . .

21 The court reasoned that ‘[t]he absence of the remove-or-disable-
 22 access provision (and the concomitant notification provision) [in the
 23 safe harbor provision of § 512(a)] makes sense where an ISP merely
 24 acts as a conduit for infringing material—rather than directly storing,
 25 caching, or linking to infringing material—because the ISP has no
 26 ability to remove the infringing material from its system or disable
 27 access to the infringing material.’ *Id.* at 776 (emphasis added). ***The***
 28 ***Eighth Circuit agreed with RIAA to hold held that a copyright owner***
may not request a § 512(h) subpoena for an ISP which merely acts as
a conduit for P2P file-sharing. Id. at 776-77.”

24 *Maximized Living, Inc. v. Google, Inc., supra*, at *13-16 [emphasis altered].

25 Thus, the argument Rightscorp makes in its brief here as to Section 512(h)
 26 supposedly having a broadly-defined purpose of “identifying infringers,” (Mot. Br.
 27 10:21-22), is the same exact same argument that the RIAA made and the D.C.
 28 Circuit rejected in *RIAA*.

1 The bottom line is that every federal court to have looked at the issue since
 2 *RIAA* and *Charter* has “uniformly adopt[ed]” the reasoning of those cases. RFJN I
 3 at 140. Thus, as made clear in these precedents, the “legitimate scope” or “ordinary
 4 purpose” of a DMCA 512(h) subpoena is substantially narrower than what
 5 Rightscorp and the RIAA would prefer. The “purpose” this sort of legal process was
 6 “designed to achieve” is the scenario illustrated in *Signature Mgmt.*, 941 F. Supp. 2d
 7 at 1152, namely identification of alleged infringers *in aid of getting an ISP that is*
 8 *still hosting or otherwise storing content to take that content down.* The different
 9 and illegitimate “purpose” that Rightscorp has used these subpoenas to achieve is
 10 identification of alleged infringers *who supposedly participated in past instances of*
 11 *file sharing of content that the ISPs have no way to “take down.”* To achieve the
 12 latter objective, copyright owners, such as Rightscorp’s clients, already have a
 13 remedy: they can file complaints for infringement against John Does and then seek
 14 leave to conduct early discovery on the ISPs. But they cannot use Section 512(h).

15 The question of whether DMCA Section 512(h) subpoenas can be used to
 16 combat file sharing may have been tough in the early 2000’s; however, this issue has
 17 been settled in a string of “uniform” federal precedents for at least a decade.

18 **(c) Rightscorp *Knew* it was Systematically Violating Section 512(h) and**
 19 **Abusing this Court’s Subpoena Power, as Evidenced by the Way it Beat a**
 20 **Hasty Retreat in the Face of the ISPs’ Motions to Quash**

21 In response to what must have been a ‘trial balloon’ subpoena issued by
 22 Rightscorp early on (RFJN A at 4-9), Telscape filed a strong motion to quash in
 23 October of 2012, laying the foregoing issues out before this Court (RFJN B at 5-37).
 24 Presumably in order to avoid making adverse precedent in its home jurisdiction that
 25 could put Rightscorp out of business, the company declined to oppose that motion
 26 (RFJN B at 10). Rightscorp did not, however, withdraw the subpoena, so this Court
 27 granted the motion to quash based on Rightscorp’s consent thereto (RFJN B at 12).
 28 So, although Rightscorp was probably trying to avoid an adverse adjudication, it

1 seems to have perhaps inadvertently created one from this Court nonetheless. *See id.*

2 A similar thing then happened in September of 2014 (about 3/4 of the way
3 through Rightscorp's campaign of issuing 140+ DMCA subpoenas) when Grande,
4 an ISP in Texas, filed another strong motion to quash (RFJN F at 4-88) a DMCA
5 subpoena Rightscorp had previously obtained from this Court and served on Grande
6 (RFJN D at 2-7). One business day after this motion to quash was filed,
7 Rightscorp's counsel, Mr. Hawk withdrew the subpoena. RFJN J at 90, 95.
8 Rightscorp's counsel may have written in an email not subject to Rule 11 that the
9 company believed it is in "full compliance with the DMCA." But what really speaks
10 volumes is that Rightscorp withdrew its subpoena so quickly.

11 By this point, at least, in view of the "uniform" federal precedent going
12 against them, and their demonstrated aversion to seeking a change in this precedent,
13 an objectively reasonable litigant would have stopped issuing DMCA subpoenas.
14 Not Rightscorp though; Mr. Hawk was back at it the very next day, September 9,
15 2014, issuing new DMCA subpoenas to various new ISPs. *See, e.g.*, RFJN G at 2-7;
16 Exhibit D to FAC (list showing dates of all Rightscorp DMCA subpoenas; 38 new
17 subpoenas were issued out of this Court after September 8, 2014).

18 Rightscorp now complains that plaintiff is attempting to "chill Rightscorp's
19 efforts to ask the courts outside the Eighth and D.C. Circuits to adopt an
20 interpretation of the DMCA that allows for issuance of subpoenas to conduit service
21 providers." Mot. Br. At 12:5-7. First, where is the evidence that Rightscorp ever
22 undertook any such "efforts" prior to the filing of this suit,¹⁶ to "ask" any court to
23

24 ¹⁶ Defendants disingenuously claim that "Rightscorp has previously opposed
25 motions to quash on this very basis and has not been found to have acted
26 unreasonably in doing so. *For example*, in *In Re Subpoena to Birch*
27 *Communications, Inc.*, N.D. Ga. Case No. 1:14-cv-03904-WSD. . ." Mot. Br. at
28 11:23-26 [emphasis added]. As far as plaintiff is informed, Rightscorp opposed only
one motion to quash, in that Georgia case, but only after first becoming aware that
this class action had been filed. When the Georgia court declined to impose

1 depart from a decade of “uniformly applied” precedent barring the issuance of
2 DMCA subpoenas to conduit ISPs? What the evidence here actually shows is that
3 when Rightscorp was presented with three opportunities to do just that, in the form
4 of the motions to quash filed by three different ISPs, it affirmatively waived its right
5 to press this legal issue. RFJN B at 10-12; RFJN F at 90, 95; RFJN J at 35-41. The
6 clear inference is that Rightscorp was fairly obviously trying to *avoid* an
7 adjudication on this legal issue, because all of the “uniformly appl[ied]” valid legal
8 precedent is 100% fatal to Rightscorp’s business model. The old saw that it is
9 sometimes better to beg forgiveness than to ask permission may be true in certain
10 circumstances. But it should have no application when it comes to the issuance of
11 federal subpoenas; particularly subpoenas issued using a special, *ex parte*, non-
12 adversarial procedure that is devoid of judicial review¹⁷. Rightscorp chose to
13 subpoena information for thousands of people and take its chances begging
14 forgiveness. So it should not now be heard to complain that the inevitable
15 reckoning, in the form of a class-wide claim for abuse of process, unduly constrains
16 its ability to have asked for permission.

17 The defendants next attempt to justify Rightscorp’s issuance of the unlawful
18 140+ DMCA subpoenas as “zealous advocacy.” Mot. Br. 12:17-28. Zealous
19 advocacy is one thing, and should rightly be safeguarded. However, beating a hasty
20 retreat at the first sign of any kind of organized opposition, so as to live on and issue

21
22 sanctions by concluding that Rightscorp had a reasonable position, Rightscorp’s
23 history of actively avoiding adjudications was not part of the factual record the court
24 considered. *See* RFJN I at 136-37.

25 ¹⁷ It is for these reasons, as well as concerns regarding nationwide personal
26 jurisdiction, and the fact that DMCA Section 512(h) subpoenas are issued apart from
27 any justiciable claim or controversy, that certain ISPs challenged Section 512(h) as
28 unconstitutional. Since the *Charter* court found for the ISPs on the “conduit” issue
and quashed the subpoenas then pending, the constitutionality issue was never
reached, although the *Charter* court seemed to hint that Section 512 may be
unconstitutional. For a more in-depth look at this issue, see RFJN I at 17-18.

1 new (equally invalid) subpoenas on another day, is something else entirely. Such
 2 tactics have arisen before in cases involving plaintiffs (sometimes referred to as
 3 “copyright trolls”) engaged in industrial-scale copyright enforcement. Judge Gibney
 4 of the Eastern District of Virginia confronted a similar issue in an infringement case
 5 filed against multiple John Doe defendants in 2011,

6 “ . . . When any of the defendants have filed a motion to dismiss or
 7 sever themselves from the litigation, however, the plaintiffs have
 8 immediately voluntarily dismissed them as parties to prevent the
 9 defendants from bringing their motions before the Court for
 10 resolution.

11 This course of conduct indicates that the plaintiffs have used the
 12 offices of the Court as an inexpensive means to gain the Doe
 13 defendants’ personal information and coerce payment from them. The
 14 plaintiffs seemingly have no interest in actually litigating
 15 the cases, but rather simply have used the Court and its subpoena
 16 powers to obtain sufficient information to shake down the John Does.
 17 Whenever the suggestion of a ruling on the merits of the claims appears
 18 on the horizon, the plaintiffs drop the John Doe threatening to litigate
 19 the matter in order to avoid the actual cost of litigation and an actual
 20 decision on the merits.

21 The plaintiffs’ conduct in these cases indicates an improper
 22 purpose for the suits.”

23 *K-Beech, Inc. v. Does 1-85*, 2011 WL 10646535 at *2-3, 2011 U.S. Dist. LEXIS
 24 124581 (E.D. Va., as amended Oct. 13, 2011). So too here: each time a motion to
 25 quash was filed by an ISP, Rightscorp would simply “drop” that particular subpoena
 26 “in order to avoid an actual decision on the merits” as to the propriety of issuing
 27 Section 512(h) subpoenas to ISPs acting as conduits.

28 Another argument defendants make repeatedly—and quite disingenuously —
 is that plaintiff’s “sole” remedy to combat Rightscorp’s abusive subpoenas was to
 file a motion to quash. As alleged in the FAC, Mr. Blaha never received notice or an
 opportunity to respond to the DMCA subpoena Rightscorp issued to his ISP, Imon
 Communications. FAC ¶ 56. This is because Rightscorp relied upon 17 U.S.C. §
 512(h)(5) to systematically pressure ISPs to make “expeditious” returns on

1 subpoenas, which apparently resulted in ISPs, whose personnel did not know any
 2 better, making returns on subpoenas (RFJN I at 131, ¶ 3) without first notifying their
 3 customers that the subpoenas were pending.

4 Defendants also argue that “until the Ninth Circuit or a court in this district
 5 decides otherwise, Rightscorp may properly advocate for issuance of a DMCA
 6 subpoena against conduit ISPs in the Central District.” Mot. Br. At 13:4-6. What
 7 defendants neglect to mention is that “a court in this district,”—in fact, this very
 8 Court—has indeed already “decided otherwise.” RFJN B at 40. In October of 2012,
 9 when Telscape filed its motion to quash in this Court, Rightscorp had its opportunity
 10 to argue that a decade of uniformly applied federal precedent ought to be abandoned.
 11 That argument would have been a loser then (as it remains a loser now), if it had
 12 indeed been “properly advocate[ed]” by Rightscorp back in 2012. Yet, in the face of
 13 Telscape making many of the same arguments repeated again now, Rightscorp
 14 waived its arguments. As a result, there *has* been an order from this Court quashing
 15 the exact same kind of subpoena that Rightscorp then turned around and started
 16 issuing *en masse* in 2014.

17 **(d) Since a Determination as to the Purpose of DMCA Section 512(h) is an**
 18 **Essential Element of the Abuse of Process Claim Alleged Here, this Claim**
 19 **“Arises Under” Federal Law**

20 However this Court ultimately adjudicates the question of whether Rightscorp
 21 issued DMCA Section 512(h) subpoenas for a purpose they were not designed to
 22 achieve, the one thing that is absolutely certain is that the answer to that question
 23 depends 100% on federal law.

24 Thus, as in the case of *Food Lion, Inc. v. United Food & Commercial*
 25 *Workers Int'l Union*, 1993 WL 410024 at *2, 1993 U.S. Dist. LEXIS 14669 (D. S.C.
 26 July 21, 1993) the abuse of process claim here “arises under” federal law, even
 27 though state law creates the cause of action. In *Food Lion*, the defendant had made
 28 statements in an underlying litigation that “Food Lion engaged in a company-wide

1 scheme, pattern and practice of discharging employees to prevent their vestment in
2 the profit-sharing plan.” *Id.* at *2. Accordingly, Food Lion sued for abuse of
3 process, alleging that these statements were demonstrably false. The court
4 concluded that to adjudicate whether these statements made in the prior proceeding
5 amounted to an abuse of process, it would have to interpret ERISA § 510 (codified
6 at 29 U.S. § 1140) (making it unlawful to retaliate against a plan participant or
7 beneficiary for taking actions authorized under the plan, or for him or her giving
8 testimony about the plan in a court proceeding). *Food Lion, supra*, at *2. Like the
9 Copyright Act, ERISA is another subject where federal law is meant to preempt the
10 field. *See, e.g., Richmond v. American Systems Corp.*, 792 F. Supp. 449, 456 (E.D.
11 Va. 1992) (ERISA preemption); 17 U.S.C. § 301 (Copyright Act preempts state
12 claims). Accordingly, the court found that “a determination under ERISA § 510 is
13 an essential element of the abuse of process claim as presented in this complaint,” so
14 it concluded the cause of action arose under federal law and removal on the basis of
15 federal question jurisdiction was proper. *Food Lion, supra*, at *2.

16 Relying almost entirely on *Berisic v. Winckelman*, 2003 WL 21714930, at *2
17 (S.D.N.Y. July 23, 2003) (S.D.N.Y. No. 03-cv-1810), defendants argue that the
18 abuse of process claim does *not* arise under federal law (Mot. Brief at 17-18); but
19 that case is easily distinguished. There, Mr. Berisic sued a licensed process server
20 for allegedly lying in an affidavit of service that he signed reciting that he had
21 personally served Berisic in connection with a prior federal case where Berisic was a
22 defendant who defaulted. *Id.* After the defendants in the subsequent action sought
23 to remand, Berisic argued that his claim against the process server for abuse of
24 process arose under federal law because the process server’s oath was sworn in
25 accordance with Fed. R. Civ. P. 4. *Berisic, supra*, at *2-3. The court—quite
26 correctly—disagreed that such a claim arose under federal law, noting that the
27 process server was not a party in the original federal action and that “the analysis of
28 whether defendant’s conduct was tortious and ill-motivated in no way requires a

1 construction of any federal statute, practice or procedure.” *Id.*

2 Here, by contrast, determining whether Rightscorp’s systematic issuance of
 3 DMCA Section 512(h) subpoenas was tortious does indeed require construction of
 4 the “purpose” of a federal statute, namely, 17 U.S.C. § 512(h) *et seq.* Further, in
 5 order to evaluate Rightscorp’s maliciousness in issuing these DMCA subpoenas and
 6 the thus the propriety of punitive damages, it is necessary to consider the three prior
 7 federal cases where Rightscorp declined to argue that its business model was
 8 justified or that the law should be changed. *See* RFJN B at 9-10, 38 (Oct. 2012
 9 motion in C.D. Cal.), RFJN F at 8-10, 90-95 (Sep. 2014 motion in W.D. Tx.); RFJN
 10 J at 9-12, 35-41 (Nov. 2014 motion in N.D. Ga.).

11 Thus, *Berisic* is inapposite, and the better analogue is *Food Lion*, where the
 12 U.S. District for South Carolina found that an abuse of process claim did arise under
 13 federal law, because considering it required the court to analyze certain provisions of
 14 federal ERISA law. *Food Lion, supra*, at *2.

15 **(e) Since Diversity Jurisdiction Has Not been Invoked, and the Abuse of**
 16 **Process Claim Arises Under Federal Law, California’s State Anti-SLAPP**
 17 **Law and Litigation Privilege Do Not Apply**

18 Since the abuse of process claim arises under federal law, and this Court is
 19 exercising only federal question jurisdiction, as a matter of federalism first
 20 principles, California’s anti-SLAPP law and litigation privilege do not apply. *See,*
 21 *e.g., Hilton*, 599 F.3d at 901 (“a federal court can only entertain anti-SLAPP special
 22 motions to strike in connection with state law claims”); *Oei*, 486 F. Supp. 2d at 1098
 23 (“It is well settled that the Supremacy Clause of the United States Constitution
 24 grants Congress the power to preempt state and local laws. [Citation]. As a result, it
 25 is equally well settled that the California litigation privilege does not apply to federal
 26 causes of action, including FDCPA claims.”)

1 **(f) Even if the Anti-SLAPP Law Did Apply, Defendants Have Failed to Meet**
2 **Their Burden of Showing that Speculative Invoicing Arises from**
3 **Protected First Amendment Activity “in Connection With a Public Issue”**

4 Defendants make no attempt at all to argue that this case arises out of
5 protected first amendment activity *in connection with a public issue*. There is no
6 authority plaintiff is aware of that might suggest that making unlawful robo-calls
7 demanding “settlements” of unproven claims for copyright infringement is a matter
8 of public concern, as opposed to a private dispute between the copyright owner and
9 alleged infringer. Accordingly, plaintiffs have failed to carry their burden on the
10 first prong of the test, so the analysis would not proceed to the second prong where
11 plaintiff would have the burden to present evidence. *Gallimore v. State Farm Fire &*
12 *Cas. Ins. Co.*, 102 Cal. App. 4th 1388, 1396 (2002) (“[T]he plaintiff ... has no
13 obligation to demonstrate [a] probability of success if the defendant fails to meet
14 [its] threshold burden [at the first step].”).

15 **(g) Even if the Anti-SLAPP Law Did Apply, And Speculative Invoicing Was**
16 **a “Public Issue,” The Motion Should Still be Denied Because Plaintiff**
17 **Has a Reasonable Probability of Success on the Merits**

18 Even if the anti-SLAPP law did apply to speculative invoicing, plaintiff has
19 asked the Court to take judicial notice of sufficient admissible evidence in the form
20 of court records, to tell the whole tale of Rightscorp’s abuse of this Court’s subpoena
21 power. Plaintiff has a reasonable probability of success on the merits because there
22 is no denying that Rightscorp issued subpoenas for a purpose other than what they
23 were designed to achieve, and that Rightscorp knew, based on the motions to quash
24 it did not oppose, that it was abusing this procedure and violating people’s rights.
25 RFJN B at 9-10, 38 (Oct. 2012 motion in C.D. Cal.), RFJN F at 8-10, 90-95 (Sep.
26 2014 motion in W.D. Tx.); RFJN J at 9-12, 35-41 (Nov. 2014 motion in N.D. Ga.).

27 Moreover, California’s litigation privilege does not apply to the unlawful
28 robo-calls and other extortionate communications made to the putative class
members, because such communications were private and made outside of any

1 judicial proceedings. *See* Cal. Civ. Code § 47(b).

2 In a highly analogous case where a defendant, who was accused of making
 3 unlawful debt collection phone calls in which debtors were threatened with
 4 collection suits, asserted the litigation privilege, Magistrate Judge Spero of the
 5 Northern District of California found that California’s litigation privilege did not
 6 apply. *Bautista v. Hunt & Henriques*, 2012 WL 160252 at *6-7, 2012 U.S. Dist.
 7 LEXIS 5009 (N.D. Cal. Jan. 17, 2012). As explained by Judge Spero, in *Edwards v.*
 8 *Centex Real Estate Corp.*, 53 Cal. App. 4th 15, 35 n. 10 (1997), the California Court
 9 of Appeal,

10
 11 “delineated the outer bounds of California’s litigation privilege. The
 12 court concluded that the litigation privilege does not attach unless the
 13 privileged communication has some relation to an *imminent* lawsuit or
 14 judicial proceeding. Reviewing the Restatement of Torts and California
 15 case law interpreting § 47, the court explained that ‘privileged
 16 communication must have some relation to an imminent lawsuit or
 17 judicial proceeding which is *actually* contemplated seriously and in
 18 good faith to resolve a dispute, and not simply as a tactical ploy to
 19 negotiate a bargain.’ [*Edwards*, 53 Cal. App. 4th] at 36 (emphasis in
 20 original). The court held that ‘the privilege attaches at that point in time
 that imminent access to the courts is seriously proposed by a party in
 good faith for the purpose of resolving a dispute, and not when a threat
 of litigation is made merely as a means of obtaining a settlement.’ *Id.*”

21 *Bautista, supra*, at *6. Accordingly, Judge Spero concluded that since the unlawful /
 22 allegedly privileged debt collection phone calls at issue in the case before him had
 23 occurred nine months before a collection suit was eventually filed, suit was not
 24 “imminent” when the calls were made, so the calls were not privileged. *Id.* at *7.

25 Here, as noted, even though Rightscorp has routinely threatened class
 26 members with suit for copyright infringement, these threats were made “merely as a
 27 means of obtaining a settlement,” and no follow-up infringement lawsuits were ever
 28 filed by Rightscorp. As for Rightscorp’s clients, who may be the more proper

1 plaintiffs in an infringement suit, as far as plaintiff and his counsel are aware, the
2 same is also true; none of them sued any class members for infringement either. In
3 any event, defendants cannot show that these threats were made in good faith, or that
4 suits were “imminent” when their unlawful robo-calls were made.

5 **(h) The First Amended Complaint States a Plausible Claim for Abuse of**
6 **Process as to All Defendants, so Dismissal Per Fed. R. Civ. P. 12(b)(6)**
7 **Would Also Be Erroneous**

8 No defendant other than Craig Harmon asserts an individualized defense to
9 the claims in this case. (Harmon’s personal jurisdiction motion is addressed in a
10 separate opposition.) The FAC contains proper vicarious liability, agency, alter-ego,
11 conspiracy, and market-share liability allegations as to each of the defendants other
12 than Rightscorp. FAC ¶¶ 99-101. Accordingly, for the reasons explained above,
13 and after accepting the facts in the FAC as true and drawing inferences in favor of
14 plaintiff, a Rule 12(b)(6) motion must be denied because a valid claim for abuse of
15 process is stated as to all defendants.

16 **II. CONCLUSION**

17 For all of the foregoing reasons, plaintiff respectfully requests that the instant
18 anti-SLAPP special motion to strike and to dismiss (ECF No. 30) be denied.

19 Respectfully submitted,

20 DATED: April 13, 2015

21 THE PIETZ LAW FIRM

22 /s/ Morgan E. Pietz

23 Morgan E. Pietz

24 *Attorneys for Plaintiff John Blaha,*
25 *individually and on behalf of others similarly situated*
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