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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

John Blaha,* individually and on behalf of others similarly situated,

Plaintiff,

v.

Rightscorp, Inc., a Nevada Corporation, formerly known as Stevia Agritech Corp.; Rightscorp, Inc., a Delaware Corporation; Christopher Sabec, an individual; Robert Steele, an individual; Craig Harmon, an individual; Dennis J. Hawk, an individual; BMG Rights Management (US) LLC; Warner Bros. Entertainment Inc.; and John Does 1 to 10,

Defendants.

[**Previously captioned with Karen J. Reif and Isaac Nesmith as lead plaintiffs*]

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

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

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE SECOND CAUSE OF ACTION PURSUANT TO CAL. CIV. PROC. CODE § 425.16 AND TO DISMISS SECOND CAUSE OF ACTION PURSUANT TO FRCP RULE 12(b)(6)

Date: May 11, 2015
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Trial Date: Not yet set

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I. INTRODUCTION

Plaintiff's Second Cause of Action in his First Amended Complaint ("FAC") asserts that defendants Rightscorp, Inc. (a Nevada Corporation), Rightscorp, Inc. (a Delaware Corporation), Christopher Sabec, Robert Steele, Craig Harmon and Dennis J. Hawk (collectively "Defendants"), committed abuse of process by seeking to obtain subpoenas under the Digital Millennium Copyright Act ("DMCA"). However, Plaintiff's claim impermissibly challenges Defendants' petitioning conduct, which is protected under California's anti-SLAPP statute. The Second Cause of Action is barred as a matter of law because: (1) the subpoena complained of was used to identify a copyright infringer — which is the express purpose of DMCA subpoenas as interpreted by the courts of this Circuit — and therefore does not constitute an "abuse" of process; and (2) the conduct complained of is protected under the litigation privilege under Cal. Civ. Code §47(b). Accordingly, Plaintiff's Second Cause of Action should be stricken or, alternatively, dismissed.

The abuse of process claim should be dismissed under California's anti-SLAPP statute, as Plaintiff's attempt to recover damages from Defendants and enjoin them from making further subpoena applications impermissibly impairs Defendants' free speech and petitioning rights. The imposition of the remedies Plaintiff seeks is prohibited as it would unduly burden Defendants' efforts to invoke legal process to identify copyright violators who illegally distribute Rightscorp's clients' protected works. As the California courts have consistently held, claims attacking a defendant's efforts to invoke the legal system are subject to being automatically stricken under anti-SLAPP. Cal. Civ. Proc. Code § 425.16(e). Plaintiff can only pursue such a claim if he can make a prima facie showing of the validity of his claim. Here, Plaintiff cannot do so because the claim is barred as a matter of law for two distinct reasons:

First, Plaintiff's claim theorizes that a party misuses DMCA subpoenas

when such subpoenas are sought for the purpose of identifying a copyright infringer. Since this is precisely the intended function of DMCA subpoenas, this theory fails to give rise to a cognizable claim. Even if this was not the case, it is well settled that the alleged discovery abuse in an underlying proceeding fails to state a cause of action for abuse of process. As an extensive body of California law establishes, the proper procedure for a Plaintiff allegedly aggrieved by a subpoena to follow is to file a motion to quash in the case in which it was issued, not to file a nation-wide class action in an entirely separate proceeding.

Second, even assuming, contrary to the law, that misuse of a subpoena could constitute an abuse of process, Plaintiff's claim here is barred by the litigation privilege. California's broad litigation privilege immunizes lawyers and parties from any liability arising from litigation-related communications. Attorney Hawk's declaration submitted to the Clerk pursuant to 17 U.S.C. § 512(h) is precisely the type of litigation-related communication that is absolutely immunized from any tort liability. Cal. Civ. Code § 47(b).

Accordingly, Defendants' motion to strike the Second Cause of Action should be granted and Defendants should be awarded their attorney's fees. Alternatively, because Plaintiff's abuse of process claim fails as a matter of law, the Second Cause of Action should be dismissed with prejudice.

II. FACTUAL BACKGROUND

A. Rightscorp Helps Enforce its Client's Copyrights

Defendant Rightscorp, Inc. ("Rightscorp") is in the business of digital rights enforcement and works on behalf of copyright owners to identify online infringements and to mitigate the damage caused by such infringers. FAC, ¶¶ 28-29. Rightscorp has a patent-pending, proprietary technology for responding to copyright infringement that identifies the unique internet addresses used by illegal distributors of copyrighted music and videos. FAC, ¶¶ 28-29. Rightscorp then uses this publicly available information to issue notifications to Internet Service

Providers (ISPs), which Rightscorp in turn asks the ISPs to forward to their customers (FAC, ¶ 29) — customers who Rightscorp believes in good faith are illegally distributing its clients' copyrighted works. Plaintiff does not dispute that the identified individuals, including Plaintiff, did in fact infringe protected copyrighted material.

When such distributors of copyrighted content respond to Rightscorp's notices forwarded to them by their ISP, Rightscorp attempts to resolve the past infringing conduct by offering to settle the past infringements on behalf of its clients for $20 per infringement. FAC, ¶ 29. Distributors who agree to these settlements obtain binding releases from the rightsholders, which fully resolve their past infringing conduct. FAC, ¶ 33.

When such distributors of copyright content do not respond to Rightscorp's notices forwarded to them by their ISP, Rightscorp in certain instances will pursue a DMCA subpoena (17 U.S.C. § 512(h)) to the ISP to obtain the identity of alleged infringers. Such a subpoena is at the heart of this lawsuit. As identified in Paragraph 55 of the FAC, attorney Hawk submitted a declaration in support of the issuance of a May 7, 2014 subpoena to Imon Communications LLC, along with notices for 110 separate acts of copyright infringement based on the electronic distribution of Rightscorp's clients' copyrighted works using IP addresses issued to Imon's subscribers. *In Re: Subpoena to IMON Communications LLC*, C.D. Cal. Case No. 2:14-mc-00277 ("*In re Subpoena to IMON*"), Docket Nos. 1 and 2. These acts of infringement by Imon subscribers included uploading and distributing films such as The Shawshank Redemption, Gravity, and The Lord of The Rings: The Fellowship of the Ring; television shows such as Supernatural, The Big Bang Theory, and Two and a Half Men; and musical works by artists such as Ellie Goulding, Demo Lovato, Eminem, and Johnny Cash. Contreras Dec., ¶ 2; Exh. 1.

With respect to Plaintiff Blaha, attorney Hawk's declaration attached notices

that had been sent to Imon that identified uploads and distribution made by a computer at IP address 207.191.209.13 (which Imon later identified as being assigned to Blaha). *In re Subpoena to IMON*, Docket No. 2; Contreras Dec., ¶ 2; Exh. 1. These included (i) an April 13, 2014 notice regarding the uploading and distribution of the Big Bang Theory, Season 7, Episode 19, on April 6 and April 7, 2014; (ii) an April 19, 2014 notice regarding the uploading and distribution of the musical track "Shine" by John Legend and The Roots on April 19, 2014, and the musical tracks "Clones" and "Dear God 2.0" by The Roots, on April 19, 2014; (iii) an April 29, 2014 notice regarding the uploading and distribution of the Big Bang Theory, Season 7, Episode 21, on April 29, 2014; and (iv) an April 30, 2014 notice regarding a second instance of uploading and distributing the Big Bang Theory, Season 7, Episode 21, on April 30, 2014. *In re Subpoena to IMON*, Docket No. 2; Contreras Dec., ¶ 2; Exh. 2.

Although the FAC is drafted in a manner designed to distract from Plaintiff Blaha's infringing conduct, it is notable that nowhere in the FAC does Plaintiff actually dispute that he engaged in the acts of copyright infringement identified in Rightscorp's notices. Indeed, Plaintiff concedes that Rightscorp sent the notices to Imon precisely so that they could be forwarded to him. FAC, ¶ 54.

The above efforts of Rightscorp to identify Blaha and address his repeated acts of copyright infringement prompted the instant action.

B. Procedural History

The original complaint was filed on November 21, 2014, and proposed novel claims on behalf of a putative nationwide class of copyright infringers who object to defendant Rightscorp's efforts on behalf of its music and motion picture industry clients to (i) identify their misconduct, (ii) inform them that their misconduct is being monitored, and (iii) advise them of a settlement option that extinguishes thousands of dollars (in some cases, hundreds of thousands of dollars) of potential liability.

Following service of the original complaint, counsel met and conferred pursuant to Local Rule 7-3 to discuss the deficiencies Defendants identified with respect to the original complaint. Contreras Decl., ¶¶ 3-6 and Exhs. 3-4. As a result of this meet and confer, putative class counsel conceded that claims originally asserted under the federal and California Fair Debt Collection Practices Act were without merit and withdrew them from the FAC. Contreras Decl., ¶¶ 5-6 and Exh. 4. Also in response to these meet and confer efforts, the FAC replaced originally named plaintiff Karen Reif in favor of new plaintiff, John Blaha, to momentarily avoid a potentially dispositive issue regarding consent with respect to the TCPA claims. Exh. 3 at pp. 2-4. The significant consent issues relating to the putative TCPA class will be taken up, if necessary, at the class certification stage.

With respect to the abuse of process claim, however, Plaintiff was unswayed by extensive California authority establishing that Plaintiff has not and cannot allege a cognizable claim for abuse of process. Nor was Plaintiff persuaded that his abuse of process claim was both barred by California's litigation privilege (Cal. Civ. Code § 47(b)) and subject to a special motion to strike under California's anti-SLAPP statute (Cal. Civ. Proc. Code § 425.16). Exh. 3 at pp. 5-7. Plaintiff disputes the applicability of these defenses, arguing that because his abuse of process claim purportedly raises substantial federal questions, it is not subject to California's litigation privilege or anti-SLAPP statute, even though the claim is asserted under California law. Plaintiff's unmeritorious arguments necessitated the instant motion.

III. PLAINTIFF'S EFFORTS TO CHILL DEFENDANTS' PETITIONING CONDUCT IS PROHIBITED BY CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16.

A. The Applicable Law on a Special Motion to Strike

The California Legislature enacted California's Anti-Strategic Lawsuit Against Public Participation (Anti-SLAPP) statute, California Code of Civil

Procedure Section 425.16, "to prevent and deter lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. Because these meritless lawsuits seek to deplete the defendant's energy and drain his or her resources, the Legislature sought to prevent SLAPPs by ending them early and without great cost to the SLAPP target." *Silverstein v. E360INSIGHT, LLC*, 2008 WL 1995217 (C.D. Cal. 2008) (*quoting Soukup v. Law Offices of Herbert Hafif*, 39 Cal.4th 260, 278 (2006)). *See also Rusheen*, 37 Cal.4th at 1055-56. This statute allows a court to strike any state claim arising from a defendant's exercise of constitutionally-protected rights of free speech or petition for redress and grievances. *Silverstein, supra;* Cal. Code Civ. Proc. §425.16(b)(1). The anti-SLAPP statute is to be construed broadly. *Silverstein, supra;* Cal. Code Civ. Proc. §425.16(a).

Defendants sued in federal court are entitled to bring anti-SLAPP motions to strike State law claims. *Silverstein, supra*. SLAPP suits may be brought in federal courts in response to pendent state law claims. *In re Bah*, 321 B.R. 41, 46 (B.A.P. 9th Cir. 2005) ("application of the anti-SLAPP statute to pendent state law claims is appropriate"). As explained in *Rogers v. Home Shopping Network, Inc.*, 57 F.Supp.2d 973, 983 (C.D. Cal. 1999), an anti-SLAPP special motion to strike that is directed to the sufficiency of the complaint "must be treated in the same manner as a motion under Rule 12(b)(6) except that the attorney's fee provision of Section 425.16 applies."

Section 425.16(b)(1) establishes a two-step process for evaluating an anti-SLAPP motion. *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010). The first step asks whether Plaintiff's claims arise from protected activity, including petitioning activity in furtherance of free speech. *Id*. at 903; *Flores*, 416 F.Supp.2d at 896. The statute defines action "in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" as including "(1) any written or oral statement or writing made before

a ... judicial proceeding" or "(2) any written or oral statement or writing made in connection with an issue under consideration or review by a ... judicial body." Cal. Civ. Proc. Code § 426.16(b)(1) and (e); *Hilton*, 599 F.3d at 903; *Flores*, 416 F.Supp.2d at 895-896.

If the first step is satisfied, as it clearly is here, the second step requires that "the plaintiff must show a 'reasonable probability' of prevailing in its claims for those claims to survive dismissal. To do this, the plaintiff must demonstrate that the complaint is legally sufficient and is supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Silverstein, supra* (internal citations and citations omitted); *see also Flores*, 416 F.Supp.2d at 895-896.

B. *Step 1*: Plaintiff's Claim That Rightscorp Misused DMCA Subpoenas Arises in Connection with Protected Activity

There is no question that Plaintiff's abuse of process claim arises from protected speech or conduct. Abuse of process claims are deemed to arise out of protected conduct as a matter of law.

> "The gravamen of [an abuse of process] claim is misconduct *in* the underlying litigation. Indeed, that is the essence of the tort of abuse of process—some misuse of process in a prior action—and it is hard to imagine an abuse of process claim that would not fall under the protection of the statute. Abuse of process claims are subject to a special motion to strike."

Booker v. Rountree, 155 Cal.App.4th 1366, 1370 (2007). *Accord Tuck Beckstoffer Wines LLC v. Ultimate Distributors, Inc.*, 682 F.Supp.2d 1003, 1015 (N.D. Cal. 2010) (striking numerous causes of action, including abuse of process claim arising out of alleged misuse of subpoenas, on determination that allegations which included the anti-SLAPP statute "protects any act in furtherance of a person's right of petition or free speech, … including, … the service of subpoenas ….").

Here, Plaintiff is attacking Defendants' right to petition courts in the Ninth Circuit to issue DMCA subpoenas to identify copyright infringers. Such attacks are prohibited in California if Plaintiff cannot establish a prima facie case at the outset of litigation that California law prohibits Defendants efforts to obtain DMCA subpoenas. Thus, the Second Cause of Action must be stricken because Plaintiff cannot meet his burden of demonstrating his claim is legally sufficient.

C. *Step 2*: Plaintiff Has No "Reasonable Probability" of Prevailing on His Abuse of Process Claim

Plaintiff has not and cannot state a viable abuse of process claim, much less one on which Plaintiff has a "reasonable probability" of prevailing. Plaintiff cannot allege that Defendants sought Section 512(h) subpoenas for an improper purpose and may not use such a claim to remedy an alleged abuse of a subpoena in an underlying proceeding. Even if such a claim were properly stated, Defendants efforts to obtain such subpoenas are protected by the litigation privilege. And Plaintiff cannot circumvent these restrictions on its claims by pleading that his abuse of process claim arises from federal rather than California law. The Second Cause of Action is prohibited as a matter of law. As a result, Plaintiff cannot establish a probability of success on the merits and the claim must be stricken.

1. Plaintiff Failed To State A Claim For Abuse Of Process.

Plaintiff's Second Cause of Action seeks damages and injunctive relief arising out of Rightscorp's alleged abuse of the statutory subpoena provision under the DMCA (17 U.S.C. § 512(h)). FAC, ¶ 102. Specifically, Plaintiff alleges Rightscorp has misused the Section 512(h) subpoena procedure because certain decisions outside the Ninth Circuit have held that such subpoenas, when issued to "conduit" service providers to obtain information about internet users engaged in acts of infringement via peer-to-peer file sharing, do not satisfy the statutory requirements of Section 512(h). FAC, ¶ 47. Thus, Plaintiff's abuse of process claim is premised on the notion that Defendants are not permitted advocate that the

courts of the Ninth Circuit adopt an interpretation of Section 512(h) of the DMCA that permits issuance to "conduit" service providers, even though this issue has been hotly contested in the courts and has never been resolved in this Circuit. Such a position is frivolous.

a) Plaintiff Failed to Allege Misuse of the DMCA Subpoena Process.

The essence of Plaintiff's abuse of process claim is that attorney Hawk, acting on behalf of Rightscorp and its clients, "intentionally used the special DMCA subpoena procedure to issue subpoenas that are invalid." FAC, ¶ 94. Indeed, it is the pursuit of "legally invalid" subpoenas that Plaintiff claims gives rise to liability for abuse of process. FAC, ¶¶ 94 and 96. But even if it were true that Section 512(h) does not permit the issuance of subpoenas against conduit service providers — an issue that has never been considered by the Ninth Circuit — the mere utilization of legal process that one is not entitled to invoke does not give rise to a derivative action for abuse of process.

"To succeed in an action for abuse of process, a litigant must establish that the defendant (1) contemplated an ulterior motive in using the process, and (2) committed a willful act in the use of the process not proper in the regular conduct of the proceedings." *Rusheen v. Cohen*, 37 Cal.4th 1048, 1057 (2006) (reversing Court of Appeal's failure to affirm trial court order striking abuse of process claim prohibited by the litigation privilege, holding that such a claim was properly stricken under anti-SLAPP statute). "The gravamen of the misconduct for which the liability stated in this section is imposed ***is not the wrongful procurement of legal process*** or the wrongful initiation of criminal or civil proceedings; ***it is the misuse of process, no matter how properly obtained***, for any purpose other than that which it was designed to accomplish. *Spellens v. Spellens*, 49 Cal.2d 210, 231 (1957) (emphasis added).

The improper purpose usually takes the form of coercion to obtain a

> collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club. There is, in other words, a form of extortion, and ***it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort***.'

Id. at 232-33 (emphasis added).

Thus, in order to properly plead an abuse of process, Plaintiff must allege that Defendants used the DMCA subpoenas for an ulterior purpose than to identify the infringers. No such allegations are found in the FAC. Rather, the FAC concedes that the subpoena was used specifically for the purpose for which it was designed; to identify the infringers. FAC, ¶¶ 94-95. Indeed, had a proper abuse of process claim been stated it would not matter that Defendants sought "legally invalid" subpoenas. "The subsequent misuse of the process, ***though properly obtained***, constitutes the misconduct for which the liability is imposed." *Spellens*, 49 Cal.2d at 231 (emphasis added). Nothing of the sort is alleged here.

Instead, the gravamen of Plaintiff's claim is the allegation that the issued subpoenas were "legally invalid." FAC, ¶ 94. This is not sufficient. "The gist of the tort is the improper use of the process ***after it is issued***." *Adams v. Superior Court*, 2 Cal.App.4th 521, 531 (1992) (emphasis in original). It is absurd to suggest that Defendants' use of DMCA subpoenas to identify anonymous copyright infringers is a ***misuse*** of Section 512(h). That is exactly the purpose of the DMCA subpoena provision. "As is clear from the title of § 512(h) — '[s]ubpoena to identify infringer' — ***the purpose of a DMCA subpoena is to identify a copyright infringer***." *Signature Mgmt. Team, LLC v. Automattic, Inc.*, 941 F.Supp.2d 1145, 1152 (N.D. Cal. 2013) (emphasis added) (denying motion to quash challenging issuance of DMCA subpoena on First Amendment grounds). Using DMCA subpoenas to identify otherwise anonymous copyright infringers

cannot possibly support a claim for abuse of process.

Plaintiff nonetheless insists it was impermissible for Rightscorp to pursue the issuance of DMCA subpoenas to identify Blaha and respond to his repeated acts of infringement, since *In re Charter Commc'ns, Inc., Subpoena Enforcement Matter ("In re Charter Commc'ns")*, 393 F.3d 771, 776-78 (8th Cir. 2005) and *Recording Industry Ass'n of America, Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003) hold that DMCA subpoenas may not be issued to conduit service providers. FAC, ¶ 47. But this is beside the point as the relevant inquiry in an abuse of process is claim is not whether the process validly issued, but whether it was abused. And even were this not the case, Plaintiff's argument simply ignores that neither the Ninth Circuit nor district courts within the Ninth Circuit are bound by these decisions. *See, e.g., Gunther v. Washington Cnty.*, 623 F.2d 1303, 1319 (9th Cir. 1979) *aff'd*, 452 U.S. 161 (1981) ("we are bound only by decisions rendered in this circuit"); *Fid. Nat. Fin., Inc. v. Friedman*, 855 F.Supp.2d 948, 969 (D. Ariz. 2012) ("unlike Ninth Circuit case law, cases outside this Circuit … are not binding on this court").

Rightscorp believes a proper interpretation of the DMCA allows for the issuance of subpoenas to conduit service providers, an interpretation that was adopted by Judge Murphy in his dissent in *Charter*: "Section 512(h) authorizes a copyright owner or its representative to request a subpoena to a service provider in order to identify infringers, and the statutory definition of 'service provider' in § 512(k) specifically includes conduit service providers." *In re Charter Commc'ns*, 393 F.3d at 778. Rightscorp has previously opposed motions to quash on this very basis and has not been found to have acted unreasonably in doing so. For example, in *In Re Subpoena to Birch Communications, Inc.*, N.D. Ga. Case No. 1:14-cv-03904-WSD, Docket No. 11 (December 8, 2014), while the magistrate judge ultimately quashed the subpoena, she rejected a request for sanctions, stating: "Rightscorp's interpretation of the terms and structure of § 512(h), although not

persuasive, is not frivolous, ***and the court does not find Rightscorp's issuance of the subpoena unreasonable***." *In Re Subpoena to Birch Communications*, Docket No. 18 (January 16, 2015) (emphasis added).

California law does not permit Plaintiff to use an abuse of process claim to chill Rightscorp's efforts to ask courts outside the Eighth and D.C. Circuits to adopt an interpretation of the DMCA that allows for issuance of subpoenas to conduit service providers. *C.f. Zamos v. Stroud*, 32 Cal. 4th 958, 970 (2004) ("Only those actions that any reasonable attorney would agree are totally and completely without merit may form the basis for a malicious prosecution suit"); *Daniels v. Robbins*, 182 Cal. App. 4th 204, 216 (2010) ("'the mere filing or maintenance of a lawsuit—even for an improper purpose—is not a proper basis for an abuse of process action'" *quoting Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal.3d 1157, 1169 (1986)). And jurisdictions throughout the United States recognize that derivative tort actions should not be used to chill an attorney's zealous advocacy on behalf of a client. *See, e.g.*, *Mosley v. Titus*, 762 F.Supp.2d 1298, 1329 (D.N.M. 2010) ("it 'would be inconsistent with the attorneys' professional duty to zealously advocate for their clients' to hold Titus liable for malicious abuse of process, when he had a reasonable belief based on the facts and law known to him that he could enforce the rights of his clients through the courts" *quoting Guest v. Berardinelli*, 145 N.M. 186, 192 (Ct. App. 2008) ("attorneys have some measure of freedom in representing their clients, and we [do] not want to chill an attorney's vigorous representation of the client")).

> "Were we to conclude, for example, that a claim is unreasonable wherever the law would clearly hold for the other side, we could stifle the willingness of a lawyer to challenge established precedent in an effort to change the law. ***The vitality of our common law system is dependent upon the freedom of attorneys to pursue novel, although potentially unsuccessful, legal theories***."

Wong v. Tabor, 422 N.E.2d 1279, 1288 (Ind. Ct. App. 1981) (emphasis added) *Accord Falls Church Grp., Ltd. v. Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 104 (2007) (same).

Until the Ninth Circuit or a court in this district decides otherwise, Rightscorp may properly advocate for issuance of DMCA subpoenas against conduit ISPs in the Central District. To find otherwise would allow parties unhappy with legal arguments advocated by an opponent to bring abuse of process claims to circumvent the safe-harbor provisions of FRCP Rule 11, which prohibits the issuance of sanctions against an attorney pursuing "claims, defenses, and other legal contentions … warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law …." FRCP Rule 11(b)(2). Neither California nor federal law invites such mischief.

b) <u>An Abuse of Process Claim Cannot Be Used to Challenge Alleged Discovery Violations In An Underlying Proceeding.</u>

Plaintiff's principal complaint — that attorney Hawk's declaration was insufficient to justify issuance of the subpoena — is a matter should have been addressed in *In re Subpoena to IMON*, the underlying proceeding. "[T]here were adequate remedies to enforce the discovery rules in the prior case. ***It is impermissible to sue for prior violations of discovery rules in a subsequent lawsuit.***" *Flores v. Emerich & Fike*, 416 F.Supp.2d 885, 907 (E.D. Cal. 2006) (emphasis added) (granting special motion to strike abuse of process claim based in part on alleged discovery misconduct in underlying litigation; "At most, [the abuse of process claim] suggest[s] a violation of civil discovery rules. Such a violation on its own does not constitute an abuse of process."). Courts routinely dismiss abuse of process claims premised on the use — or misuse — of discovery in an underlying proceeding. *See Warren v. Wasserman, Comden & Casselman*, 220 Cal.App.3d 1297, 1301 (1990) (affirming judgment on demurrer finding that

allegations of knowing pursuit of groundless cross-complaint and excessive depositions failed to state cause of action for abuse of process); *Flores*, 416 F.Supp.2d at 905. *See also Pasant v. Jackson Nat. Life Ins. Co. of America*, 751 F.Supp. 762, 765 (N.D. Ill. 1990) (granting motion to dismiss abuse of process claim arising out of "[a]llegedly oppressive discovery" since such conduct "standing alone will not provide the basis for an abuse of process claim.") (internal quotations omitted).

During the Local Rule 7-3 meet and confer, Plaintiff's counsel argued that Defendants' view of abuse of process is overly constrained, and, relying on *Coleman v. Gulf Ins. Group*, 41 Cal.3d 782, 792 (1986), asserted that the allegation that the subpoenas were issued for the ulterior motive of "improperly obtaining contact information for the Abuse of Process Class," is enough to state an abuse of process claim under California law. Contreras Dec., ¶ 5; Exh. 4 at p. 4. Plaintiff's reliance on *Coleman* is misplaced.

Coleman does not hold that alleged discovery abuse can support a claim for abuse of process. Instead, *Coleman* affirmed a judgment on demurrer dismissing a novel attempt by a party to state a derivative cause of action for "malicious appeal." In affirming the trial court's determination, the Court rejected numerous theories in support of the complaint, including abuse of process. As to that claim, the Supreme Court unremarkably held that "merely taking a frivolous appeal is not enough to constitute an abuse of process." *Id*. at 792 (internal quotation and citation omitted). More importantly, the Court observed that while defendants' alleged misconduct was clearly improper, the proper vehicle to address the misconduct would have been a motion to sanction a frivolous appeal under California Code of Civil Procedure Section 907, not a derivative action. *Id*. at 789-90 ("if plaintiffs had requested sanctions under section 907 in the initial appeal and had established the facts alleged in the present complaint, the appellate court could have awarded damages on this basis").

Here, the proper procedure for challenging any alleged misuse of DMCA subpoenas — indeed, the only procedure — was a motion to quash the subpoena in the action in which it issued. There is no cognizable claim for abuse of process based on applying for and serving the subpoenas, much less a derivative claim asserted on behalf of an allegedly aggrieved class. Plaintiff has failed to state a claim for abuse of process as a matter of law.

2. A Litigant's Efforts To Obtain A Subpoena Are Shielded By The Litigation Privilege.

California's litigation privilege offers an alternative and independent basis for striking the Second Cause of Action. Because the gravamen of Plaintiffs' claim is the communicative act of "filing a miscellaneous DMCA action" (FAC, ¶ 93) to "issue subpoenas that are legally invalid" (FAC, ¶ 94), Defendants' conduct is shielded by the absolute immunity provided by the litigation privilege under California Civil Code Section 47.

Civil Code Section 47(b) establishes the so-called "litigation privilege," which broadly protects any communication or communicative act made during any official proceeding authorized by law:

> A privileged publication or broadcast is one made: (a) In the proper discharge of an official duty, or (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law.

The litigation privilege is broadly construed and has been consistently interpreted to prevent, as a matter of law, all "secondary lawsuits" which arise solely from communications or communicative acts related to any proceeding authorized by law. *Rubin v. Green* 4 Cal.4th 1187, 1196-98 (1993) (reversing Court of Appeal and affirming trial court's sustaining of demurrer arising out of claim founded on attorney's counseling of prospective clients). "The principal

purpose of [the privilege] is to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." *Silberg v. Anderson*, 50 Cal.3d 205, 213 (1990) (reversing failure to sustain demurrer on grounds of litigation privilege). The privilege also "gives finality to judgments, and avoids unending litigation." *Wise v. Thrifty Payless, Inc.*, 83 Cal.App.4th 1296, 1302 (2000).

To that end, the privilege is ***broadly*** applied even where communication is not "pertinent, relevant, or material in a technical sense to any issue in the action; it need only have some connection or relation to the proceedings." *Portman v. George McDonald Law Corp*. 99 Cal.App.3d 988, 991-92 (1979). The privilege covers not only communications made during an official proceeding, but also to statements, communications, court filings, and other related communicative acts made outside of the strict confines of the proceeding. *Silberg*, 50 Cal.3d at 212; *Block v. Sacramento Clinical Labs, Inc*. 131 Cal.App.3d 386, 390-91 (1982).

California decisions make clear that the litigation privilege applies to Plaintiff's claim. "[S]ection 47(2) has been held to immunize defendants from tort liability based on theories of abuse of process …." *Silberg*, 50 Cal.3d at 215 (1990). "***The '[p]leadings and process in a case are generally viewed as privileged communications.'*** The privilege has been applied specifically in the context of abuse of process claims …." *Rusheen*, 37 Cal.4th at 1058 (emphasis added; internal citation omitted). "The breadth of the litigation privilege cannot be understated. It immunizes defendants from virtually any tort liability (including claims for fraud), with the sole exception of causes of action for malicious prosecution." *Olsen v. Harbison*, 191 Cal.App.4th 325, 333 (2010).

The gravamen of Plaintiffs' claim is attorney Hawk's filing of a miscellaneous DMCA action to obtain "legally invalid" subpoenas. FAC, ¶ 96. Such a DMCA action is a petition to the Court. Such petitions are privileged. As a result, Plaintiff's abuse of process claim fails as a matter of law.

3. There Is No Federal Claim for Abuse of Process – Plaintiff's Claims Arise, and Fall, Solely Under California Law.

Tacitly acknowledging that his claim should be stricken because it is barred as a matter of California law, Plaintiff attempts to plead around these fatal flaws by asserting that "'even though state 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 this 'well-pleaded complaint establish[es] that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties.'" FAC, ¶ 20 (*citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13 (1983)).

When considering whether a federal question arises from an alleged abuse of "federal" process, courts have routinely rejected such arguments, holding that claims for abuse of "federal" process claims arise under state law. "The Supreme Court has explicitly stated, 'Congress has not ... left to federal courts the creation of a federal common law for abuse of process.' As such, it is clear that plaintiff's cause of action arises out of state, not federal law." *Berisic v. Winckelman*, No. 03 CIV. 1810 (NRB), 2003 WL 21714930, at *2 (S.D.N.Y. July 23, 2003) (*quoting Wheeldin v. Wheeler*, 373 U.S. 647, 651–652 (1963)).

In *Berisic*, plaintiff filed a state court complaint alleging abuse of process under New York law, claiming that a default judgment in an underlying lawsuit was wrongfully obtained when defendants submitted a false affidavit under Rule 4(1) of the Federal Rules of Civil Procedure. Defendants removed the case to federal court, pursuant to 28 U.S.C. § 1441(b), alleging that the abuse of process claim raised a federal question. Plaintiff then moved to remand the claim to state court, arguing the abuse of process claim raised no federal questions and that removal had been improper. The district court agreed and remanded the abuse of process action back to state court. *Id*. at **1-3.

In opposition to the motion to remand, defendants argued that a federal

question arose because plaintiff's abuse of process claim "requires a determination of federal statutes, practice and procedure." *Id*. at *2. Specifically, defendants argued that whether the underlying affidavit had been wrongfully submitted required an interpretation of Rule 4(1). The district court, relying on a host of federal authorities, found this argument had "no merit." *Id*.

> The sole issue … is whether defendants are liable for abuse of process. ***While the process in question is federal process, the definition of its abuse is governed by state law***. … [T]he analysis of whether the defendants' conduct was tortious and ill-motivated in no way requires a construction of any federal statute, practice or procedure.

Id. at **2-3 (emphasis added) (*citing Tarkowski v. County of Lake*, 775 F.2d 173, 174–175 (7th Cir. 1985); *Eastern Indus., Inc. v. Joseph Ciccone & Sons, Inc.*, 532 F.Supp. 726, 727–728 (E.D. Pa.1982); *Fisher v. White*, 715 F.Supp. 37, 41–42 (E.D.N.Y. 1989); *Voors v. National Women's Health Organization, Inc.*, 611 F.Supp. 203, 207 (N.D. Ind. 1985)).

Notwithstanding these authorities, Plaintiff insists he has successfully "federalized" his abuse of process claim by pleading it such that the Court will be required to interpret and apply 17 U.S.C. § 512(h) in determining whether attorney Hawk misused DMCA subpoenas. FAC, ¶ 20. But this argument is no different than that resoundingly rejected in *Bersic* as having "no merit."

Plaintiff's federal abuse of process theory also underscores Plaintiff's complete misunderstanding of the elements of a claim for abuse of process under California law. Whether a party has tortuously abused process hinges on how the party ***threatened*** to use the process or misused the process ***after it was obtained***. Whether a party is legally entitled to invoke the process giving rise to the abuse of process claim is ***legally irrelevant***. "The gravamen of the misconduct for which … liability … is imposed is not the wrongful procurement of legal process … it is the

misuse of process, no matter how properly obtained ….” *Spellens*, 49 Cal.2d at 231. “The gist of the tort is the improper use of the process ***after it is issued***.” *Adams*, 2 Cal.App.4th at 531 (emphasis in original).

Plaintiff claims that attorney Hawk obtained the subpoenas in question “for an improper purpose, namely to obtain personally identifiable information for member of the Abuse of Process Class, that Rightscorp could then use as grist for its national ‘settlement’ mill.” FAC, ¶ 94. As established in Section III.C.1., *supra*, this does not constitute a tortious “ulterior motive in using the process.” But whether such a motive ***is tortious*** is determined exclusively under California law. As a result, this is a California claim interpreted under California law subject to California defenses, and Plaintiff’s misguided attempt to “federalize” the claim cannot save it from dismissal.

D. Attorney’s Fees and Costs Must Be Awarded.

Plaintiff was notified that his claim violated California’s anti-SLAPP statute and was afforded an opportunity to withdraw the claim during the Local Rule 7-3 meet and confer. Contreras Dec., 4 and Exh. 3. Having forced Defendants to bring the instant motion, the court must award attorney’s fees and costs to a successful anti-SLAPP movant. Cal. Civ. Code § 425.16(c); *Rogers*, 57 F.Supp.2d at 983. Should the Court determine that the Second Cause of Action must be stricken pursuant to Cal. Civ. Code § 425.16, Defendants will submit a separate application supporting the amount of fees that should be awarded.

IV. PLAINTIFF’S ABUSE OF PROCESS CLAIM MUST ALSO BE DISMISSED UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6).

Defendants are entitled to an order dismissing the Second Cause of Action with prejudice. A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims alleged in the complaint. *Ileto v. Glock Inc.*, 349 F.3d 1191, 1199–200 (9th Cir.2003). Dismissal under Rule

12(b)(6) may be based on either the "lack of a cognizable legal theory" or on "the absence of sufficient facts alleged." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). As discussed above, Plaintiff has failed to allege any cognizable theory of recovery.

Plaintiff has not and cannot state a viable abuse of process claim. Plaintiff cannot allege that Defendants sought Section 512(h) subpoenas for an improper purpose and may not use such a claim to remedy an alleged abuse of a subpoena in an underlying proceeding. Section III.C.1., *supra*. Even if such a claim were properly stated, Defendants efforts to obtain such subpoenas are protected by the litigation privilege. Section III.C.2., *supra*. And Plaintiff's abuse of process claim is resolved under California law. Section III.C.3., *supra*. As a result, Plaintiff cannot establish a cognizable legal theory, since the Second Cause of Action is prohibited as a matter of law.

V. CONCLUSION

For the foregoing reasons, the Second Cause of Action for Abuse of Process should be dismissed with prejudice and stricken pursuant to California Code of Civil Procedure Section 425.16 and the Court should order further proceedings to determine the amount of fees to be awarded to Defendants.

Dated: March 30, 2015

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