

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DISNEY ENTERPRISES, INC.;  
LUCASFILM LTD. LLC;  
TWENTIETH CENTURY FOX FILM  
CORPORATION and WARNER  
BROS. ENTERTAINMENT, INC.,

Plaintiff,

v.

VIDANGEL, INC.,

Defendant.

Case No. 2:16-cv-04109 – AB (PLAx)

**ORDER GRANTING PLAINTIFFS’  
MOTION TO DISMISS  
DEFENDANT’S FIRST AMENDED  
COUNTERCLAIMS AND STRIKE  
DEFENDANT’S AFFIRMATIVE  
DEFENSE OF COPYRIGHT  
MISUSE (DKT. NO. 103)**

Pending before the Court is Plaintiffs Disney Enterprises, Inc., Lucasfilm Ltd. LLC, Twentieth Century Fox Film Corporation, and Warner Bros. Entertainment Inc.’s (“Plaintiffs”) Motion to (i) Dismiss Defendant and Counter-Claimant VidAngel, Inc.’s (“VidAngel”) First Amended Counterclaims (“FACC”) pursuant to Federal Rule of Civil Procedure 12(b)(6) and the Declaratory Judgment Act, 17 U.S.C. § 2201; and (ii) Strike VidAngel’s affirmative defense of Copyright misuse pursuant to Federal Rule of Civil Procedure 12(f).

Plaintiffs bring this motion on the grounds that VidAngel fails to plead a plausible Sherman Act § 1 claim based on any alleged vertical or horizontal conspiracy (First Counterclaim). Plaintiffs also assert that VidAngel fails to plead claims for intentional interference with prospective economic advantage (Second Counterclaim) and violation of California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof.

1 Code §§ 1700 *et seq.* (Third Counterclaim). Additionally, Plaintiffs contend that  
2 VidAngel’s declaratory judgment counterclaims (Fourth through Seventh  
3 Counterclaims) are duplicative of Plaintiffs’ Digital Millennium Copyright Act  
4 (“DMCA”) and copyright infringement claims and VidAngel’s defenses to those  
5 claims, and the Court should exercise its discretion to dismiss those counterclaims.  
6 Finally, Plaintiffs argue that VidAngel’s copyright misuse affirmative defense  
7 (Seventeenth Affirmative Defense) should be stricken because VidAngel bases this  
8 defense on its antitrust counterclaims, and thus the defense fails along with those  
9 claims. VidAngel filed an opposition to the instant motion (Dkt. No. 132), and  
10 Plaintiffs filed a reply (Dkt. No. 142). The Court heard oral arguments from the  
11 parties and took Plaintiffs’ motion under submission. Upon consideration of the  
12 parties’ arguments, papers and the case file, the court hereby GRANTS Plaintiffs’  
13 motion.

## 14 **I. BACKGROUND**

### 15 **a. Factual and Procedural Background**

16 VidAngel is a filtering company that provides technology which enables  
17 viewers to eliminate objectionable material from motion pictures and television  
18 programs. (FACC, ¶ 9). In their first amended answer and counterclaims, VidAngel  
19 alleges that major motion picture studios and directors have historically been hostile to  
20 any alterations made to the director’s final cut. (FACC, ¶ 20). In 2014, several major  
21 motion picture and television studios, including Plaintiffs, entered into a written  
22 agreement with the Director’s Guild of America (the “DGA Agreement”). (*Id.*, ¶¶ 26-  
23 27). VidAngel contends that Section 7-509 of the DGA Agreement, entitled “Editing  
24 Theatrical Motion Pictures,” prohibits any alteration to a motion picture, without the  
25 involvement, consultation or final approval of the director. (*Id.*, ¶ 23). VidAngel also  
26 alleges that Section 7-509 of the DGA Agreement has been understood and enforced  
27 by the studios as prohibiting all filtering. (*Id.*, ¶ 24). VidAngel avers that the studios  
28 entered the DGA Agreement as part of a concerted effort to prohibit the lawful  
provision of online filtering services and the provisions of section 7-509 of the DGA  
Agreement are an unreasonable restraint on trade in violation of Section 1 of the  
Sherman Act. (*Id.*, ¶¶ 23, 27).

1 VidAngel also alleges that Plaintiffs only license film content pursuant to  
2 anticompetitive agreements which include terms and conditions that restrict content  
3 editing and filtering of any kind without their prior written consent. (*Id.*, ¶ 24).  
4 VidAngel asserts that Plaintiffs refused to enter into licensing agreements with  
5 VidAngel and also rejected VidAngel’s offers to buy DVDs directly from Plaintiffs.  
6 (*Id.*, ¶¶ 40, 41). VidAngel contends that these actions run counter to each individual  
7 Plaintiff’s best interests, and therefore are evidence of collusion. (*Id.*, ¶ 41). Finally,  
8 VidAngel alleges that Plaintiffs induced and persuaded Google and other major digital  
9 content distributors to refuse to support VidAngel’s filtering service. (*Id.*, ¶¶ 46, 47).  
10 VidAngel contends that Plaintiffs’ actions have seriously diminished the ability of  
11 VidAngel and other filtering services to function in the market. (*Id.*, ¶ 9).

12 On June 9, 2016, Plaintiffs commenced this action by filing a complaint against  
13 VidAngel. (Complaint, Dkt. No. 1). On July 5, 2016, VidAngel filed an answer and  
14 counterclaim. (Dkt. No. 11). On September 16, 2016, VidAngel filed an Amended  
15 Answer and Affirmative Defenses, as well as First Amended Counterclaims. (Dkt.  
16 No. 77). On October 8, 2016, Plaintiffs filed the instant motion. (Dkt. No. 119).

## 17 II. LEGAL STANDARD

18 Rule 8 requires a “short and plain statement of the claim showing that the pleader  
19 is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The statement must provide enough  
20 detail to “give the defendant fair notice of what the . . . claim is and the grounds upon  
21 which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotations  
22 omitted). The complaint must also be “plausible on its face,” allowing the Court to  
23 “draw the reasonable inference that the defendant is liable for the misconduct  
24 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility standard is  
25 not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility  
26 that a defendant has acted unlawfully.” *Id.* Labels, conclusions, and “a formulaic  
27 recitation of the elements of a cause of action will not do.” *Id.* (quoting *Twombly*, 550  
28 U.S. at 555).

29 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may  
30 move to dismiss a pleading for “failure to state a claim upon which relief can be  
31 granted.” Fed. R. Civ. P. 12(b)(6). When ruling on a Rule 12(b)(6) motion, “a judge  
32 must accept as true all of the factual allegations contained in the complaint.” *Erickson*

1 *v. Pardus*, 551 U.S. 89, 94 (2007). But a court is “not bound to accept as true a legal  
2 conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. at 678 (internal quotation  
3 marks omitted). Furthermore, courts are not bound to “accept as true allegations that  
4 contradict matters properly subject to judicial notice or by exhibit. Nor is the court  
5 required to accept as true allegations that are merely conclusory, unwarranted  
6 deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*,  
7 266 F.3d 979, 988 (9th Cir. 2001) (citation omitted), *amended on other grounds*, 275  
8 F.3d 1187 (9th Cir. 2001). The complaint is properly dismissed if it fails to “plead  
9 ‘enough facts to state a claim to relief that is plausible on its face.’” *Weber v. Dep’t of  
Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at  
544).

### 10 III. JUDICIAL NOTICE

11 “Generally, a district court may not consider any material beyond the pleadings in  
12 ruling on a Rule 12(b)(6) motion. However, a court may consider judicially  
13 noticeable documents, such as documents attached to a complaint, documents  
14 incorporated by reference in the complaint, or documents that form the basis of the  
15 complaint. *United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003).  
16 Additionally, “documents whose contents are alleged in a complaint and whose  
17 authenticity no party questions, but which are not physically attached to the pleading,  
18 may be considered in ruling on a Rule 12(b)(6) motion to dismiss” without converting  
19 the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14  
20 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule of Evidence 201, a court  
21 may take judicial notice of “matters of public record.” *Mack v. South Bay Beer  
Distributors*, 798 F.2d 1279, 1282 (9th Cir. 1986). *Arpin v. Santa Clara Valley  
Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

22 Plaintiffs request that the Court take Judicial Notice of the following documents: (1)  
23 Directors Guild of America, 2014 Basic Agreement, Section 7-509; (2) Directors  
24 Guild of America, 1978 Basic Agreement, Section 7-509; (3) Directors Guild of  
25 America, 2014 Side Letter 15; (4) December 15, 2014 email exchange between Mark  
26 Fleming and Neal Harmon; (5) 2014 email from Neal Harmon to Jeffrey Harmon; (6)  
27 Exhibit A to the Declaration of David Quinto (Dkt. 46-1); and (7) Declaration of Neal  
28 Harmon and Exhibit A thereto (Dkt. 43 and 43-1). The Court grants judicial notice  
with respect to documents 1-4, 6 and 7, because they are either incorporated by

1 reference in the First Amended Counterclaims or are publically available on the  
2 Director's Guild's website. The Court declines to take judicial notice of the 2014  
3 email from Neal Harmon to Jeffrey Harmon, because it is not incorporated by  
4 reference into the complaint, and the Court is not aware of any legal authority  
5 permitting the Court to take notice of this type of document in connection with a  
6 12(b)(6) motion. The email at issue includes what Plaintiffs allege is a near-  
7 contemporaneous account of Harmon's conversation with Google executive Mark  
8 Fleming. The conversation with Fleming forms the basis of one of VidAngel's claims.  
9 Plaintiffs contend that the email is analogous to a phone transcript which was the  
10 subject of a request for judicial notice in *Hoffman v. Cenlar Agency, Inc.*, No. 12-CV-  
11 414-L (NLS), 2013 WL 1285126, at \*1-2 (S.D. Cal. Mar. 27, 2013). However, in  
12 *Hoffman*, the plaintiff alleged that the defendant wrongfully recorded a telephone  
13 conversation in violation of California's eavesdropping statute, Cal. Penal Code §  
14 632. *Id.* at \*2. Because the recording of the phone call itself was the subject of the  
15 claim, the court took judicial notice of the recording and a transcript of the recording.  
16 Here, it is not the email itself which forms the basis of VidAngel's claims, rather it is  
17 the conversation referenced in the email that forms the basis of a claim. Therefore,  
18 the Court declines to take judicial notice of the aforementioned email. The remaining  
19 documents are either incorporated by reference in the First Amended Counterclaims  
20 or are publically available. Moreover, VidAngel does not genuinely dispute the facts  
21 Plaintiffs seek to judicially notice. Accordingly, judicial notice of the requested  
22 documents is proper. (*See* Plaintiffs' Request for Judicial Notice ("RJN") Dkt. No.  
23 119).

#### 24 IV. DISCUSSION

##### 25 a. Whether VidAngel has plausibly alleged a violation of Section 1 of 26 the Sherman Act (First Counterclaim)

27 Section 1 of the Sherman Act prohibits "[e]very contract, combination in the  
28 form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the  
several States, or with foreign nations." 15 U.S.C. § 1. Under Rule 8(a)(2), a party  
asserting a claim under section 1 "must plead not just ultimate facts (such as a  
conspiracy), but evidentiary facts which, if true, will prove: (1) a contract,  
combination or conspiracy among two or more persons or distinct business entities;  
(2) by which the persons or entities intended to harm or restrain trade or commerce

1 among the several States, or with foreign nations; (3) which actually injures  
2 competition.” *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008)  
3 (citing *Les Shockley Racing Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 507 (9th Cir.  
4 1989)); *see also Twombly*, 550 U.S. at 544.

5 VidAngel alleges that Plaintiffs are parties to two different types of agreements  
6 in restraint of trade. First, VidAngel contends that the Plaintiffs have entered into  
7 horizontal agreements among themselves and other studios which have eliminated  
8 companies like VidAngel from participating in online filtering. VidAngel also alleges  
9 that each individual Plaintiff has entered into vertical agreements that prohibit  
10 streaming licensees from doing business with filtering companies. The Court analyzes  
11 each allegation in turn.

12 **i. Whether VidAngel has plausibly alleged a horizontal  
13 conspiracy**

14 As discussed above, VidAngel alleges that each of the Plaintiffs entered the  
15 2014 DGA Agreement as part of a concerted effort to prohibit the lawful provision of  
16 online filtering services. (FACC, ¶ 27). Specifically, VidAngel asserts that section 7-  
17 509 of the 2014 DGA Agreement, entitled “Editing Theatrical Motion Pictures,”  
18 prohibits any alteration to a motion picture without the approval of the director. (*Id.*,  
19 ¶¶ 23–24, 26). VidAngel argues that the terms of section 7-509 operate as an  
20 unreasonable restraint on trade in violation of Section 1 of the Sherman Act. (*Oppo.*  
21 at 5). Section 7-509 of the 2014 DGA Agreement establishes an obligation for the  
22 studios to consult with directors when editing motion pictures. The studios’  
23 obligation to consult with directors varies based on the media platform upon which the  
24 movie is to be broadcast. While the terms of section 7-509 certainly limit the studios’  
25 ability to edit films without initially consulting the director, the language of this  
26 provision does not support VidAngel’s contention that the studios must obtain the  
27 approval of the director. The Ninth Circuit addressed a related issue in *Tristar*  
28 *Pictures v. Dir.'s Guild of Am.*, 160 F.3d 537 (9th Cir. 1998). There, the appellant  
movie studio edited a 118 minute film down to 90 minutes for exhibition on network  
television. The director was initially consulted with regard to the edits but ultimately  
refused to participate. The studio then proceeded to perform the edits over the  
objection of the director. While the studio’s right to unilaterally make edits to a movie  
was not at issue in the *Tristar Pictures* decision, the Ninth Circuit observed that



1 section 7-509 of the DGA Agreement arguably grants a studio the right “to edit the  
2 film as it sees fit.” *Id.* at 541.

3  
4 Plaintiffs contend that the DGA Basic Agreement is typically negotiated at  
5 three year intervals, with some provisions of the agreement remaining unchanged for  
6 decades. (Mot. at 8). Plaintiffs also assert, and VidAngel does not dispute that the  
7 current version of section 7-509 has remained materially unchanged since 1978, which  
8 predates the creation of movie filters by decades. Thus, VidAngel argues that section  
9 7-509 does not prohibit, nor even address filtering. (*Id.*) It is clear that section 7-509  
10 does not prohibit secondary editing by companies like VidAngel. The only subsection  
11 of section 7-509 that even addresses streaming services such as VidAngel is 7-509(g).  
12 (*See* RJN, Ex. 1 § 7-509(g)). Section 7-509(g) addresses a director’s right to edit  
13 motion pictures which are to be exhibited on basic cable television and “New Media”  
14 which includes streaming services.<sup>1</sup> However, this subsection only applies if the  
15 studio “edits the motion picture at its own facilities in the United States.” (RJN, Ex. 1  
16 § 7-509(g)). The circumstances required for section 7-509(g) to apply are not  
17 presented by secondary editing services such as VidAngel’s. VidAngel argues that  
18 the Court cannot interpret the provisions of a contract on a 12(b)(6) motion. However,  
19 the case they cite, *FT Travel--N.Y., LLC v. Your Travel Ctr., Inc.*, clearly states that  
20 “[w]here a contract's language is clear and unambiguous, a court may dismiss a breach  
21 of contract claim on a Rule 12(b)(6) motion to dismiss.” *FT Travel - N.Y., LLC v.*  
22 *Your Travel Ctr., Inc.*, 112 F. Supp. 3d 1063, 1090 n.134 (C.D. Cal. 2015) (citing  
23 *Maniolos v. United States*, 741 F.Supp.2d 555, 567 (S.D.N.Y. 2010)). The language  
24 of section 7-509 of the DGA agreement is clear and unambiguous with regard to the  
25 fact that it does not prohibit editing nor does it prohibit or even address filtering  
26 services like VidAngel’s service. Indeed, even VidAngel concedes that the terms of  
27 section 7-509 do not explicitly forbid filtering. (Oppo. at 9).

28  
29 Despite their concession that section 7-509 doesn’t prohibit filtering, VidAngel  
30 contends that the terms have nonetheless been “understood and implemented” by the  
31 parties to prohibit studios from entering into agreements that allow secondary editing  
32 or filtering of movies or television programs. (*Id.*) This argument fails for multiple  
33 reasons. First, the Ninth Circuit has held that allegations that “[an] anticompetitive  
34 agreement [is] a secret term of an otherwise public agreement” are insufficient to state

---

<sup>1</sup> *See* DGA Basic Agreement Side Letter 15 (RJN, Ex. 3)

1 a claim for a violation of section 1 of the Sherman Act. *PharmaRX Pharm., Inc. v.*  
2 *GE Healthcare, Inc.*, 596 Fed. Appx. 580, 580-81 (9th Cir. 2015) (citing *William O.*  
3 *Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 665 (9th Cir. 2009)). Second,  
4 VidAngel’s allegations that they have been advised by several potential business  
5 partners that no agreement would be possible without director or DGA approval, are  
6 either implausible or are contradicted by evidence in the record.

7 VidAngel makes two primary allegations in support of their contention that the  
8 DGA agreement has been “understood and enforced” as prohibiting filtering. First,  
9 VidAngel alleges that non-party Lionsgate Entertainment, Inc. advised VidAngel that  
10 in order to enter into a licensing agreement to stream filtered movies, VidAngel would  
11 first need to obtain the permission of the DGA. However, there is no indication that  
12 Lionsgate’s position stems from the DGA Agreement. In fact, the explicit language of  
13 section 7-509 does not prohibit filtering, nor provide that DGA approval is required in  
14 order to edit or filter a movie. Therefore, the Court finds the inference that  
15 Lionsgate’s requirement of DGA approval stems from section 7-509 implausible. In  
16 fact, VidAngel itself asserts that major motion picture studios and directors have  
17 historically been hostile to any alterations made to a director’s final cut. (FACC, ¶  
18 20). Plaintiffs argue that this evidences an independent motivation for each studio to  
19 not allow their movies to be filtered. (Mot. at 15-16). It is inherently clear that movie  
20 directors are integral to a studio’s production of motion pictures. Therefore, the Court  
21 finds it plausible that a movie studio such as Lionsgate might independently employ a  
22 rational business strategy that would require DGA approval before entering into a  
23 licensing agreement which might upset directors. VidAngel argues the Court cannot  
24 choose between competing inferences at this stage of the proceedings. VidAngel cites  
25 *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011), for the proposition that “[i]f there  
26 are two alternative explanations, one advanced by defendant and the other advanced  
27 by plaintiff, **both of which are plausible**, plaintiff’s complaint survives a motion to  
28 dismiss under Rule 12(b)(6).” *Id.* (emphasis added). Given the fact that Defendant’s  
inference is unsupported by the plain language of the DGA agreement, the Court finds  
it implausible. Moreover, “Allegations of facts that could just as easily suggest  
rational, legal business behavior by the defendants as they could suggest an illegal  
conspiracy are insufficient to plead a violation of the antitrust laws.” *Kendall v. Visa*  
*U.S.A., Inc.*, 518 F.3d 1042, 1049 (9th Cir. 2008). Lionsgate is not a party to this  
action, and there is no indication that Plaintiffs share Lionsgate’s position with regard



1 to DGA approval. The Supreme Court in *Twombly* emphasized the “need at the  
2 pleading stage for allegations plausibly suggesting (not merely consistent with)  
3 agreement.” *Twombly* 550 U.S. at 557. VidAngel’s allegation with regard to non-  
4 party Lionsgate does not plausibly suggest that Plaintiffs are a party to a conspiracy to  
5 prohibit filtering, or that this conspiracy stems from the DGA agreement.

6 VidAngel also alleges that Google representative Mark Fleming informed  
7 VidAngel that Google was concerned that a “blocker” to a potential licensing deal was  
8 that “the directors won’t let this happen” and that the studios’ “existing deals with the  
9 production companies/directors/etc. may not allow for it and therefore those [contracts]  
10 will need to get renegotiated first.” (FACC, ¶ 24). VidAngel misrepresents these  
11 statements which were contained in an email dated December 15, 2014. In the email  
12 Fleming is responding to specific questions set forth in a December 11, 2014 email  
13 from VidAngel CEO Neal Harmon. In response to Harmon’s question about whether  
14 Google’s licensing would allow them to partner with VidAngel, Fleming responds, “I  
15 need to work w/ our legal and biz dev teams to see if there’s any language in our  
16 current contracts that may block this.” (RJN, Ex. 4). Fleming further states that he  
17 will receive this information “after our initial pitch, at which point they review our  
18 deals to see if any terms exist to halt this.” Harmon also asked Fleming to speculate  
19 whether the studios would “redo the Google Play licensing” to permit them to license  
20 VidAngel, if there was indeed a current block to such an agreement. (*Id.*) Fleming  
21 replies “If there is a block on this w/ the current contracts” they would need to get “an  
22 amendment to allow it.” He also states that “it can get a bit more complicated” and  
23 the studios “existing deals with production companies/directors/etc. may not allow for  
24 it” and thus would “need to get renegotiated first.” He ends his answer with  
25 “hopefully this isn’t the case.” Contrary to VidAngel’s contention that Fleming  
26 expressed concerns that there were “blockers” to a potential deal, Fleming did not  
27 purport to know whether there were any “blockers” and only addressed that issue in  
28 response to specific questions in Harmon’s email.

24 VidAngel alleges that several months later Harmon met with executives from  
25 non-party Sony in order to discuss the option of partnering with VidAngel. (FACC, ¶  
26 52). After the meeting, Fleming allegedly told VidAngel that the MPAA studios and  
27 Sony refused to allow Google to partner with VidAngel. (*Id.*) Non-party Sony’s  
28 alleged refusal to allow Google to partner with VidAngel does not lead to the

1 plausible inference that section 7-509 of the DGA Agreement, as “understood and  
2 enforced” by the parties thereto prohibits filtering. As discussed above, the explicit  
3 language of 7-509 doesn’t prohibit filtering, and Defendant’s attempts to argue that  
4 there is a “secret term”, or private understanding of the publically available DGA  
5 Agreement is unavailing. Additionally, Plaintiffs persuasively argue that it is  
6 plausible to infer that studios have an independent motivation not to allow filtering  
7 due to the fact that directors have historically been hostile to such changes to motion  
8 pictures. VidAngel does not allege that either Sony or Fleming stated that the basis of  
9 Sony’s refusal was the DGA Agreement or some other unstated agreement between  
10 the studios.

11 Defendant’s allegation that Fleming informed them that “the rest of the MPAA  
12 member studios refused to allow Google to partner with VidAngel” is also insufficient.  
13 “To allege an agreement between antitrust co-conspirators, the complaint must allege  
14 facts such as a ‘specific time, place, or person involved in the alleged conspiracies’ to  
15 give a defendant seeking to respond to allegations of a conspiracy an idea of where to  
16 begin.” *Kendall* 518 F.3d at 1042 (citing *Twombly*, 550 U.S. at 565 n.10). VidAngel  
17 only alleges that executives of non-plaintiff Sony were present at the meeting with  
18 Fleming. There is no allegation that any other MPAA studios were present, nor is  
19 there any indication which of the studios, if any, communicated with Fleming. Based  
20 on the lack of necessary detail with regard to this allegation, the Court cannot find that  
21 Fleming’s statement supports a plausible inference that the Plaintiff studios conspired  
22 to prohibit a partnership between Google and Vidangel, or to prohibit the licensing of  
23 filtering in general. In a footnote on page 5 of their opposition, VidAngel argues that  
24 *Kendall* doesn’t impose a heightened pleading standard in antitrust claims, and also  
25 doesn’t apply in cases where discovery has not been conducted. However, the court in  
26 *Bay Area Surgical Mgmt. LLC v. Aetna Life Ins.Co.*, 166 F. Supp. 3d 988 (N.D. Cal.  
27 2015) rejected an identical argument, in part due to the Ninth Circuit’s statement that  
28 the *Kendall* decision specifically “concern[ed] the pleading requirements to state a  
claim for antitrust violations under Section 1 of the Sherman Act following the  
Supreme Court’s recent pronouncement in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct.  
1955, 1964-66, 167 L. Ed. 2d 929 (May 21, 2007).” *Id.* at 995 n.2 (citing *Kendall*,  
518 F.3d at 1044). While the Court in *Kendall* did allow discovery, nowhere in the  
decision do they state that this is required, and district courts in the Ninth Circuit have  
applied *Kendall* to cases at the pleading stage where no discovery has been conducted.

1 *See generally PharmaRX Pharm., Inc. v. GE Healthcare, Inc.*, 596 Fed. Appx. 580  
2 (9th Cir. 2015) *see also Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc.*, No. 12-  
3 CV-05847-WHO, 2013 WL 5694452, (N.D. Cal. Oct. 18, 2013). All of VidAngel's  
4 allegations with regard to Plaintiff studios' understanding and implementation of  
5 section 7-509 of the DGA agreement suffer from the same lack of specificity, and thus  
6 do not meet the pleading requirements to state a claim for a violation of Section 1 of  
7 the Sherman Act.

8 VidAngel also alleges Plaintiffs have engaged in other coordinated exclusionary  
9 conduct that constitutes a concerted refusal to deal. (Oppo. at 12). Specifically,  
10 VidAngel alleges that Plaintiff studios have uniformly: (1) rejected VidAngel's  
11 attempts to obtain licensing agreements; (2) refused to sell VidAngel DVDs directly  
12 without the use of an intermediate wholesaler; (3) declined VidAngel's offers to  
13 negotiate a mutually agreeable solution concerning the studios' copyright concerns;  
14 and (4) prevented distributors and third-party services from using VidAngel's services  
15 by including the restrictive anti-filtering terms of the DGA Agreement into  
16 distribution agreements and by threatening or coercing parties not to do business with  
17 VidAngel. (*Id.*) VidAngel argues that these actions all run counter to each Plaintiff's  
18 economic self-interest and were undertaken in furtherance of their conspiracy to  
19 eliminate filtering. (*Id.* at 2).

20 With regard to Plaintiffs' refusal to negotiate a licensing agreement, VidAngel  
21 contends that absent an agreement to eliminate filtering, Plaintiffs would not each  
22 reject negotiating a licensing agreement with VidAngel because such an agreement  
23 would provide additional revenue and could expand their motion picture and  
24 television audiences. (*Id.* at 12). However Plaintiffs contend, and VidAngel does not  
25 dispute, that VidAngel first approached Plaintiffs to negotiate a license after litigation  
26 was initiated in this action. (Mot. at 15). Moreover, Plaintiffs assert that VidAngel  
27 attempted to negotiate with Plaintiffs jointly, and was not rebuffed by "each"  
28 individual Plaintiff as the countercomplaint seems to suggest. (*Id.* at 16). Plaintiffs'  
refusal to engage in joint licensing discussions with a company that they allege is  
operating an infringing service is a rational business decision and does not support a  
plausible inference of an agreement to eliminate filtering.

1 VidAngel also argues that Plaintiffs’ refusal to sell them DVDs runs counter to  
2 Plaintiff’s economic self-interest because Plaintiffs could eliminate payments to  
3 intermediate retailers by selling directly to VidAngel. (FACC, ¶ 41.) However, in  
4 paragraph 77 of their countercomplaint, VidAngel states that the studios have  
5 economic motives “to subvert VidAngel’s business because VidAngel’s DVDs are re-  
6 sold and streamed to a new customer an average of 16 times each in the first four  
7 weeks of the new release” and Plaintiffs “do not receive a profit from each instance a  
8 title is re-sold and streamed” on VidAngel’s website. (FACC, ¶ 77.) VidAngel  
9 seemingly concedes that Plaintiffs have rational economic motives not to deal with  
10 VidAngel. While Plaintiffs might reap some profit by avoiding intermediate retailers,  
11 the evidence in the record shows that VidAngel would buy and resell these discs to  
12 multiple customers in short time frames. VidAngel would likely contend that these  
13 customers would not otherwise buy the unfiltered DVD’s from Plaintiffs, however  
14 there is no indication that Plaintiffs shared this belief. Thus, Plaintiffs could  
15 reasonably contend that the sale of DVDs to VidAngel might ultimately be  
16 detrimental to their economic interests, and their refusal to sell to VidAngel could  
17 constitute rational independent business behavior. Moreover, as described above, the  
18 fact that directors oppose filtering could also be a legitimate business reason for  
19 Plaintiff studios’ refusal to do business with VidAngel. Because all of the  
20 aforementioned allegations could just as easily constitute rational, legal business  
21 behavior as they could suggest an illegal agreement, they are insufficient to plead a  
22 violation of section 1 of the Sherman Act.

19 VidAngel finally argues that Plaintiffs induced a group boycott of VidAngel’s  
20 services by distributors and third-party services by injecting the restrictive anti-  
21 filtering terms of the DGA Agreement into distribution agreements and by threatening  
22 or otherwise coercing third parties not to do business with VidAngel. The Court will  
23 later address the distribution agreements in relation to VidAngel’s allegations of  
24 vertical conspiracies. VidAngel specifically alleges that the studios “induced and  
25 persuaded other major digital content distributors (*e.g.*, Google Play, Netflix, Amazon,  
26 and Hulu) to refuse to support VidAngel’s online filtering service.” (FACC, ¶ 47.)  
27 As discussed above, VidAngel’s lack of specific details renders this allegation  
28 insufficient under *Kendall*. VidAngel does not allege which Plaintiffs engaged in this  
action, when it occurred, nor do they allege that they ever sought to partner with  
Netflix, Amazon, or Hulu. VidAngel also fails to specify what these distributors did

1 that constituted a refusal to support VidAngel. VidAngel’s only specific allegations  
2 are with regard to their efforts to work with Google. Specifically VidAngel alleges  
3 that: (1) on December 5, 2013, VidAngel received a notice from YouTube’s legal  
4 department which stated that VidAngel’s content filtering violated YouTube’s terms  
5 of use (FACC, ¶ 47); and (2) in February 2014, Google removed technology from  
6 Chromecast that enabled Plaintiff’s filtering technology to work with the Chromecast  
7 Device (*Id.*, ¶ 45). VidAngel alleges that the Plaintiffs conspired to pressure Google  
8 to take these actions. However, VidAngel does not offer any facts that would render  
9 this allegation plausible. VidAngel does not allege or otherwise offer evidence that  
10 Plaintiffs were aware of their service prior to VidAngel’s letter to general counsel for  
11 each Plaintiff in July 2015. VidAngel states that the letters introduced VidAngel’s  
12 business model and invited the Plaintiffs to meet and discuss the distribution of  
13 content for filtering pursuant to the Family Movie Act. (*Id.*, ¶ 70). Moreover,  
14 VidAngel CEO Neal Harmon’s email correspondence with Mark Fleming of Google  
15 contradicts VidAngel’s allegations. The email correspondence occurred in December  
16 2014, several months after VidAngel alleges that Plaintiffs pressured Google to  
17 remove support for VidAngel. At the time of the email correspondence, Fleming  
18 stated that he had been talking about VidAngel’s filtering service to the internal teams  
19 at Google and had gotten a fairly positive response. (RJN, Ex 4). Harmon also stated  
20 that he did not know whether Google’s licensing agreements or the MPAA studios’  
21 agreements would prohibit Google from partnering with VidAngel. (*Id.*) These  
22 statements are inconsistent with Google having been pressured by the MPAA studios  
23 to remove support for VidAngel just months earlier. VidAngel’s failure to allege facts  
24 in support of their assertion that Plaintiffs pressured Google to withdraw its support is  
25 fatal to its claims. “It is not enough merely to include conclusory allegations that  
26 certain actions were the result of a conspiracy; the plaintiff must allege facts that make  
27 the conclusion plausible.” *See Kendall* 518 F.3d at 1047-48.

23 The aforementioned allegations are either insufficient pursuant to *Kendall*, or  
24 contradicted by evidence which is properly subject to judicial notice. For the  
25 foregoing reasons, the Court finds that VidAngel has not sufficiently alleged that  
26 Plaintiffs were party to a horizontal conspiracy to prohibit filtering in violation of  
27 Section 1 of the Sherman Act.  
28



1  
2 **ii. Whether VidAngel has plausibly alleged a vertical conspiracy.**

3 VidAngel's vertical conspiracy claims are based on their allegation that each  
4 Plaintiff's license agreements with its licensees violate antitrust law. Defendants  
5 contend, and Plaintiffs acknowledge that non-price, vertical restraints, like the  
6 licensing agreements at issue, are analyzed under the rule of reason.<sup>2</sup> Under the rule  
7 of reason, VidAngel must allege: "(1) a contract, combination or conspiracy among  
8 two or more persons or distinct business entities; (2) by which the persons or entities  
9 intended to harm or restrain trade or commerce among the several States, or with  
10 foreign nations; (3) which actually injures competition." *Brantley v. NBC Universal*  
11 *Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012). Additionally, "[i]n order to state a valid  
12 claim under the Sherman Act, a plaintiff must allege that the defendant has market  
13 power within a 'relevant market.' That is, the plaintiff must allege both that a  
14 'relevant market' exists and that the defendant has power within that market." *Newcal*  
15 *Indus. v. Ikon Office Sol.*, 513 F.3d 1038, 1044 (9th Cir. 2008)

16 Market power may be demonstrated through either "direct evidence of the  
17 injurious exercise of market power," or by "circumstantial evidence pertaining to the  
18 structure of the market." *Top Rank, Inc. v. Haymon*, No. CV 15-4961-JFW (MRWx),  
19 2015 U.S. Dist. LEXIS 164676, at \*21-22 (C.D. Cal. Oct. 16, 2015) (citing *Rebel Oil*  
20 *Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995)). "To demonstrate  
21 market power circumstantially, a plaintiff must: (1) define the relevant market, (2)  
22 show that the defendant owns a dominant share of that market, and (3) show that there  
23 are significant barriers to entry and show that existing competitors lack the capacity to  
24 increase their output in the short run." *Id.* Finally, "[a]lthough market power need not  
25 be pled with specificity, the allegations must be sufficiently detailed "to raise a right to  
26 relief above the speculative level." *Rick-Mik Enters., Inc. v. Equilon Enters. LLC*, 532  
27 F.3d 963, 973 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 555).

28 VidAngel alleges that the individual Plaintiffs have the following respective  
market shares: Fox - 14.1%; Warner Brothers - 16.5%; and Disney - 26.2%. (FACC,  
¶ 85). Courts generally hold that these individual market shares are insufficient as a

---

<sup>2</sup> Although VidAngel does not address the rule of reason in their opposition, Defense conceded at oral argument that the vertical agreements at issue are analyzed under the rule of reason.



1 matter of law to confer market power. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*,  
2 466 U.S. 2, 26 & n.43 (1984) (30 percent market share insufficient); *Pilch v. French*  
3 *Hosp.*, No. CV 98-9470 CAS(CWX), 2000 WL 33223382, at \*7 (C.D. Cal. Apr. 28,  
4 2000) (33.2 percent market share insufficient). VidAngel argues that Plaintiffs' levels  
5 of market power may be aggregated with one another as well as the unnamed co-  
6 conspirator studios because they have combined to sign and enforce the DGA  
7 Agreement. (Oppo. at 18). However the cases they cite hold that "[t]he aggregation  
8 of market shares of several rivals is justified if the rivals are alleged to have conspired  
9 to monopolize." *Rebel Oil Co.*, 51 F.3d at 1437 (9th Cir. 1995); *see also United*  
10 *States v. Am. Airlines, Inc.*, 743 F.2d 1114, 1115–1122 (5th Cir. 1984). However, as  
11 discussed above, VidAngel has not sufficiently alleged that the Plaintiffs engaged in a  
12 horizontal conspiracy. Therefore, VidAngel's allegation that Plaintiffs own a  
13 dominant share fails as a matter of law, because each individual Plaintiff's market  
14 share is insufficient to confer market power. Due to their failure to show that  
15 Plaintiffs have market power, VidAngel's allegations that Plaintiffs engaged in a  
16 vertical conspiracy also fail as a matter of law.

17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**b. VidAngel's Claim for Intentional Interference with Prospective  
Economic Advantage (Second Counterclaim)**

In order to state a claim for intentional interference with prospective economic advantage, VidAngel must allege "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *See CRST Van Expedited, Inc. v. Werner Enters., Inc.*, 479 F.3d 1099, 1108 (9th Cir. 2007). Plaintiffs argue that VidAngel fails to allege that Plaintiffs interfered with an existing economic relationship that was "reasonably probable" to result in an economic benefit to VidAngel. (Mot at 21). In *Pardi v. Kaiser Permanente Hosp., Inc.*, 389 F.3d 840, 852 (9th Cir. 2004), the Ninth Circuit held that a mere "speculative expectation that a potentially beneficial relationship will arise" is insufficient to demonstrate an economic relationship between the plaintiff and some third party." Moreover, the Court finds that VidAngel only engaged in preliminary discussions with Google as evidenced by the communications with Mark Fleming.

1 Allegations of “preliminary discussions . . . concern[ing] only the possibility of a  
2 licens[e] agreement” are insufficient to state a tortious interference claim. *Cal.*  
3 *Expanded Metal Prods. Co. v. ClarkWestern Dietrich Bldg. Sys. LLC*, No. CV 12-  
4 10791 DDP (MRWx), 2014 WL 5475214, at \*4 (C.D. Cal. Oct. 29, 2014)(citing *Sole*  
5 *Energy Co. v. Petrominerals Corp.*, 128 Cal. App. 4th 212, 243, 26 Cal. Rptr. 3d 798  
6 (2005)).

7 VidAngel also alleges that they have developed advantageous prospective  
8 business and economic relationships with business partners to expand VidAngel’s  
9 business, visibility and availability to consumers, and that these relationships promise  
10 a continuing probability of future economic benefit to VidAngel. (FACC, ¶ 104).  
11 VidAngel contends that Plaintiffs knew, or reasonably should have known, of the  
12 existence of those prospective economic advantages. (*Id.*) This is a conclusory  
13 allegation that merely recites the elements of an intentional interference claim. The  
14 California Supreme Court in *Youst v. Longo*, 43 Cal. 3d 64, 71, 233 Cal. Rptr. 294,  
15 298, 729 P.2d 728, 733 (1987) held that “as a matter of law, a threshold causation  
16 requirement exists for maintaining a cause of action for [intentional interference with  
17 prospective economic advantage], namely, proof that it is reasonably *probable* that the  
18 lost economic advantage would have been realized but for the defendant’s  
19 interference.” *Id.* (emphasis in original). VidAngel falls woefully short of this  
20 threshold by simply alleging the existence of advantageous prospective economic  
21 relationship with unidentified partners. Moreover, there are no factual allegations  
22 which would permit the Court to determine whether it is reasonably probable that  
23 these relationships would have resulted in an economic benefit to VidAngel. Finally,  
24 as discussed above, the Court finds that VidAngel’s allegation that Plaintiffs pressured  
25 Google to remove their support for VidAngel is contradicted by the email  
26 correspondence with Mark Fleming, as well as VidAngel’s other allegations which  
27 tend to show that Plaintiffs became aware of VidAngel’s service in July 2015, well  
28 after the alleged claims of interference. For the foregoing reasons, the Court finds that  
VidAngel does not sufficiently plead a claim for intentional interference with  
prospective economic advantage.

1  
2 **c. VidAngel’s UCL Claims (Third Counterclaim)**

3  
4 California’s Unfair Competition Law (“UCL”), prohibits “any unlawful, unfair  
5 or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. VidAngel  
6 asserts that Plaintiffs’ alleged anticompetitive actions constitute both “unlawful” and  
7 “unfair” conduct for the purposes of the UCL. (FACC, ¶¶ 112-115). “Under its  
8 “unlawful” prong, ‘the UCL borrows violations of other laws ... and makes those  
9 unlawful practices actionable under the UCL.’” *Berryman v. Merit Prop. Mgmt., Inc.*,  
10 152 Cal. App. 4th 1544, 1554, 62 Cal. Rptr. 3d 177, 185 (2007) (quoting *Lazar v.*  
11 *Hertz Corp.*, 69 Cal. App. 4th 1494, 1505, 82 Cal. Rptr. 2d 368 (1999)). “Thus, a  
12 violation of another law is a predicate for stating a cause of action under the UCL's  
13 unlawful prong.” *Id.* VidAngel’s claim under the “unlawful” prong is premised on  
14 VidAngel’s allegations that Plaintiffs’ violated section 1 of the Sherman Act. Since  
15 VidAngel fails to sufficiently allege antitrust claims, their UCL claim under the  
16 “unlawful” prong fails as well.

17  
18 Likewise, VidAngel’s claim under the “unfair” prong of the UCL is also  
19 premised on their antitrust allegations. “Where the same conduct is alleged to support  
20 both a plaintiff’s federal antitrust claims and state-law unfair competition claim, a  
21 finding that the conduct is not an antitrust violation precludes a finding of unfair  
22 competition.” *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App’x 554, 557–58 (9th  
23 Cir. 2008); see also *Carter v. Variflex, Inc.*, 101 F. Supp. 2d 1261, 1270 (C.D. Cal.  
24 2000) (“Thus, in light of the Court's findings under the Sherman Act, the Court finds  
25 that Variflex has failed to produce sufficient evidence to support its California  
26 unfair competition claim.”); *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375,  
27 113 Cal. Rptr. 2d 175 (2001) (“If the same conduct is alleged to be both an antitrust  
28 violation and an 'unfair' business act or practice for the same reason. . . the  
determination that the conduct is not an unreasonable restraint of trade necessarily  
implies that the conduct is not 'unfair' toward consumers.”). Therefore VidAngel’s  
claim under the “unfair” prong of the UCL fails along with its antitrust claims.

1  
2 **d. VidAngel’s Declaratory Relief Claims (Fourth through Seventh**  
3 **Counterclaims)**

4 In VidAngel’s fourth through seventh claims for relief it seeks declarations that:  
5 (1) its “current” system is legal; (2) VidAngel is entitled to decrypt Discs without  
6 liability under the DMCA; (3) the FMA authorizes VidAngel’s service; and (4) the  
7 FMA relieves VidAngel of the obligation to get licenses to stream Plaintiffs’  
8 copyrighted works. The exercise of jurisdiction under the Federal Declaratory  
9 Judgment Act, 28 U.S.C. § 2201(a), is committed to the sound discretion of the  
10 federal district courts. *Huth v. Hartford Ins. Co.*, 298 F.3d 800, 802 (9th Cir. 2002)  
11 (Citing *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282-83, 132 L. Ed. 2d 214, 115 S. Ct.  
12 2137 (1995); *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494-95, 86 L. Ed.  
13 1620, 62 S. Ct. 1173 (1942); *Gov’t Employees Ins. Co. v. Dizon*, 133 F.3d 1220, 1223  
14 (9th Cir. 1998) (en banc)). Therefore, even if the district court has subject matter  
15 jurisdiction, “the district court must also be satisfied that entertaining the action is  
16 appropriate. This determination is discretionary, for the Declaratory Judgment Act is  
17 ‘deliberately cast in terms of permissive, rather than mandatory, authority.’” *Dizon*,  
18 133 F.3d at 1223 (quoting *Public Serv. Comm’n of Utah v. Wycoff Co.*, 344 U.S. 237,  
19 250, 97 L. Ed. 291, 73 S. Ct. 236 (1952)). Among the reasons for which a court may  
20 properly decline to hear a claim for declaratory relief are: “avoid[ing] needless  
21 determination of state law issues... discourag[ing] litigants from filing declaratory  
22 actions as a means of forum shopping; and avoid[ing] duplicative litigation.” *Huth*,  
23 298 F. 3d at 803.

24 Each of the issues that VidAngel raises in its claims for declaratory relief will  
25 be decided through Plaintiff’s claims in this action or Defendants affirmative defenses  
26 thereto. Because this would amount to duplicative litigation, the Court, in its  
27 discretion, denies VidAngel’s fourth through seventh claims for declaratory relief.  
28

29 **e. VidAngel’s Copyright Misuse Defense**

30 Plaintiffs move to strike VidAngel’s seventeenth affirmative defense of copyright  
31 misuse. Under Federal Rule of Civil Procedure 12(f), a district court may strike from  
32 the pleadings "an insufficient defense or any redundant, immaterial, impertinent, or  
33

1 scandalous matter." Copyright misuse is an affirmative defense to copyright  
2 infringement. *Apple, Inc. v. Psystar Corp.*, 658 F.3d 1150, 1157 (9th Cir. 2011). The  
3 purpose of the copyright misuse defense is to "prevent[] holders of copyrights 'from  
4 leveraging their limited monopoly to allow them control of areas outside  
5 the monopoly.'" *Id.* (quoting *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th  
6 Cir. 2001)).

7 In *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1337 (9th Cir. 1995), the  
8 Ninth Circuit adopted the Fourth Circuit's view that copyright misuse involves  
9 restraining development of competing products. The Ninth Circuit has only upheld  
10 the copyright misuse defense in one case, *Practice Mgmt. Info. Corp. v. AMA*, 121  
11 F.3d 516 (9th Cir. 1997). There, the copyright licensor prevented licensees from  
12 using any competitor's product. VidAngel has not alleged that Plaintiffs' licensing  
13 agreements prevent licensees from using competing products. Rather VidAngel  
14 alleges that Plaintiffs license film content only on the express written condition that  
15 the licensee not filter. (FACC, ¶ 28). The allegations here are analogous to those in  
16 *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). In *Napster* the Ninth  
17 Circuit upheld a district court's rejection of a copyright misuse defense where  
18 plaintiffs' licensing agreements merely sought to control reproduction and distribution  
19 of their copyrighted works. *Id.* at 1026. The *Napster* Court held that the exclusive  
20 rights of copyright holders "include the right, within broad limits, to curb the  
21 development of such a derivative market by refusing to license a copyrighted work or  
22 by doing so only on terms the copyright owner finds acceptable." *Id.* (quoting *UMG  
23 Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y.)). VidAngel  
24 does not allege facts showing that Plaintiffs licensing agreements improperly extended  
25 their rights pursuant to the Copyright Act to control an area outside of the Plaintiffs'  
26 copyrighted works. Although VidAngel alleges that Plaintiffs sought to eliminate  
27 filtering, this is not the proper subject of a copyright misuse claim. VidAngel has not,  
28 and cannot allege that their filtering service is "a competing product" to Plaintiffs'  
movie production studios. Moreover, VidAngel seeks to use Plaintiffs' copyrighted  
works in conjunction with its filtering service, and therefore, this case does not  
implicate an "area outside the monopoly" conferred by Plaintiffs registered  
copyrights. Based on the foregoing, the Defendant has not adequately plead copyright  
misuse. Therefore, the Court strikes this affirmative defense.


1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**V. CONCLUSION**

For the foregoing reasons, the Court hereby **GRANTS** Plaintiff’s Motion to Dismiss Defendant’s First Amended Counterclaims pursuant to Federal Rule of Civil Procedure 12(b)(6). Additionally, the Court hereby **STRIKES** VidAngel’s copyright misuse defense pursuant to Federal Rule of Civil Procedure 12(f). Because VidAngel has previously amended its countercomplaint, and there is no indication in the record or the pleadings that VidAngel can identify additional facts to support its claims, the Court hereby **DISMISSES** VidAngel’s Counterclaims **WITHOUT** leave to amend.

**IT IS SO ORDERED.**

Dated: August 10, 2017

  
\_\_\_\_\_  
HONORABLE ANDRÉ BIROTTE JR.  
UNITED STATES DISTRICT COURT JUDGE