

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
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

ENTTECH MEDIA GROUP LLC,

Plaintiff,

v.

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

Defendants.

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

Counterclaimants,

v.

ENTTECH MEDIA GROUP LLC,

Counterdefendant.

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

**MEMORANDUM OPINION AND
ORDER REGARDING:**

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

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

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

I. INTRODUCTION

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

18
19 Before the Court are three separate but related matters. The first two are
20 Defendants’ motions: (1) for sanctions against ENTTEch and its counsel,
21 Robert Tauler and his firm, for violation of Rule 11 of the Federal Rules of Civil
22 Procedure,² and (2) to dismiss ENTTEch’s Third Amended Complaint
23 pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure³ (jointly, the
24

25 ¹ Defendant Splash News and Picture Agency, LLC, together with Xposure
26 Photo Agency, Inc., and BackGrid USA, Inc., are collectively referred to herein
as the “Photo Agencies.”

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

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

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

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

9 **II. BACKGROUND**

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

11 ENTTEch filed its original complaint on July 15, 2020.⁵ On August 5,
 12 2020, counsel for Defendants notified ENTTEch’s counsel, Robert Tauler, that
 13 Defendants were contemplating several motions, including a motion to dismiss
 14 under Rule 12(b)(6) and a motion for sanctions under Rule 11.⁶ Among other
 15 grievances, Defendants objected that the factual contentions in ENTTEch’s
 16 Complaint lacked the requisite legal and evidentiary support—in violation of
 17 Rule 11—particularly ENTTEch’s allegations regarding Defendants’ abuse of
 18 the DMCA takedown notice procedures.⁷ Defendants demanded that

19
 20
 21

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

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

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

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

28 ⁷ See *id.* at 1 & 3–6.

1 ENTTEch withdraw its Complaint.⁸ ENTTEch filed its First Amended
2 Complaint five days later.⁹

3 On August 24, 2020, Defendants moved to dismiss ENTTEch’s FAC for
4 failure to state a claim pursuant to Rule 12(b)(6);¹⁰ ENTTEch opposed.¹¹ On
5 September 25, 2020, Defendants filed a joint Motion for Rule 11 Sanctions,¹²
6 which ENTTEch also opposed.¹³ On October 2, 2020, the Court—the
7 Honorable R. Gary Klausner, presiding—(1) granted Defendants’ motion to
8 dismiss the FAC, with leave to amend, with respect to ENTTEch’s RICO claim;
9 and (2) denied Defendants’ motion to dismiss with respect to ENTTEch’s
10 DMCA claim.¹⁴ A few days later, the action was transferred to this Court by
11 order of the Chief Judge.¹⁵ ENTTEch filed its Second Amended Complaint on
12 October 16, 2020.¹⁶ Shortly thereafter, the Photo Agencies filed a Counterclaim
13 against ENTTEch with respect to the alleged infringing material that was the
14 target of the DMCA takedown notices.¹⁷

15
16
17 ⁸ See *id.* at 1.

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

20 ¹⁰ Defs.’ Mot. to Dismiss the FAC [ECF No. 26]; Mem. in Supp. of Mot. to
21 Dismiss the FAC [ECF No. 27]; Notice of Joinder in Mot. to Dismiss the FAC
[ECF No. 28].

22 ¹¹ Pl.’s Opp’n to Defs.’ Mot. to Dismiss the FAC [ECF No. 35].

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

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

26 ¹⁴ See generally Order Re: Defs.’ Mot. to Dismiss [ECF No. 40].

27 ¹⁵ See Order of the Chief Judge (#20-156) [ECF No. 43].

28 ¹⁶ Pl.’s Second Amend. Compl. (the “SAC”) [ECF No. 46].

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

1 Upon review of ENTTEch’s SAC and ENTTEch’s arguments in
 2 opposition to the Motion for Sanctions, the Court determined that although the
 3 paper that was the subject of that motion (*i.e.*, the FAC) had been superseded,
 4 the SAC contained many, if not all, of the challenged allegations.¹⁸ On
 5 October 28, 2020, pursuant to Rule 11(c)(3) of the Federal Rules of Civil
 6 Procedure, the Court ordered ENTTEch to show cause regarding sanctions
 7 under Rule 11.¹⁹ Specifically, the Court determined that it was “appropriate to
 8 give ENTTEch one more chance to cure (or otherwise to address in a more
 9 robust manner) the apparent infirmities that Defendants raise[d] in their Motion
 10 for Sanctions.”²⁰ The Court, therefore, provided ENTTEch with three options:
 11 (1) file a notice of withdrawal of the SAC and either a stipulation of dismissal of
 12 ENTTEch’s claims with prejudice or a motion for dismissal of ENTTEch’s
 13 claims with prejudice;²¹ (2) file a Third Amended Complaint that cured each of
 14 the allegedly offending allegations in the FAC;²² or (3) file a Memorandum of
 15 Points and Authorities, with supporting declarations, explaining why the Court
 16 should not issue sanctions and setting forth detailed facts demonstrating
 17 ENTTEch and ENTTEch’s counsel’s reasonable inquiry regarding each of the
 18 allegedly offending allegations in the FAC.²³

19 ENTTEch elected option two²⁴ and filed its Third Amended Complaint
 20 on November 13, 2020.²⁵ Defendants responded to the OSC on November 20,
 21

22 ¹⁸ See OSC 4:1–5:2.

23 ¹⁹ See *id.*

24 ²⁰ *Id.* at 4:24–5:2.

25 ²¹ *Id.* at 5:5–15.

26 ²² *Id.* at 5:17–20.

27 ²³ *Id.* at 5:22–6:2.

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

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

1 2020.²⁶ Defendants then requested to cross-examine Mr. Tauler live at the
2 hearing on the OSC, pursuant to this Court's Local Rules,²⁷ which ENTTEch
3 opposed.²⁸ Defendants filed the instant Motion to Dismiss on November 30,
4 2020. On December 14, 2020, the Court held a status conference regarding
5 Defendants' L.R. 7-8 Request and set a schedule for further briefing in response
6 to the OSC and with respect to Defendants' Motion to Dismiss the TAC.²⁹
7 With regard to Defendants' L.R. 7-8 Request, the Court authorized the parties
8 to depose their respective opposing declarants, so long as the scope of each
9 deposition was limited to cross-examination regarding the declarants' testimony
10 in connection with the Motion for Sanctions and the OSC.

11 Thereafter, the parties timely filed their respective supplemental briefs
12 regarding the OSC³⁰ as well as their briefs in connection with Defendants'
13 Motion to Dismiss.³¹ On February 11, 2021, the Court conducted a hearing
14 regarding the OSC and the Motions.

15
16
17
18
19 ²⁶ See Defs.' Joint Mem. of P & A Re the OSC (the "Defs.' OSC
Response") [ECF No. 63].

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

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

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

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

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

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

III. DISCUSSION

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

A. The Motion to Dismiss

1. Legal Standard

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

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

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

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

17 2. **ENTTech’s DMCA Claim**

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

25 To satisfy the “knowingly” prong, ENTTech must allege sufficient facts
26 to show that Defendants lacked a subjective good faith belief that the images that
27

28 ³² *See generally* Motion to Dismiss 20:17–22:21; MTD Reply 8:7–10.

1 were the subject of the takedown notices were infringing. *See Lenz v. Universal*
 2 *Music Corp.*, 815 F.3d 1145, 1154 (9th Cir. 2016) (citing *Rossi v. Motion Picture*
 3 *Ass'n of Am. Inc.*, 391 F.3d 1000, 1004 (9th Cir. 2004)). In this regard, the Ninth
 4 Circuit has held that the DMCA “requires consideration of fair use prior to
 5 sending a takedown notification” *Id.* In other words, a defendant in a
 6 § 512(f) claim cannot maintain that it formed a subjective good faith belief of the
 7 plaintiff’s copyright infringement if the defendant did not consider fair use.
 8 This Court previously held that ENTTEch adequately pleaded its DMCA
 9 claim³³ based upon ENTTEch’s allegations that Okularity “automatically
 10 generates [and submits] DMCA notices without considering . . . fair use.”³⁴
 11 The Court reasoned that those allegations, if true, were enough to constitute
 12 “lack of subjective good faith belief because if Okularity failed to consider fair
 13 use, it could not have formed a good faith belief that the images were
 14 infringing.”³⁵

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

- 18 • In its TAC, ENTTEch alleges that the DMCA takedown notices are
 19 automatically *generated*, but ENTTEch does not allege that the notices are
 20 automatically *submitted* (as ENTTEch alleged in its previous pleadings).

21 Therefore, the TAC does not support an inference that Okularity’s process does
 22 not include any infringement or fair use analysis.³⁶

23
 24
 25
 26 ³³ See Order Re Defs.’ Motion to Dismiss 6–8.

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

28 ³⁵ *Id.*

³⁶ See Motion to Dismiss 20:24–21:8.

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

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

20
21
22
23

 ³⁷ TAC ¶ 15.

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

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

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

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

10 Although *Lenz* involved a motion for summary judgment, that decision is
11 nevertheless instructive with respect to the issue presently before the Court.
12 *Lenz* supports the conclusion that the question of whether a copyright owner
13 formed a subjective good faith belief that an alleged infringer’s copying of the
14 work did not constitute fair use is, in most instances, a factual issue that is not
15 appropriate for resolution on a motion to dismiss. “Because the DMCA
16 requires consideration of fair use prior to sending a takedown notification,” the
17 Ninth Circuit held that “a jury must determine whether [the defendant’s]
18 actions were sufficient to form a subjective good faith belief about the [allegedly
19 infringing] video’s fair use or lack thereof.”⁴³ *Id.* at 1154. In response to the
20

21 ⁴¹ In this regard, because § 512(f) “does not require an exacting
22 consideration of fair use principles,” Defendants contend that ENTTEch is
23 required to plead a lack of subjective good faith, supported by sufficient factual
24 allegations plausibly to show the same. MTD Reply 7:24–25; *see also id.* at 7:4–5.
25 Defendants argue that § 512(f) requires only “so much consideration [of fair
26 use] as to form a subjective good-faith belief” and “only the complete failure to
27 consider fair use—and the knowledge that one failed to do so when submitting
28 the DMCA takedown notice—has previously been found to violate this
standard.” *Id.* at 7:25–28.

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

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

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

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

20
21 _____
22 fair use by claiming it formed a good faith belief ***when there is evidence to the***
23 ***contrary*** is still subject to § 512(f) liability.” *Lenz*, 815 F.3d at 1154–55
24 (emphasis added) (citing cases denying summary judgment of § 512(f) claims
25 where there was evidence in the record to suggest the defendant did not form a
26 good faith belief). In this regard, the plaintiff in *Lenz* submitted evidence that
the defendant “did not form any subjective belief about the video’s fair use—
one way or another—because it failed to consider fair use at all, and knew that it
failed to do so.” *Id.* at 1154. The presence of such evidence, therefore,
precluded summary judgment. *Id.* This case, in contrast, is still in its initial
stages.

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

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

4 **3. ENTTEch’s RICO Claim**

5 In its TAC, ENTTEch alleges that Defendants formed an enterprise that
6 engages in a pattern of racketeering activity to harm ENTTEch in violation of
7 RICO. Defendants argue that the *Noerr-Pennington* doctrine⁴⁵ bars ENTTEch’s
8 RICO claim.⁴⁶ In its Opposition, ENTTEch acknowledges this Court’s previous
9 ruling that the DMCA takedown notices constitute petitioning activity for the
10 purpose of the *Noerr-Pennington* doctrine.⁴⁷ Accordingly, ENTTEch’s argument
11 is limited to whether the sham litigation exception to the *Noerr-Pennington*
12 doctrine applies in this case.⁴⁸

13 Under that exception, a party cannot claim the protections of the
14 *Noerr-Pennington* doctrine if it engaged in a “sham” litigation. *See Octane*
15 *Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556 (2014). To assert
16 the sham litigation exception, ENTTEch must allege that Defendants’
17 transmittal of the DMCA notices—the petitioning conduct—was both
18 (1) objectively baseless; and (2) subjectively improper. *Id.*; *see also Prof’l Real*
19 *Est. Inv’rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 62 (1993). In this
20 regard, the Ninth Circuit has held that *Noerr-Pennington* immunity “is not a
21 shield for petitioning conduct that, ‘although ostensibly directed toward
22

23 ⁴⁵ *See E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127
24 (1965); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

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

⁴⁷ MTD Opposition 8:15–21.

⁴⁸ *Id.*

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

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

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

25
26
27

⁴⁹ *See id.* at 9:19–10:15.

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

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

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

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

14 **1. Legal Standard**

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

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

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

9 2. Analysis

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

22 In their Motion for Sanctions, Defendants contend that Mr. Tauler and
23 his law firm failed to make a reasonable inquiry and ignored evidence and
24 information provided by Defendants regarding ENTTech’s DMCA claim and
25 RICO claim. The thrust of Defendants’ argument⁵¹ relates to pre-litigation
26

27 ⁵¹ Defendants organize the allegedly offending allegations within different
28 categories. However, the broader question of whether Rule 11 was violated
turns upon whether ENTTech’s allegations—concerning Defendants’

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

11 The Court's analysis with respect to the *Lenz* decision, which is discussed
12 in the preceding section, is dispositive of whether sanctions are warranted.
13 Because the Court finds that it is generally a factual issue whether the
14 Defendants' analysis of the alleged infringing material was sufficient, *see Lenz*,
15 815 F.3d at 1154 n.3, the Court cannot conclude that the challenged allegations
16 are objectively baseless under Rule 11. The parties have strong disagreements
17 with respect to the inquiry that is required under these circumstances.
18 However, Defendants' arguments effectively ask this Court to rule on the merits
19 of ENTTEch's DMCA claim, which is not appropriate in the context of a
20 motion under Rule 11 at this stage of the litigation. Similarly, notwithstanding
21 the Court's decision to dismiss 's RICO claim with prejudice, in view of the
22 broad standard set forth in *Lenz*; the nature of Defendants' process for
23 generating DMCA takedown notices; and the parties' differing views with
24

25 _____
26 analytical process and process for transmitting the takedown notices—are
frivolous.

27 ⁵² See Motion for Sanctions 7:3–9:10.

28 ⁵³ See *id.* at 9:11–10:4.

⁵⁴ See *id.* at 7:18–8:11.

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

5 The Court also finds that Defendants’ Motion for Sanctions was not
6 objectively baseless. Therefore, ENTTEch’s counterdemand for attorneys’ fees
7 in defense of Defendants’ Motion for Sanctions⁵⁶ is **DENIED**.

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

12 **IV. CONCLUSION**

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

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

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

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

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

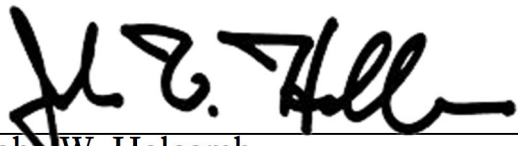
28 ⁵⁶ *See* Sanctions Opposition 15:25–28.

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

3 5. The Court’s OSC is **DISCHARGED**.

4 **IT IS SO ORDERED.**

5
6 Dated: March 10, 2021



John W. Holcomb
UNITED STATES DISTRICT JUDGE

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28