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13  
 14 UNITED STATES DISTRICT COURT  
 15 NORTHERN DISTRICT OF CALIFORNIA

16 REALNETWORKS, INC., et al.,  
 17  
 18 Plaintiffs,  
 19 vs.  
 20 DVD COPY CONTROL ASSOCIATION,  
 INC., et al.,  
 21 Defendants.

CASE NO. C 08-4548 MHP

**REPLY IN SUPPORT OF MOTION  
 PICTURE STUDIO PARTIES' MOTION  
 TO DISMISS REAL'S ANTITRUST  
 CLAIMS**

Judge: Hon. Marilyn Hall Patel  
 Date: October 26, 2009  
 Time: 2:00 p.m.  
 Ctrm: 15

22  
 23 UNIVERSAL CITY STUDIOS  
 PRODUCTIONS LLLP, et al.,  
 24 Plaintiffs,  
 25 vs.  
 26 REALNETWORKS, INC., et al.,  
 27 Defendants.

CASE NO. C 08-4719-MHP

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1 **I. INTRODUCTION**

2 Real's Opposition walks away from the contention Real made in its complaint (¶¶ 83,  
3 128) and in opposing the DVD CCA's dismissal motion that the CSS License is anticompetitive.  
4 Real now insists it does "*not* allege that the CSS License itself, without more, constitutes a *per se*  
5 illegal group boycott." Opp. at 17:22-23.<sup>1</sup> Instead, Real says its antitrust claim is based on the  
6 purported "fact" that any Studio "could, acting independently, license RealNetworks to make and  
7 sell a device that copies their DVD content [,]" but rather than doing so, all conspired to cite the  
8 License's ban on DVD copying as an "alibi" for not licensing Real to make prohibited copies. *Id.*  
9 at 1:2-6.

10 Real's latest contention, like those it has made before, fails to state a plausible antitrust  
11 claim. The cornerstone of this new argument is Real's conclusory assertion that any Studio can  
12 license Real to do something (copy from CSS-protected disks) that the CSS License prohibits.  
13 That assertion is not entitled to any weight on a motion to dismiss. What is more, everyone, Real  
14 included, knows it is false, and Real cannot hide from this fact now. The complaint explicitly  
15 incorporates the License, and the Court must consider its clear prohibition of "digital-to-digital  
16 copying" of CSS-protected DVD content in ruling on the Motion. Order (Doc. No. 448)  
17 ¶ 39. The License forbids any licensee (whether a Studio or a technology company) from settling  
18 a claim of breach against any other licensee in a way "that (i) amends any material term of [the  
19 License]; (ii) has a material adverse effect on the integrity and/or security of CSS; or (iii) impacts  
20 any of the rights in and to CSS held by [the DVD CCA], [Matsushita], or Toshiba or to any  
21 intellectual property rights embodied therein. . ." Ex. 1 at 24 § 9.5(d). Granting a unilateral  
22 exemption from the License's no-copying restrictions—which Real claims any Studio is fully  
23 authorized to do—strikes at the heart of CSS's security system. The fact that the License does  
24 not allow licensees to grant one-off exemptions from the no-copying prohibition is not an "alibi."  
25 It is a critical part of the CSS License, which Real says it is not challenging.

26 Even if Real were to reverse course once again and assert that the CSS License constitutes

27  
28 <sup>1</sup> Compare Real's Opp. to DVD CCA's Mot. to Dismiss (Doc. No. 449) at 1:10-11 ("the CSS License Agreement is a mechanism that assists in enabling the unlawful boycott").

1 an antitrust conspiracy for not allowing such individual exemptions, Real's claims still would fail.  
 2 The CSS License is non-exclusive—licensees remain free to offer their content in formats using  
 3 other encryption systems or none at all. Thus, there is nothing anti-competitive about the fact that  
 4 CSS licensees are unable to grant exemptions that the License does not authorize. CSS is a no-  
 5 copying system. But CSS does not impede any of the numerous alternative means for content  
 6 owners to authorize the distribution *of the same content* digitally (e.g., downloads through  
 7 services like iTunes and Amazon). *CBS, Inc. v. ASCAP*, 620 F.2d 930, 935-36 (2d Cir. 1980),  
 8 makes it clear that the existence of such alternative channels for individually authorizing the  
 9 distribution of the same content means there is no restraint of trade, and hence no antitrust  
 10 violation. Real has no answer to this argument, and so ignores it.

11 Beyond its conclusory (and incorrect) assertion that any Studio can grant exemptions from  
 12 CSS's no-copying system, Real's Opposition rests on the claim that the alleged breakdown of  
 13 Real's settlement discussions with one Studio (Paramount) over an unspecified "business deal"  
 14 plausibly alleges "direct evidence" of a "Studio cartel." *E.g.*, Opp. at 2:11-13 (citing ¶ 74). This  
 15 allegation amounts to nothing more than a simple disagreement over price and does not rise to the  
 16 level of "direct evidence"—evidence so "explicit" as to require "no inferences to establish" the  
 17 conspiracy. *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1155 (9th Cir. 2001).

18 It is obvious what is going on here. Rather than compete in the legal market for digital  
 19 content, Real wanted to make and sell a DVD copier. Real knew that a DVD copying device was  
 20 contrary to the License's core purpose. Real also knew that the Studios (whom Real apprised of  
 21 its plans just days before RealDVD's launch) viewed DVD copying as unlawful under the DMCA  
 22 and prohibited by the License. Real nevertheless rushed RealDVD to market. The Studios  
 23 promptly sued Real, and this Court enjoined Real from engaging in its unlawful conduct. Even  
 24 Real's purported legal justification for "green-lighting" RealDVD, the *Kaleidescape* trial court  
 25 decision, now has evaporated, with the California Court of Appeal's reversal of that decision. *See*  
 26 *DVD Copy Control Ass'n, Inc. v. Kaleidescape, Inc.*, 176 Cal. App. 4th 697 (2009). There is no  
 27 antitrust violation here. Real was properly enjoined from engaging in illegal conduct and now is  
 28 looking for litigation leverage. Real does not and cannot plead any antitrust claim.



## II. ARGUMENT

The Studios' Motion demonstrated that the Court can and should dismiss Real's antitrust claims with prejudice because (1) Real fails to allege a causal connection between the alleged antitrust violations and any injury-in-fact; (2) Real fails to plead plausible antitrust claims under *Twombly* and *Iqbal*; (3) Real's claims are barred under *Noerr-Pennington*; and (4) Real's state law claims fall with its federal claims. Real's responses to all of these arguments fail. We address each in turn, after responding to Real's overarching (and incorrect) contention that the Studios have ignored Real's allegations in favor of evidence not properly before the Court.

### A. The Studios Have Not Asked The Court To Consider Any Materials Outside The Scope Of A 12(b)(6) Motion; In Fact, It Is Real - Not The Studios - That Ignores The Complaint's Allegations

Real accuses the Studios of basing their motion on "thousands of pages of testimony and exhibits," "facts that remain in dispute," and mere "preliminary" findings. Opp. at 8-9. The only matters that the Court has to consider to grant this Motion are the allegations in Real's complaint; the words contained on the face of the CSS License (which the complaint expressly incorporates, ¶ 22 & Ex. 1); and the facts that Real would have to allege in order to state viable antitrust claims but has *not* alleged. The matters from the preliminary injunction proceeding that the Studios discussed in their Motion relate to the latter category. They demonstrate that Real has omitted critical allegations because Real already has admitted facts that it cannot now contradict. Real's admissions are binding regardless of the fact that the Court's injunction Order is preliminary. Whatever the Ninth Circuit does with Real's appeal will not alter the facts that Real has admitted.

One example of this type of admission is the sworn testimony of Real's own CEO Rob Glaser, that copying from CSS-protected DVDs is a "side effect of what we have to do, in order to add value." Hr'g Tr. at 537:5-10 (Apr. 28, 2009). That admission is relevant because (along with other allegations) it shows why Real cannot allege that its RealDVD device must make copies from CSS-protected disks. Real *itself* elicited this admission from its own CEO (the self-described visionary of RealDVD) on direct examination. It is binding on Real. See, e.g., *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 458-59 (9th

1 Cir. 1990) (statements of director constitute admissions against company); *Ventre v. Datronic*  
 2 *Rental Corp.*, 1996 WL 66115, at \*1 (N.D. Ill. Feb. 13, 1996) (considering “judicial admissions”  
 3 by party “within the extensive record of this case . . . on a motion to dismiss”). And, contrary to  
 4 Real’s Opposition, what Mr. Glaser admitted is not disputed. None of the additional lines of Mr.  
 5 Glaser’s testimony that Real cites, *see* Opp. at 14 n.3, says that Real must make a digital copy  
 6 *from a CSS-protected disk* for a consumer to “get a whole bunch of extra features and  
 7 functions[.]” Hr’g Tr. at 536:11-17. This admission, and others cited in the Studios’ Motion, are  
 8 fully and properly noticeable under firmly established authority. *See* Mot. at 3-4 n.3.

9 It is ironic, to say the least, for Real to charge the Studios with ignoring the complaint’s  
 10 allegations, because Real itself repeatedly ignores what it has alleged. For example, Real strains  
 11 to avoid discussing how, exactly, it alleges it has been injured. Real must allege a causal  
 12 connection between the claimed wrongdoing and some injury-in-fact to Real. *Associated Gen.*  
 13 *Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 (1983). As the  
 14 Studios demonstrated, the injuries that Real alleges—namely, the “delay[.]” in launching  
 15 RealDVD and the “taint[.]” of an illegal product—flow entirely from the Court’s Orders enjoining  
 16 Real’s violations of law. And that is fatal to Real’s claims under multiple doctrines (including  
 17 *Modesto Irrigation District* and *Noerr*). *See* Mot. at 10-12; 21-22.

18 Real’s Opposition repeatedly asserts that the lawsuit and the Court’s Orders are not the  
 19 cause of Real’s injuries. But Real never comes out and says what those injuries are. *See, e.g.,*  
 20 Opp. at 21:2-4 (“The Studios’ agreement to refuse to grant individual licenses would have harmed  
 21 RealNetworks even if the Studios had not prevailed on their preliminary injunction motion.”).  
 22 *See also id.* at 20:7-9. The *only* injuries that Real attempts to allege are those that flow from this  
 23 lawsuit and the Court’s adjudication of the likely illegality of Real’s conduct. The complaint  
 24 groups these allegations under the heading, “***The Group Boycott Has Harmed RealNetworks*
 25 (¶¶ 110-112). There Real says that “[a]s a result of the [alleged] conduct, *RealNetworks entry*  
 26 *into the relevant market has been delayed* while the Studios have remained free to distribute and  
 27 sell their own ‘Digital Copy’ products and capture the market for themselves.” ¶ 112 (emphasis  
 28 added). The *only* facts that Real cites as the cause of that “delay,” however, are (1) Real’s**



unilateral decision to “delay[] the launch of Vegas” from September 8 to September 30, so that Real could engage in settlement discussions with the Studios, ¶ 110; and (2) the delay and “taint[]” from the “DVD CCA’s and the Studio Defendants’ *efforts* to keep its products from the market[,]” ¶ 111 (emphasis added). The only “efforts” that Real possibly can refer to are this lawsuit and the Studios’ motions for injunctive relief.<sup>2</sup> *These* are Real’s allegations about its “injury.” As explained in the Studios’ Motion (and below), they cannot be the basis for a valid antitrust claim.

**B. Real Fails To Allege A Causal Connection Between The Alleged Anti-Competitive Conduct And A Cognizable Injury-In-Fact**

**1. Real’s Alleged Injuries - The “Delay” And “Taint” Of Launching RealDVD - Result From Real’s Unlawful Conduct**

Real is right that its “allegations include no mention of the TRO (nor the then-yet-to-exist preliminary injunction) as causing the harm [Real] describes.” Opp. at 10:17-20. The “good reason” for this, *id.*, is not that Real has any other claimed source of injury (as discussed above). The reason for the omission is that Real recognized that explicitly referring to the injunctive orders issued to restrain Real’s illegal conduct would walk its claims right into the *Modesto Irrigation District* line of cases. *See Modesto Irrigation Dist. v. Pac. Gas & Elec. Co.*, 309 F. Supp. 2d 1156, 1169-70 (N.D. Cal. 2004) (“an action under the antitrust laws will not lie where the business conducted by the plaintiff, and alleged to have been restrained by the defendant, was itself unlawful”) (quotations omitted). That principle, applied in numerous cases, *see* Mot. at 10-12, dooms Real’s antitrust claims. Real’s claimed injuries are the result of its illegal trafficking in a device that violates the DMCA through circumvention not only of CSS (the exclusive focus of Real’s claims) but also ARccOS and RipGuard, which are independent of CSS (and which Real does not even *mention* in its Opposition), as well as Real’s breach of the CSS License and the implied covenant of good faith and fair dealing.

<sup>2</sup> The Studios’ “efforts” certainly have nothing to do with the Studios’ licensing or not of Real. Real has been emphatic that it did not (and does not) believe that it needed any license from the Studios. ¶ 46 (Real “believed then [in September 2008], *as it does now*” that no permission is needed for copying with RealDVD (emphasis added)). *See also* ¶¶ 28, 45; Hr’g Tr. at 472:3-9 (Real’s Counsel: “Did you think you needed Viacom or any other studios’ permission to launch the product?” Rob Glaser: “Not the product, the Vegas RealDVD product, version 1.”).

1 Real's arguments for disregarding the *Modesto Irrigation District* cases are baseless:

2 First, Real asserts that this Court's finding of likely illegality is preliminary and must be  
3 disregarded. Opp. at 10. There is nothing preliminary about what the License actually says, *i.e.*,  
4 that its purpose is to "prevent digital-to-digital" copying. And Real does not even attempt to  
5 assert that the Court's finding of likely illegality is wrong, much less why it is wrong. Real may  
6 be appealing the Court's Order, but Real cannot pretend that the Order does not exist. On the  
7 contrary, Real, as the plaintiff, has the burden of "nudg[ing its] claims across the line from  
8 conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Real  
9 cannot come close to crossing this line when the cause of its inability to traffic in RealDVD is the  
10 fact that such conduct has been adjudged illegal.

11 Second, relying on *Memorex Corp. v. International Business Machines Corp.*, 555 F.2d  
12 1379 (9th Cir. 1977), Real argues that the illegality of its conduct is irrelevant to the causation  
13 requirement. Opp. at 12. That, however, is not what *Memorex* holds. *Memorex* simply reaffirms  
14 that the doctrine of *in pari delicto*—the antitrust "plaintiff's participation in the same wrongdoing  
15 as the defendant"—does not deprive the plaintiff of standing to assert an antitrust claim. 555 F.2d  
16 at 1382. *Memorex* does not address the question here, which is whether an antitrust plaintiff can  
17 plead and prove the required element of causation where the cause of the plaintiff's injuries is the  
18 fact that its conduct is illegal. That question is answered by the *Modesto Irrigation District* cases,  
19 which make it clear that Real cannot establish causation.

20 Third, Real argues that the *Modesto Irrigation District* cases are inapposite because they  
21 did not involve an allegation of "a collective refusal to deal." Opp. at 13:13. That is a *non*  
22 *sequitur*. Nothing about the nature of the alleged antitrust violation eliminates the causation  
23 requirement, or the rule that a plaintiff cannot meet that element when its own illegal conduct  
24 caused its injuries. What is more, Real's attempted distinction of those cases is wrong as a factual  
25 matter. *In re Canadian Import Antitrust Litigation*, 470 F.3d 785 (8th Cir. 2006), which reaches  
26 the same conclusion as *Modesto Irrigation District*, was in fact a case involving an alleged  
27 collective refusal to deal. *Id.* at 787. The court in that case nevertheless held that the  
28 unlawfulness of importing drugs from Canada, rather than defendants' alleged refusal to deal, was

the cause of the plaintiffs' claimed injuries, and therefore the plaintiffs had no claim. *Id.* at 791. Tacitly conceding that *Canadian Import Antitrust Litigation* is a refusal to deal case, Real argues that this Court should distinguish the case on the ground that what the plaintiffs wanted (the importation of drugs from Canada) "was beyond the defendants' power to authorize[.]" whereas here, Real says, the Studios can individually license Real to copy from CSS-protected disks. Opp. at 13:13-19. That attempted distinction fails, however, because the Studios do not have the power to grant the exemption from "no copying" that Real asserts they have.

Fourth, Real argues that this case is analogous to *PrimeTime 24 Joint Venture v. National Broadcasting Co., Inc.*, 219 F.3d 92 (2d Cir. 2000), which involved allegations of a collective offer to license, followed by a collective refusal to deal. The causation obstacle to Real's claims here, however, was not remotely present there. Although Real misleadingly suggests that the case is similar because in a "prior action" the defendants had enjoined PrimeTime "from violating" their "copyrights," Opp. at 11, there was no allegation in the case that PrimeTime's injuries flowed entirely, or even partly, from that injunction.<sup>3</sup> Moreover, *PrimeTime 24* bears no resemblance to Real's claim. Real's allegations fail to show that any Studio refused to deal with Real on its stated goal of putting copies of movies and TV shows on hard drives. In fact, Real concedes that the Studios regularly enter into bilateral content agreements authorizing third parties to make digital copies of their copyrighted content. *See* Section B.2, *infra*. Further, whereas the Second Circuit rejected the defendants' argument that the Satellite Home Viewers Act "prevent[ed]" them "from individually licensing" content to PrimeTime, 219 F.3d at 103, the CSS License, which is not a restraint and which Real says it does not challenge (Opp. at 17-18), does not authorize licensees to authorize others to copy from CSS-protected disks.

Fifth, and finally, Real argues that this case is just like *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941). Opp. at 12-13. The Studios explained in their Motion why that case is inapposite. *See* Mot. at 17-18. Real tries to distill the Studios' arguments down

<sup>3</sup> PrimeTime alleged that it was injured from "signal-strength" challenges the defendants filed under the Satellite Home Viewers Act ("SHVA"). 219 F.3d at 97. The court found SHVA actions generally to be *Noerr*-protected but held PrimeTime adequately alleged these challenges were sham litigation. *Id.* at 100-02. Real does not (and cannot) allege the Studios' suit is sham.

1 to the proposition that the case is relevant only in actions brought by the FTC. Opp. at 18-19.  
 2 What the Studios actually argued—and what Real ignores—is that the FTC, unlike Real, did not  
 3 face causation and other hurdles that are fatal to Real’s claim. Mot. at 17-18. This argument is  
 4 unaffected by the cases that Real cites applying *Fashion Originators’ Guild* in private litigation.  
 5 The causation requirements come from cases like *Associated General Contractors* that  
 6 significantly post-date *Fashion Originators’ Guild* and that are controlling here. The Studios also  
 7 demonstrated that *Fashion Originators’ Guild* is inapplicable because, in that case, Guild  
 8 membership imposed an exclusive dealing requirement. 312 U.S. at 461-62. Here, in contrast,  
 9 the CSS License is non-exclusive and imposes no restraint on Real’s ability to enter into bilateral  
 10 licenses for digital copies not protected by CSS. Tellingly, Real ignores this argument.

11 Because Real’s illegal conduct caused its alleged injuries, Real has no antitrust claim.

12 **2. The Purported Conspiracy Did Not Exclude Real From Competing In**  
 13 **The Market That Real Alleges**

14 Real also fails to allege a causal connection to an injury-in-fact because Real cannot (and  
 15 so does not) allege that the product it says it wants to build has to copy from CSS-protected  
 16 DVDs. The binding admission of Real’s CEO, Rob Glaser, makes it clear that Real’s stated  
 17 objective is not copying from DVDs *per se*, but providing consumers with the extra features that  
 18 Real says come from having a digital copy of a movie on a hard drive, rather than on a disk. *See*  
 19 *supra* at 3-4. Real, however, could provide all of this “extra value” by obtaining content-owner  
 20 authorization (as iTunes, Amazon and others have done) to use methods other than copying from  
 21 CSS-protected disks to put *exactly the same content* in digital format on a hard drive. Mot. at 13-  
 22 14. Each Studio was free to negotiate such licenses with Real, had Real sought them, which Real  
 23 never alleges that it did. That undeniable fact is another break in the alleged causal chain.

24 Real’s only response to this argument is to assert that its allegations involve only copying  
 25 directly from DVDs and do not mention iTunes and Amazon. Opp. at 14. It is true that Real’s  
 26 complaint does not mention iTunes and Amazon *by name*, but the complaint expressly  
 27 incorporates into the relevant market those means (and others) that put digital copies onto hard  
 28 drives without copying from CSS-protected DVDs. Although Real refrains from citing to it in

1 this part of its Opposition, the complaint, under the heading, “*The Relevant Market*,” alleges that  
 2 the market is for “the provision of technology that enables consumers to (a) create or otherwise  
 3 obtain digital copies of movies and TV shows that they own on DVDs and (b) store and manage  
 4 those copies electronically (e.g., on a hard drive) for subsequent playback.” ¶ 99 (emphasis  
 5 added). Real alleges that the market includes means of “otherwise obtain[ing] digital copies”  
 6 because Real alleges that the market includes the Studios’ “digital copy” products.<sup>4</sup> As Real  
 7 expressly alleges, however, “digital copy” products come on “a second disc,” and they are  
 8 protected “*without CSS encryption*.” ¶ 103 (emphasis added). *See also* Opp. at 5:22-23. What  
 9 Real is alleging (and admitting) is that “digital copy” products do *not* involve making copies of  
 10 content from copies that are protected by CSS.

11 Contrary to Real’s Opposition, therefore, its complaint *does* allege that the relevant means  
 12 of putting content onto a hard drive to add “value” to that content include means other than  
 13 copying from copies protected by CSS.<sup>5</sup> That means that alternative methods of putting such  
 14 content onto hard drives *are* relevant, even if Real refrains from mentioning them by name. And  
 15 the undisputed presence of such alternatives is yet another reason why Real cannot allege a causal  
 16 link between the CSS License’s proscription on copying and any asserted injury-in-fact.

### 17 C. Real Fails To Plead Plausible Antitrust Conspiracies

#### 18 1. Real’s Third Cause Of Action - Even As Revised - Fails To Allege A 19 Plausible Antitrust Claim

20 Real’s *Twombly-Iqbal* defense of its third claim consists exclusively of an argument that  
 21 the Studios attack the wrong “conspiracy.” Real is emphatic, for the first time since filing its  
 22 antitrust claims, that it does “*not* allege that the CSS License itself, without more, constitutes a  
 23 *per se* illegal group boycott.” Opp. at 17:22-23. Rather, Real now claims that the prohibited

24 <sup>4</sup> In particular, Real alleges that its own “entry into the relevant market has been delayed while  
 25 the Studios have remained free to distribute and sell their own ‘Digital Copy’ products and  
 capture the market for themselves.” ¶ 112.

26 <sup>5</sup> Real briefly refers to RealDVD as being “a product that makes fair use of *copies of DVDs*.”  
 27 Opp. at 14:9. As the Studios explained, fair use is irrelevant to Real’s antitrust claim, which is  
 28 premised on Real’s claimed inability to offer copies authorized by the content owner, not copies  
 claimed to be excused from a finding of infringement under the fair use defense. Mot. at 18:13-  
 18. Real says nothing in response to the Studios’ argument on this point.



“agreement” is one not to enter into individual licenses authorizing the copying of content from CSS-protected DVDs. *Id.* at 17-18.

This reformulated conspiracy claim, like Real’s original arguments, fails to allege plausible antitrust violations. Real does not allege any facts showing that any Studio, even if it so desires, can license Real (or anyone else) to copy content from CSS-protected DVDs. The CSS License on its face shows that no such authority is granted to any licensee. Real also fails to allege any facts showing that the lack of such authority implicates the antitrust laws. Real does not allege (nor could it) that any Studio’s individual decision to participate in the *non-exclusive* CSS system for protecting copyrighted content against copying is the result of anything other than rational, lawful behavior. The fact that the License is non-exclusive, and that there exist abundant alternative means for individual, bilateral licensing of the same content for digital dissemination, means that the License’s proscription on copying from CSS-protected DVDs is not a restraint of trade. *See CBS v. ASCAP*, 620 F.2d at 935-36. Real’s third claim fails under *Twombly* and *Iqbal*.

**2. Real’s Fourth Cause of Action Is Not Based On “Direct Evidence” Of A Conspiracy; It Is Based On Indirect Allegations That Fail The Most Basic Pleading Standards**

Real asserts that its fourth cause of action (the purported “group boycott” in September 2008) is not subject to *Twombly* and *Iqbal* at all because Real claims it has “direct evidence” of a “cartel” among the Studios. *Opp.* at 15-16. Simply alleging a “cartel” is not sufficient.

In the Ninth Circuit, “direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.” *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1155 (9th Cir. 2001) (quotations omitted). In *County of Tuolumne*, the Ninth Circuit held that statements in a signed letter authored by one party to the alleged conspiracy, and addressed to the others, failed to provide direct proof of a conspiracy, because it failed to “evidence a ‘meeting of [the] minds’” among the alleged co-conspirators. *Id.* at 1156.

Real’s threadbare allegations do not remotely satisfy the demanding standards for direct proof of a conspiracy. The sum total of Real’s purported “direct evidence” is found in the



1 following paragraph in the complaint:

2 The negotiations for a potential solution and a business deal went the furthest with  
 3 Paramount. RealNetworks and Paramount exchanged numerous term sheets, and had  
 4 even agreed upon preliminary dollar amounts to enter into a marketing arrangement  
 5 whereby Paramount would include Vegas on its DVDs and receive some payment in  
 6 return. ***At the last minute, however, Paramount indicated that it was not prepared to  
 break with the Studio cartel without substantial compensation for doing so. The  
 compensation demanded by Paramount was an exorbitant sum, not at all tethered to the  
 business value of the deal under negotiation.*** ¶ 74 (emphasis added).

7 This is not direct evidence of a conspiracy. One would have to pile unsubstantiated  
 8 inference upon unsubstantiated inference to get from Real's highly general description of a  
 9 disagreement over price to proof of any conspiracy. The allegations do not evidence any  
 10 agreement among the alleged conspirators; indeed, neither these allegations (nor any others in the  
 11 complaint) provide direct evidence of any type of agreement among the Studios not to do  
 12 business with Real. As in *County of Tuolumne*, nothing in these allegations shows any "meeting  
 13 of the minds." Real does not overcome this deficiency by putting the word *cartel* in quotation  
 14 marks in its Opposition, at 16:14. Real uses quotation marks because Real is merely quoting *its*  
 15 *own allegation* back to itself. These are not words that Real alleges came from the mouth of  
 16 anyone representing Paramount. As in *Twombly*, Real's shorthand description of "the Studio  
 17 cartel" is nothing more than "mere[] legal conclusions resting on the prior allegations." *Twombly*,  
 18 550 U.S. at 564. If the allegations set forth in Paragraph 74 were enough to get past a motion to  
 19 dismiss, *Twombly's* plausibility standard would be a dead letter. That cannot be the case.

20 Real's allegations also fail to assert "indirect" proof of a conspiracy. Real fails to provide  
 21 any of the basic facts about "who, did what, to whom (or with whom), where, and when[,] as the  
 22 cases require. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008). Such facts are  
 23 missing even as to Paramount. Paragraph 74 says nothing about who made statements on behalf  
 24 of Paramount, what they actually said, or to whom they said it. Paragraph 74 is cryptic even as to  
 25 the nature of the "business deal" or "marketing arrangement" that Real claims it was discussing  
 26 with Paramount. Real's allegation that the "deal" contemplated Paramount "includ[ing] Vegas on  
 27 its DVDs and receiv[ing] some payment in return," is indicative of a proposal to have Paramount  
 28 act as a distributor of RealDVD, not of Paramount licensing Real to copy content from CSS-

protected DVDs. And Real's conclusory allegation that Paramount purportedly demanded "substantial compensation" "not at all tethered to the business value of the deal under negotiation," suggests, at most, a price dispute. It does not show the existence of a conspiracy.

Beyond Real's conclusory allegations concerning Paramount, the complaint is completely devoid of information about the other Studios' participation in the alleged group boycott. That deficiency, too, is fatal to Real's claim. *See In re Travel Agent Comm'n Antitrust Litig.*, \_\_\_ F.3d \_\_\_, 2009 WL 3151315, at \*7 (6th Cir. Oct. 2, 2009) (allegations regarding claimed conspiracy among airlines fails to satisfy *Twombly* where complaint fails to specify how multiple airline members of alleged conspiracy were involved).<sup>6</sup> Real does not fill this void with its string cite to other paragraphs, which Real says "consistently identify[] all of the Studio Defendants as the members." *See* Opp. at 16:17-18. The paragraphs that Real cites contain nothing more than conclusory allegations that all of the Studios were members of a "cartel." In fact, the only allegations that Real makes concerning its discussions with other Studios aver that Real's discussions with those Studios went in different directions. ¶¶ 70, 74. These allegations are more consistent with independent, self-interested behavior in each Studio's discussions with Real than they are with the existence of a group boycott. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 787 (7th Cir. 1999) (Posner, C.J.) (plaintiff must show "that the hypothesis of collusive action [i]s more plausible than that of individual action").

#### **D. Noerr-Pennington Bars Real's Claims**

##### **1. Real's Claimed Injuries Flow From The Court's Injunction And Constitutionally Protected Petitioning Conduct, Which Are Noerr-Protected**

Even if Real were correct (and it is not) that the *Modesto Irrigation District* line of cases does not apply, Real's claims still would be barred under *Noerr-Pennington*. RealDVD is not on

<sup>6</sup> *See also Michigan Div. - Monument Builders of N. Am. v. Mich. Cemetery Ass'n*, 458 F. Supp. 2d 474, 485 (E.D. Mich. 2006) ("Plaintiffs cannot escape their burden of alleging that each defendant participated in or agreed to join the conspiracy by using the term 'defendants' to apply to numerous parties without any specific allegations as to any individual cemetery defendant."); *Jung v. Ass'n of Am. Med. Colleges*, 300 F. Supp. 2d 119, 164 (D.D.C. 2004) ("[P]laintiffs are not relieved from alleging that each individual defendant joined the conspiracy and played some role in it.").

1 the market *solely* because the Studios sued Real and the Court granted orders of injunctive relief  
 2 keeping RealDVD off the market. As Real's own allegations make clear, *see supra* n.2, Real  
 3 does not believe that RealDVD requires studio authorization, and Real did (and would have  
 4 continued to) sell the product absent the Court's orders.

5 "[W]here, as here, all of the plaintiff's alleged injuries result from state action, antitrust  
 6 liability cannot be imposed on a private party who induced the state action by means of concerted  
 7 anticompetitive activity." *Armstrong Surgical Ctr., Inc. v. Armstrong County Mem'l Hosp.*, 185  
 8 F.3d 154, 160 (3d Cir. 1999). The case law that Real cites holds the same thing. *See Andrx*  
 9 *Pharms., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 818 (D.C. Cir. 2001) (cited by Real, Opp. at  
 10 4:2-4, 22:8-9) ("If anticompetitive harm is caused by the decision of a court, even though granted  
 11 at the request of a private party, no private restraint of trade occurs because the intervening  
 12 government action breaks the causal chain.").

13 The fact that the Court's injunction Order is preliminary does not, as Real contends, Opp.  
 14 at 10, change this analysis. In *Boulware v. State of Nevada, Department of Human Resources*,  
 15 960 F.2d 793 (9th Cir. 1992), the plaintiff asserted antitrust claims against a competitor based on  
 16 its intervention in a state court action. The state trial court issued a temporary injunction followed  
 17 by a permanent injunction prohibiting construction of a facility for plaintiff's business. The state  
 18 supreme court later reversed that decision. In the federal antitrust suit, the plaintiff alleged that  
 19 his injury stemmed from being "[d]riven into bankruptcy by the injunction that stalled his"  
 20 business. *Id.* at 795-96 (emphasis added). The Ninth Circuit affirmed dismissal of the plaintiff's  
 21 claims under *Noerr*, notwithstanding the vacatur of the state trial court's injunction. *Id.* at 800  
 22 (defendant's "intervention in the state suit may be characterized as a monopolist's attempt to  
 23 prevent competition by aiding a state agency to push the boundaries of its jurisdiction by taking  
 24 an aggressive legal position in enforcement proceedings. [This] does not place it beyond *Noerr*-  
 25 *Pennington*'s protection. [The plaintiff's] success on appeal does not alter this conclusion." ).  
 26 *Accord Krasnyi Oktyabr, Inc. v. Trilini Imports*, 578 F. Supp. 2d 455, 475 (E.D.N.Y. 2008)  
 27 (claim dismissed where alleged injuries stemmed from TRO that was vacated upon dismissal of  
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claims on summary judgment). Real's injuries likewise flow from the Studios' protected petitioning conduct and the Court's injunction Orders.

As expected, Real also argues that its claims are not *Noerr*-barred based on *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982). *See* Opp. at 21. *Clipper Express* holds only that if petitioning activity is one element of a larger scheme with other anti-competitive acts, the court will not disregard the other non-petitioning acts based on *Noerr*. 690 F.2d at 1265. *Clipper Express* is irrelevant because all of the anti-competitive acts that Real alleges (settlement discussions, lawsuit, requests for (and granting of) injunctions) are core petitioning activities under *Noerr*.

## 2. Real's Fourth Cause Of Action Is Based On Failed Settlement Discussions, Which Are *Noerr*-Protected

*Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525 (9th Cir. 1991), holds that where conduct "amount[s] to an offer to settle the lawsuit," *Noerr* applies. *Id.* at 1528 (emphasis added). *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 933-34 (9th Cir. 2006), holds that *Noerr* also applies to pre-litigation settlement communications. Real's fourth cause of action is based exclusively on Real-Studio settlement discussions in the days before this litigation. These cannot be the basis for liability under *Noerr*.

Real's claim that the September 2008 discussions were "business" discussions ignores (again) Real's allegations, which make the settlement nature of the discussions clear. *See, e.g.*, ¶¶ 97, 132 (purpose of talks was to "resolve the Studios Defendants' stated concerns with the product" and "to resolve the ensuing dispute between" Real and the Studios (emphases added)). Real also ignores the Court's Order on the Studios' motion for sanctions. That Order holds that the parties' tolling agreement showed that "Real was on notice that litigation was probable and a potential claim was identifiable[.]" Order (Doc. No. 316) at 14:9-15.

Real's argument that the September discussions had business as well as settlement components, Opp. at 22:18-19, does not change this analysis. As the Ninth Circuit held in *Sosa*, even though pre-litigation discussions between private parties may raise issues concerning the parties' "commercial interests," in "nearly every instance in which *Noerr-Pennington* has been

1 applied, including *Noerr* itself, the petitioning conduct at issue was carried out to further the  
 2 petitioning party's commercial interests." 437 F.3d at 935 n.8. *See Meridian Project Sys., Inc. v.*  
 3 *Hardin Constr. Co., LLC*, 404 F. Supp. 2d 1214, 1222 (E.D. Cal. 2005) ("most courts" have  
 4 concluded that prelitigation communications are incidental to suit and thus *Noerr*-protected).

5 Real, in its *Noerr* argument, again returns to the Second Circuit's decision in *PrimeTime*  
 6 *24*, this time as a purported basis for disregarding the Ninth Circuit's controlling decision in  
 7 *Columbia Pictures*. Opp. at 23:10-12. *PrimeTime 24* is as irrelevant here as it is to the causation  
 8 issue. In connection with allegations about the networks' refusal to deal with PrimeTime, the  
 9 Second Circuit distinguished *Columbia Pictures* on grounds that do not apply here. That court  
 10 noted that PrimeTime's "initial offer" to deal "predated the copyright infringement lawsuits."  
 11 219 F.3d at 102. *Sosa*, decided by the Ninth Circuit four years later, makes clear that, in this  
 12 Circuit, pre-litigation conduct may be *Noerr*-protected. 437 F.3d at 933-34. The Second Circuit  
 13 also suggested that PrimeTime's proposal to "offer each station a fee for each local subscriber"  
 14 may have "allow[ed] ongoing legal actions to survive." 219 F.3d at 102. Here, Real admits it  
 15 was aware of the possibility of litigation with the Studios and that its September discussions were  
 16 "attempts to resolve the ensuing dispute between" Real and the Studios. ¶ 97 (emphasis added).

17 Finally, Real asserts that if the CSS License in fact prohibits licensees from granting  
 18 exemptions to its no-copying rule, then any settlement discussions were undertaken in "bad  
 19 faith." Opp. at 24:8. That is baseless. Real never describes what the content of its discussions  
 20 was, what business "arrangements" were proposed, or what the proposals said about Real's  
 21 compliance with the License. Real's cry of "bad faith" must be disregarded.

#### 22 **E. Real's State Law Claims Fail**

23 Real concedes that if its federal law claims fail, then so do its state law claims. *See* Opp.  
 24 at 24:13-18. Hence, Real's state law claims also should be dismissed.

### 25 **III. CONCLUSION**

26 The Court should dismiss Real's antitrust claims with prejudice.  
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