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 Counterclaim Defendants  
 9 REALNETWORKS, INC. and  
 REALNETWORKS HOME  
 10 ENTERTAINMENT, INC.

11 UNITED STATES DISTRICT COURT  
 12 NORTHERN DISTRICT OF CALIFORNIA

13 REALNETWORKS, INC., a Washington  
 Corporation; and REALNETWORKS HOME  
 14 ENTERTAINMENT, INC., a Delaware  
 corporation,

15 Plaintiffs,

16 v.

17 DVD COPY CONTROL ASSOCIATION, INC., a  
 18 Delaware nonprofit corporation, DISNEY  
 ENTERPRISES, INC., a Delaware corporation;  
 19 PARAMOUNT PICTURES CORP., a Delaware  
 corporation; SONY PICTURES ENTER., INC., a  
 20 Delaware corporation; TWENTIETH CENTURY  
 FOX FILM CORP., a Delaware corporation; NBC  
 21 UNIVERSAL, INC., a Delaware corporation;  
 WARNER BROS. ENTER. INC., a Delaware  
 22 corporation; and VIACOM, Inc., a Delaware  
 Corporation,

23 Defendants.

24  
 25  
 26 AND RELATED CASES  
 27  
 28

Case Nos. C08 04548 MHP;  
 C08 04719 MHP

**NOTICE OF MOTION AND MOTION  
 TO DISMISS DVD COPY CONTROL  
 ASSOCIATION, INC.'S SECOND  
 COUNTERCLAIM AND TO STRIKE  
 AFFIRMATIVE DEFENSES**

**Before: Hon. Marilyn Hall Patel  
 Dept: Courtroom 15  
 Date: February 9, 2009  
 Time: 2:00 p.m.**

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE THAT, on February 9, 2009 at 2:00 p.m. or at such date and  
4 time as the Court may establish, Plaintiffs and Counterclaim Defendants RealNetworks, Inc. and  
5 RealNetworks Home Entertainment, Inc. (collectively, "Real") will and hereby do move before  
6 the Honorable Marilyn Hall Patel for an Order (1) dismissing with prejudice DVD Copy Control  
7 Association, Inc.'s Second Counterclaim for Breach of the Implied Covenant of Good Faith and  
8 Fair Dealing pursuant to Fed. R. Civ. P. 12(b)(6), and (2) striking the Second and Third  
9 Affirmative Defenses contained in the Amended Answer and Counterclaims of Defendant and  
10 Counterclaimant DVD Copy Control Association, Inc. ("DVD CCA").

11 This Motion is based on this Notice of Motion and Motion, including the Memorandum  
12 of Points and Authorities set forth below, the pleadings and papers on file with the Court, the  
13 argument of counsel and on any other matters properly before the Court.

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **INTRODUCTION**

16  
17 In response to Real's Complaint seeking a judgment declaring that its License Agreement  
18 with Defendant and Counterclaimant DVD Copy Control Association, Inc. ("DVD CCA")  
19 permits Real to manufacture and offer for sale its Real DVD product, DVD CCA has interposed  
20 three affirmative defenses and two counterclaims. Amended Answer and Counterclaims of  
21 Defendant and Counterclaimant DVD Copy Control Association, Inc. ("Answer") at 9-17. In  
22 this motion, Real seeks to (1) dismiss DVD CCA's second counterclaim for failure to state a  
23 claim on which relief may be granted, and (2) strike DVD CCA's Second and Third Affirmative  
24 Defenses for failing to provide Real with fair notice of the defense as required by Fed. R. Civ. P.  
25 8(b).

**ARGUMENT**

**I. DVD CCA’S SECOND COUNTERCLAIM SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM**

In response to Real’s Complaint, DVD CCA interposed two counterclaims: the first for breach of its CSS License Agreement with Real, and the second for breach of the implied covenant of good faith and fair dealing in that agreement. Real seeks to dismiss the second of these counterclaims for failure to state a claim on which relief may be granted on two grounds: first, that DVD CCA’s claim for breach of the implied covenant of good faith and fair dealing merely duplicates its claim for breach of contract; and second, that as a signatory to a contract of adhesion drafted solely by DVD CCA, Real cannot as a matter of law have agreed to the implied covenant suggested by DVD CCA’s allegations.

**A. DVD CCA’s Second Counterclaim Merely Duplicates Its Claim for Breach of Contract and Should Be Dismissed**

DVD CCA’s claim for breach of the implied covenant of good faith and fair dealing relies on the same five alleged acts as its breach of contract claim. Under California law, which governs the Agreement, License Agreement §10.4(a), the implied covenant claim must therefore be dismissed. A claim for “breach of the implied covenant of good faith and fair dealing involves something beyond breach of the contractual duty itself[.]” *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal. App. 3d 1371, 1394 (1990) (demurrer properly sustained where implied covenant claim was duplicative of claim for breach of contract). Accordingly, “[i]f the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages . . . already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated.” *Id.* at 1395. *Accord Bionghi v. Metropolitan Water District of Southern California*, 70 Cal. App. 4th 1358, 1370 (1999) (affirming summary judgment for defendant where implied covenant claim “relies on the same acts, and seeks the same damages, as its claim for breach of contract”); *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317, 352-53 (2000) (“to the extent the implied covenant claim seeks simply to invoke terms to which the parties did agree, it is superfluous”;

1 affirming summary judgment for defendant). Courts in this Circuit have not hesitated to dismiss  
2 clearly duplicative claims under these precedents. *See, e.g. Diaz v. Federal Express Corp.*, 373  
3 F. Supp. 2d 1034, 1066 (C.D. Cal. 2005) (granting summary judgment for defendant on implied  
4 covenant claim based on allegations in complaint); *see also Hogue v. City of Holtville*, 2008 WL  
5 1925249, at \*3-4 (S.D. Cal. 2008) (granting motion to dismiss implied covenant claim).

6 Here, DVD CCA's claim for breach of the covenant of good faith and fair dealing alleges  
7 no act by Real beyond the acts alleged in its breach of contract claim: developing, designing,  
8 manufacturing, distributing and using Real DVD. Compare Answer paragraphs 21 and 27:

9 21. RealNetworks has materially breached the CSS License Agreement by, in  
10 and among other ways, developing and distributing RealDVD, which (a) includes  
11 functionality prohibited by the CSS License Agreement, (b) fails to implement CSS  
12 in the manner required by the CSS License Agreement, (c) fails to effectively  
13 prevent the creation of permanent copies of CSS protected DVD content onto  
14 personal computers, and (d) fails to require authentication and play back of CSS  
15 protected DVD content from a physical DVD disc.

16 27. RealNetworks has breached the covenant of good faith and fair dealing  
17 implied in the CSS License Agreement by, in and among other ways, developing  
18 and distributing Real DVD, which (a) includes functionality prohibited by the CSS  
19 License Agreement, (b) fails to implement CSS in the manner required by the CSS  
20 License Agreement, (c) fails to effectively prevent the creation of permanent copies  
21 of CSS protected DVD content onto personal computers, and (d) fails to require  
22 authentication and play back of CSS protected DVD content from a physical DVD  
23 disc.

24 And compare Answer paragraph 22 with paragraph 29:

25 22. RealNetworks is not a CSS Licensee in the CSS Decryption Module  
26 Membership Category; by developing, designing, manufacturing and using Real  
27 DVD, which constitutes a CSS Decryption Module, it has violated the scope of its  
28 CSS License Agreement.

29. RealNetworks has breached the covenant of good faith and fair dealing  
implied in the CSS License Agreement by, in and among other ways, developing  
Real DVD, which is a CSS Decryption module.

The relief to which DVD CCA alleges it is entitled under its implied covenant claim  
similarly adds nothing to its claim for relief for breach. Compare Answer ¶ 23 with ¶ 30. Thus,  
DVD CCA has “not even attempted to plead a basis for recovery of anything other than ordinary  
contract damages and [its] claim is simply duplicative of [its] contract causes of action and thus  
may be disregarded.” *Careau*, 222 Cal. App. 3d at 1392.

1           **B. As the Drafter of a Contract of Adhesion, DVD CCA Is Not Entitled to**  
 2           **Dictate the Meaning of Any Implied Covenant of Good Faith and Fair**  
 3           **Dealing**

4           Not only has DVD CCA failed to state a claim for a breach of the implied covenant of  
 5           good faith and fair dealing, as discussed above, but DVD CCA also cannot state such a claim  
 6           with respect to the contract at issue. As DVD CCA itself explained to this Court, anyone who  
 7           wants to manufacture a product used for playing back CSS protected DVD content will be  
 8           granted permission to use CSS under the CSS License Agreement, a “uniform and non-  
 9           discriminatory license.” Answer at 2. Because it is a non-negotiable, standardized form  
 10          agreement, all licensees “are subject to the same structure for the license’s use.” Answer at 3.  
 11          DVD CCA cannot dispute that the CSS License Agreement is a “standardized contract, imposed  
 12          upon the subscribing party without an opportunity to negotiate the terms” – the very definition of  
 13          a contract of adhesion. *Intershop Communications AG v. Martinez*, 104 Cal.App.4th 191, 201  
 14          (Cal. App. 2002), citing *Neal v. State Farm Ins. Co.*, 188 Cal.App.2d 690, 694 (Cal. App. 1961);  
 15          *Armendariz v. Foundation Health PsychCare Services, Inc.*, 24 Cal.4th 83, 113 (Cal. 2000);  
 16          *Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 817 (Cal. 1981). In addition to DVD CCA’s  
 17          acknowledgment of the standardized format of its license in the Counterclaim, the License  
 18          Agreement itself confirms its adhesive nature. See CSS License Agreement ¶ 1.11 (“CSS  
 19          Agreement” shall mean an agreement between Licensor and another party that contains the *same*  
 20          *terms* as this Agreement.”) (emphasis added).<sup>1</sup>

21          When construing contracts of adhesion, California courts look to the language of the  
 22          agreement interpreted in light of the reasonable expectations of the adhering parties, and not  
 23          “from the subjective intent of the people who drew up those policies of adhesion.” *State Farm*  
 24          *and Casualty Co. v. Keenan*, 171 Cal.App.3d 1, 14 (Cal. App. 1985). Furthermore, any

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25          <sup>1</sup> The Court may properly consider the CSS License Agreement to be incorporated by reference  
 26          into DVD CCA’s counterclaims, since DVD CCA has specifically alleged that Real breached or  
 27          is in violation of the requirements of these documents. *United States v. Ritchie*, 342 F.3d 903,  
 28          908 (9<sup>th</sup> Cir. 2003); *Branch v. Tunnell*, 14 F.3d 449, 454 (9<sup>th</sup> Cir. 1994). Doing so does not  
 require the Court to convert Real’s motion to dismiss to one for summary judgment. *Ritchie*, 342  
 F.3d at 908.

1 ambiguity in a contract of adhesion must be construed against the drafter. *Badie v. Bank of*  
2 *America*, 67 Cal.App.4th 779, 801 (Cal.App. 1 Dist. 1998). Given these principles, the DVD  
3 CCA should not benefit, as a matter of law, from allegedly implied terms it did not explicitly  
4 include in the standardized contract it drafted.

5 While a covenant of good faith and fair dealing is implied by law in every contract, it  
6 “exists merely to prevent one contracting party from unfairly frustrating the other party’s right to  
7 receive the *benefits of the agreement actually made.*” *Guz*, 24 Cal.4th at 349 (emphasis in  
8 original) (approving denial of summary judgment on implied covenant claim). Hence, the  
9 covenant “cannot impose substantive duties or limits on the contracting parties beyond those  
10 incorporated in the specific terms of their agreement.” *Id.* As drafter of the CSS License  
11 Agreement, DVD CCA had every opportunity to expressly define the substantive duties and  
12 limits on the contracting parties. Thus, DVD CCA cannot now turn to an implied covenant to  
13 supplement the terms it failed to include.

14 Allegations asserting a breach of the implied covenant of good faith and fair dealing must  
15 show that:

16 [T]he conduct of the defendant, whether or not it also constitutes a breach of a  
17 consensual contract term, demonstrates a failure or refusal to discharge contractual  
18 responsibilities, prompted not by an honest mistake, bad judgment or negligence  
19 but rather by a conscious and deliberate act, which *unfairly frustrates the agreed*  
*common purposes and disappoints the reasonable expectations of the other party*  
thereby depriving that party of the benefits of the agreement.

20 *Careau*, 222 Cal.App.3d at 1395.

21 The allegations here appear to suggest that by signing up for a license, Real agreed that  
22 the purpose of the license was to prevent consumer copying of any kind of audio-visual works  
23 contained on DVDs. *See Answer* ¶¶ 1, 6-8, 11. DVD CCA has presented no adequate basis for  
24 such an allegation. Real had to accept the License Agreement on a take-it-or-leave-it basis, and  
25 therefore could only ascertain DVD CCA’s intentions and expectations from the express  
26 language of the contract itself. Moreover, because the License Agreement is a contract of  
27 adhesion, if there is any ambiguity regarding the fundamental purpose of the CSS License  
28

1 Agreement, it is only “‘poetic justice’ ... if such ambiguity is construed in favor of the  
2 [licensee].” *Tahoe National Bank v. Phillips*, 4 Cal.3d 11, 20 (Cal. 1971).

3 For these reasons, DVD CCA cannot claim that Real agreed to anything beyond the  
4 express terms of the contract at issue. Even if the CSS License Agreement was not a contract of  
5 adhesion, Real cannot be held to an implied covenant that DVD CCA has constructed solely  
6 from its own interpretation of the purposes of that agreement where those purposes are nowhere  
7 evidenced in the contract’s expressed terms. As Real had no opportunity to negotiate explicit  
8 terms, it would be unfair to impose any additional obligations based on contractual purposes that  
9 Real also had no opportunity to define or ascertain. Real respectfully requests that the Court  
10 reject any such attempt by DVD CCA by dismissing this claim with prejudice.

11 **II. DVD CCA’S SECOND AND THIRD AFFIRMATIVE DEFENSES SHOULD BE**  
12 **STRICKEN AS INSUFFICIENTLY PLED**

13 In its Answer to Real’s Complaint, DVD CCA interposed three affirmative defenses,  
14 which read in their entirety as follows:

15 **First Affirmative Defense: Failure to State a Claim**

16 The Complaint fails to state a claim upon which relief can be granted.

17 **Second Affirmative Defense: Unclean Hands**

18 Plaintiffs’ claims are barred by the doctrine of unclean hands.

19 **Third Affirmative Defense: Waiver and Estoppel**

20 Plaintiffs’ claims are barred by the doctrines of Waiver and Estoppel.

21 *Amended Answer and Counterclaims of Defendant and Counterclaimant DVD Copy Control*  
22 *Association, Inc.* (“Answer”) at 9.

23 Real seeks to strike the Second and Third Affirmative Defenses for failing to provide  
24 Real with fair notice of the defense as required by Fed. R. Civ. P 8(b).<sup>2</sup>

25 **A. DVD CCA’s Affirmative Defenses are Appropriately Stricken as Failing to**  
26 **Provide Fair Notice**

27 <sup>2</sup> DVD CCA’s First Affirmative Defense is properly considered denied or avoided pursuant  
28 to Fed. R. Civ. P. 8(b)(6).

1 Under the Federal Rules of Civil Procedure, a Court may “order stricken from any  
2 pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous  
3 matter.” Fed. R. Civ. P. 12(f). The Ninth Circuit has held that under the Federal Rules of Civil  
4 Procedure, “[t]he key to determining the sufficiency of pleading an affirmative defense is  
5 whether it gives plaintiff fair notice of the defense.” *Wyshack v. City Nat’l Bank*, 607 F.2d 824,  
6 827 (9<sup>th</sup> Cir. 1979). Affirmative defenses that consist of nothing more than a mere reference to a  
7 doctrine—such as the doctrines of unclean hands, waiver, and estoppel—do not provide fair  
8 notice, and are properly stricken. *Qarbon.com Inc. v. EHelp Corp.*, 315 F.Supp.2d 1046, 1049  
9 (N.D. Cal. 2004) (striking affirmative defenses of unclean hands, waiver and estoppel). DVD  
10 CCA’s Second and Third Affirmative Defenses provide no more than a bare mention of the  
11 doctrines of unclean hands, waiver and estoppel, and should be stricken.

12 **B. Any Amendment to the Challenged Affirmative Defenses Must Set Forth the**  
13 **Elements of the Defense Asserted and Supporting Factual Allegations**

14 If DVD CCA is to provide Real with fair notice of its affirmative defenses, it must, at a  
15 minimum, “set out the elements of the affirmative defense and some factual allegations that meet  
16 those elements.” *Hynix Semiconductor Inc. v. Rambus Inc.*, 2007 WL 4062845 at \* 8 (N.D. Cal.  
17 2007) (striking affirmative defense of unclean hands), citing *Qarbon.com*, 315 F.Supp.2d at  
18 1049; *see also Sun Microsystems, Inc. v. Datram Corp.*, 1997 WL 50272 at \*4 (N.D. Cal. 1997)  
19 (declining to strike affirmative defense of estoppel where elements of defense set forth). Real  
20 respectfully requests that the Court’s order striking DVD CCA’s Second and Third Affirmative  
21 Defenses also directs that, if DVD CCA wished to amend those defenses, DVD CCA must  
22 indicate the elements of the defense and provide factual allegations sufficient to meet those  
23 elements.

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