

1 QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
 Claude M. Stern (Bar No. 96737)
 2 claudestern@quinnemanuel.com
 Rachel Herrick Kassabian (Bar No. 191060)
 3 rachelkassabian@quinnemanuel.com
 555 Twin Dolphin Drive, Suite 560
 4 Redwood Shores, California 94065
 Telephone: (650) 801-5000
 5 Facsimile: (650) 801-5100

6 David J. Ruderman (Bar No. 245989)
 davidruderman@quinnemanuel.com
 7 50 California Street, 22nd Floor
 San Francisco, California 94111-4624
 8 Telephone: (415) 875-6600
 Facsimile: (415) 875-6700
 9

10 Attorneys for Defendant
 Zynga Game Network, Inc.
 11
 12
 13

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

16 PSYCHO MONKEY, LLC,
 17
 Plaintiff,
 18
 vs.
 19 ZYNGA GAME NETWORK, INC., a
 20 Delaware Corp., and DOES 1-10, inclusive,
 21 Defendants.

CASE NO. 4:09-cv-0603-SBA

**DEFENDANT ZYNGA GAME
 NETWORK, INC.'S NOTICE OF
 MOTION AND MOTION TO
 DISMISS OR, IN THE
 ALTERNATIVE, TO STRIKE
 PORTIONS OF PLAINTIFF'S
 AMENDED COMPLAINT;**

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT
 THEREOF**

**[FED. R. CIV. P. 12(b)(6); FED. R.
 CIV. P. 12(f)]**

Date: May 12, 2009
 Time: 1:00 p.m.
 Dept.: Courtroom 3, 3rd Floor
 Judge: Hon. Sandra Brown Armstrong

1 **NOTICE OF MOTION AND MOTION**

2 **TO ALL PARTIES AND THEIR ATTORNEYS:**

3 NOTICE IS HEREBY GIVEN that on May 12, 2009 at 1:00 p.m. in Courtroom 3, Third
4 Floor of the United States District Court for the Northern District of California, Oakland Division,
5 1301 Clay Street, Oakland, California, 94612, the Honorable Sandra Brown Armstrong
6 presiding, defendant Zynga Game Network, Inc. (“Zynga”) will, and hereby does, move to dismiss
7 or, in the alternative, to strike portions of the amended complaint of plaintiff Psycho Monkey,
8 LLC (“Psycho Monkey”) pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(f). This
9 Motion is made on the grounds that: (1) plaintiff’s unfair competition claim pursuant to California
10 Business and Professions Code § 17200 is preempted by the federal Copyright Act to the extent it
11 is premised on alleged copyright infringement, and (2) plaintiff fails to state a claim that Zynga
12 acted in a manner that would constitute an “unfair” business practice pursuant to California
13 Business and Professions Code § 17200. Accordingly, these portions of plaintiff’s unfair
14 competition claim should be dismissed and/or stricken.

15 Pursuant to this Court’s standing order in civil cases, the parties met and conferred
16 regarding this motion on March 31 and April 1, 2009, but were unable to resolve this matter
17 without motion practice.

18 This Motion is based on this Notice of Motion and Motion, the attached Memorandum of
19 Points and Authorities, all matters of which the Court may take judicial notice, the pleadings and
20 other papers on file in this action, and such further evidence and argument as may be presented at
21 or before the hearing on this Motion.

22 DATED: April 2, 2009

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

23
24 By _____/s/_____
25 Claude M. Stern
26 Attorneys for Defendant Zynga Game
27 Network, Inc.
28

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

STATEMENT OF ISSUES (Civ. L. R. 7-4(a)(3))

1. Is plaintiff’s claim under California Business and Professions Code § 17200 preempted to the extent it relies on alleged violations of the Copyright Act, where the rights plaintiff asserts under California law are equivalent to those protected by the Copyright Act and the copyrighted work falls within the subject matter of the Copyright Act?

2. Does plaintiff’s California Business and Professions Code § 17200 cause of action fail to state a claim that defendant engaged in “unfair” business practices, where it does not plead that defendant, its alleged direct competitor, threatened an incipient violation of antitrust law?

TABLE OF CONTENTS

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

Page

Preliminary Statement 1

Factual Background..... 1

Argument..... 2

I. LEGAL STANDARDS..... 3

II. PSYCHO MONKEY’S UNFAIR COMPETITION CLAIM IS PREEMPTED BY THE FEDERAL COPYRIGHT ACT. 3

 A. The Unfair Competition Claim Asserts Rights Equivalent to Those Protected by the Copyright Act—Specifically, the Right to Reproduce, Prepare Derivative Works of, and Distribute Copies of a Work..... 4

 B. The Unfair Competition Claim Involves a Work Within the Subject Matter of the Copyright Act—Specifically, a Computer Video Game. 5

 C. Having Met Both Prongs of the Preemption Test, Psycho Monkey’s Unfair Competition Claim Is Subject to Dismissal. 6

III. PSYCHO MONKEY’S UNFAIR COMPETITION CLAIM FAILS TO ALLEGE AN INCIPIENT VIOLATION OF THE ANTITRUST LAWS, AS IT MUST TO STATE A CLAIM..... 7

Conclusion..... 9

TABLE OF AUTHORITIES

Page

Cases

1

2

3

4

5 *Apple, Inc. v. PsyStar Corp.*,
586 F. Supp. 2d 1190 (N.D. Cal. 2008)8

6 *Apple, Inc. v. PsyStar Corp.*,
08-03251 WHA, 2009 WL 303046 (N.D. Cal. Feb. 6, 2009).....8

7

8 *Axis Imex, Inc. v. Sunset Bay Rattan, Inc.*,
No. C 08-3931 RS, 2009 WL 55178 (N.D. Cal. Jan. 7, 2009).....3

9 *Blue Nile, Inc. v. Ice.com, Inc.*,
478 F. Supp. 2d 1240 (W.D. Wash. 2007)5

10

11 *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*,
20 Cal. 4th 163 (1999).....7, 8, 9

12 *Del Madera Properties v. Rhodes and Gardner, Inc.*,
820 F.2d 973 (9th Cir. 1987).....4

13

14 *Fogerty v. Fantasy, Inc.*,
510 U.S. 517 (1994)4

15 *FTC v. Brown Shoe Co.*,
384 U.S. 316 (1966)7

16

17 *Federal Sav. and Loan v. Gemini Mgmt.*,
921 F.2d 241 (9th Cir. 1990).....3

18 *Firoozye v. Earthlink Network*,
153 F. Supp. 2d 1115 (N.D. Cal. 2001)6

19

20 *Garman v. Sterling Publ'g Co., Inc.*,
No. C-91-0882 SBA, 1992 WL 12561293 (N.D. Cal. Nov. 5, 1992).....5

21 *Girafa.com v. Alexa Internet, Inc.*,
No. C-08-02745 RMW, 2008 WL 4500858 (N.D. Cal. Oct. 6, 2008).....8, 9

22

23 *Higher Gear Group, Inc. v. Rockenbach Chevrolet Sales, Inc.*,
223 F. Supp. 2d 953 (N.D. Ill. 2002)5, 6

24 *Kodadek v. MTV Networks, Inc.*,
152 F.3d 1209 (9th Cir. 1998).....4

25

26 *MGA Entertainment, Inc. v. Mattel, Inc.*,
No. CV 05-2727 NM, 2005 WL 5894689 (C.D. Cal. Aug. 26, 2005).....3

27 *McCoy v. Scantlin*,
No. CV 04-371-GHK, 2004 WL 5502111 (C.D. Cal. June 1, 2004).....6

28

1 *Parrish v. Nat'l Football League Players Ass'n*,
534 F. Supp. 2d 1081 (N.D. Cal. 2007)7, 8

2

3 *Sybersound Records, Inc. v. UAV Corp.*,
517 F.3d 1137 (9th Cir. 2008).....4, 6, 8

4 *Sidney-Vinson v. A.H. Robins Co.*,
697 F.2d 880 (9th Cir. 1983).....3

5

6 *SmileCare Dental Group v. Delta Dental Plan of Cal., Inc.*,
88 F.3d 780 (9th Cir. 1996).....3

7 *Smith & Hawken, Ltd. v. Gardendance, Inc.*,
No. C04-1664 SBA, 2004 WL 2496163 (N.D. Cal. Nov. 5, 2004)5, 6

8

9 *Townshend v. Rockwell Intern. Corp.*,
No. C99-0400 SBA, 2000 WL 433505 (N.D. Cal. Mar. 28, 2000)9

10
11 **Statutes**

12 17 U.S.C. § 1064, 5

13 17 U.S.C. § 301(a).....3

14 Fed. R. Civ. P. 12(b)(6).....3

15 Fed. R. Civ. P. 12(f)3, 9

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **Preliminary Statement**

3 This is a copyright and trademark infringement case between plaintiff Psycho Monkey,
4 LLC (“Psycho Monkey”) and defendant Zynga Game Network, Inc. (“Zynga”), two companies
5 involved in Internet-based social-network gaming. Psycho Monkey’s amended complaint alleges
6 that Zynga copied its online mobster game called “Mob Wars” and released a competing game
7 called “Mafia Wars,” thereby infringing its copyright and trademark.

8 Psycho Monkey also tacks on a cause of action under California’s unfair competition law,
9 pursuant to California Business and Professions Code § 17200 *et seq.* (“Section 17200”). More
10 specifically, Psycho Monkey’s Section 17200 claim has three components: (1) allegations that
11 Zynga’s conduct was “unfair” because it was immoral, unethical, injurious to consumers, and
12 constituted an incipient violation of copyright law; (2) allegations that Zynga’s conduct was
13 “fraudulent” because it was likely to mislead and confuse consumers; and (3) allegations that
14 Zynga’s conduct was “unlawful” because it violated the federal copyright and trademark statutes.
15 This claim is legally infirm for two reasons.

16 First, to the extent Psycho Monkey’s Section 17200 claim is premised on allegations of
17 copyright infringement, it is completely preempted by the federal Copyright Act. Second, Psycho
18 Monkey’s claim that Zynga’s conduct constitutes an “unfair” business practice is not cognizable
19 because it fails to allege an incipient violation of antitrust law—as it must to state a claim between
20 alleged competitors. Lacking any viable legal claim in these respects, Psycho Monkey’s Section
21 17200 cause of action should be dismissed and/or stricken.

22 **Factual Background**

23 Allegations Regarding Mob Wars. Psycho Monkey alleges that its principal, David
24 Maestri, created an online game called “Mob Wars” that is played on the social networking
25 website Facebook, in which players assume the role of a mobster and interact with other players.
26 First Amended Complaint for Damages and Injunctive Relief (Docket No. 4) (“FAC”) ¶¶ 9-10.
27 Per Psycho Monkey, Mob Wars was first published in February 2008 and was later registered with
28 the United States Copyright Office in July 2008. *Id.* ¶¶ 14, 16.

1 Allegations Regarding Zynga's Conduct. Psycho Monkey alleges that after discussions
 2 concerning Zynga's potential acquisition of the intellectual property rights to Mob Wars fell
 3 through, Zynga copied Mob Wars and released a competing on-line mobster game called "Mafia
 4 Wars." *Id.* ¶ 16. More specifically, Mafia Wars allegedly copied the physical and operational
 5 aspects of Mob Wars, including the "layout and arrangement, visual presentation, sequence and
 6 flow, scoring system, and . . . overall look." *Id.* ¶ 19.

7 Psycho Monkey's Causes of Action. Based on the above-referenced allegations, Psycho
 8 Monkey pleads three causes of action: (1) copyright infringement, 17 U.S.C. § 101 *et seq.* (*id.* ¶¶
 9 18-29), (2) unfair competition/false designation of origin under the Lanham Act, 15 U.S.C.
 10 § 1125(a) *et seq.* ("trademark infringement claim") (*id.* ¶¶ 30-40), and (3) unfair competition
 11 under California Business and Professions Code § 17200 *et seq.* ("Section 17200 claim" or "unfair
 12 competition claim") (*id.* ¶¶ 41-48). The Section 17200 claim has three components.

13 First, Psycho Monkey alleges that Zynga violated the "unfair" prong of Section 17200
 14 because "(a) the utility of [Zynga's] actions is outweighed by the gravity of the harm they cause to
 15 Psycho Monkey, (b) such actions are immoral, unethical, oppressive, unscrupulous, and
 16 substantially injurious to consumers, and (c) such actions constitute incipient violations of state
 17 and federal copyright laws." *Id.* ¶ 43.

18 Second, Psycho Monkey alleges that Zynga violated the "fraudulent" prong of Section
 19 17200 because its conduct is "likely to mislead and confuse a statistically significant percentage of
 20 reasonable consumers." *Id.* ¶ 44.

21 Third, Psycho Monkey alleges that Zynga violated the "unlawful" prong of Section 17200
 22 because its conduct "constitute[s] violations of the state and federal statutes set forth above"—*i.e.*,
 23 the federal copyright and trademark statutes. *Id.* ¶ 45. Although Psycho Monkey does allege that
 24 Zynga is its direct competitor (*id.* ¶ 6), nowhere in its amended complaint does Psycho Monkey
 25 contend that Zynga's conduct threatens an incipient violation of the antitrust laws.

26 **Argument**

27 Psycho Monkey's unfair competition claim is uncognizable in two respects. First, to the
 28 extent it is predicated upon Zynga's alleged copying of Psycho Monkey's copyrighted Mob Wars

1 game, it is completely preempted by the Copyright Act. Second, Psycho Monkey fails to state a
2 claim for unfair competition based on “unfair” conduct because it fails to plead an incipient
3 violation of antitrust law—as it must to state such a claim against an alleged direct competitor like
4 Zynga. Accordingly, these claims should be dismissed and/or stricken.

5 **I. LEGAL STANDARDS.**

6 A complaint may be dismissed as a matter of law pursuant to Federal Rule of Civil
7 Procedure 12(b)(6) for one of two reasons: “(1) lack of a cognizable legal theory or (2) insufficient
8 facts under a cognizable legal claim.” *SmileCare Dental Group v. Delta Dental Plan of Cal., Inc.*,
9 88 F.3d 780, 783 (9th Cir. 1996); *see also Axis Imex, Inc. v. Sunset Bay Rattan, Inc.*, No. C 08-
10 3931 RS, 2009 WL 55178, at *2 (N.D. Cal. Jan. 7, 2009) (same); Fed. R. Civ. P. 12(b)(6).

11 Under Federal Rule of Civil Procedure 12(f), a court “may strike from a pleading an
12 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R.
13 Civ. P. 12(f). Rule 12(f) gives the court discretion to strike a pleading or portions thereof. *MGA*
14 *Entertainment, Inc. v. Mattel, Inc.*, No. CV 05-2727 NM, 2005 WL 5894689, at *4 (C.D. Cal.
15 Aug. 26, 2005) (citing *Federal Sav. and Loan v. Gemini Mgmt.*, 921 F.2d 241, 243 (9th Cir.
16 1990)). “[T]he function of a Rule 12(f) motion to strike is to avoid the expenditure of time and
17 money that must arise from litigating spurious issues by dispensing with those issues prior to
18 trial” *Sidney-Vinson v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983).

19 **II. PSYCHO MONKEY’S UNFAIR COMPETITION CLAIM IS PREEMPTED BY**
20 **THE FEDERAL COPYRIGHT ACT.**

21 The portions of Psycho Monkey’s unfair competition claim that are premised on
22 allegations of copyright infringement are completely preempted by the federal Copyright Act. The
23 Copyright Act contains a preemption provision that nullifies “all legal or equitable rights that are
24 equivalent to any of the exclusive rights within the general scope of copyright.” 17 U.S.C.
25 § 301(a). State law claims are preempted

26 if two elements are present. First, the rights that a plaintiff asserts under state law
27 must be “rights that are equivalent” to those protected by the Copyright Act. . . .
28 Second, the work involved must fall within the “subject matter” of the Copyright
Act as set forth in 17 U.S.C. §§ 102 and 103.

1 *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1212 (9th Cir. 1998). Courts routinely find that
2 unfair competition claims grounded in allegations of copyright infringement meet this test and are
3 thus preempted. *See, e.g., id.* (upholding Copyright Act preemption of Section 17200 claim where
4 claim was premised on defendants’ unauthorized release of cartoons and merchandise “derived
5 from [plaintiff’s] drawings”); *see also Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137,
6 1152 (9th Cir. 2008) (finding § 17200 claim preempted to the extent it relied on violations of the
7 Copyright Act where plaintiff lacked standing to bring copyright claims directly); *Del Madera*
8 *Properties v. Rhodes and Gardner, Inc.*, 820 F.2d 973, 976-77 (9th Cir. 1987), *overruled on other*
9 *grounds in Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) (unfair competition claims were
10 preempted by the Copyright Act where premised on the misappropriation and copying of a real
11 estate development map).

12 Psycho Monkey’s unfair competition claim fares no better here, as both requirements for
13 preemption are met.

14 **A. The Unfair Competition Claim Asserts Rights Equivalent to Those Protected**
15 **by the Copyright Act—Specifically, the Right to Reproduce, Prepare**
16 **Derivative Works of, and Distribute Copies of a Work.**

17 Psycho Monkey’s unfair competition claim meets the first prong of the preemption test
18 because the rights Psycho Monkey asserts thereby are equivalent to—and indeed identical to—
19 rights enunciated in § 106 of the Copyright Act. *See* 17 U.S.C. § 106 (granting copyright holder
20 exclusive right to “reproduce the copyrighted work . . . to prepare derivative works based upon the
21 copyrighted work . . . [and] to distribute copies . . . of the copyrighted work to the public by sale or
22 other transfer of ownership”).

23 Here, Psycho Monkey alleges that Zynga copied the Mob Wars game and distributed these
24 unauthorized copies to the public on various social networking websites. FAC ¶ 16. More
25 specifically, the amended complaint alleges that Maestri “created an interactive, online game,
26 ‘Mob Wars’” (*id.* ¶ 9), which was first published in February of 2008 (*id.* ¶ 16). The amended
27 complaint further alleges that Zynga “cloned Mobs Wars, dubbing its game ‘Mafia Wars.’” *Id.*
28 Zynga then allegedly “posted ‘Mafia Wars’ on www.myspace.com, Facebook, and other social
networks.” *Id.* According to Psycho Monkey, Zynga “copied Mob Wars’ layout and

1 arrangement, visual presentation, sequence and flow, scoring system, and Mob Wars’ overall
2 look.” *Id.* ¶ 19. Psycho Monkey’s unfair competition claim directly incorporates the above
3 allegations. *Id.* ¶ 41. Going even further, Psycho Monkey expressly confirms that its unfair
4 competition claim is based upon allegedly “unfair” conduct that constitutes “violations of state and
5 federal copyright laws,” and allegedly “unlawful” conduct that constitutes “violations of the state
6 and federal statutes set forth above”—which includes the Copyright Act. *Id.* ¶¶ 43, 45.

7 These allegations—that Zynga copied Psycho Monkey’s game and used it to develop and
8 distribute Zynga’s own game—fall squarely within the rights governed exclusively by § 106 of the
9 Copyright Act, mandating preemption. *See* 17 U.S.C. § 106; *Smith & Hawken, Ltd. v.*
10 *Gardendance, Inc.*, No. C04-1664 SBA, 2004 WL 2496163, at *4 (N.D. Cal. Nov. 5, 2004)
11 (Armstrong, J.) (finding California unfair competition counterclaim was “based solely on rights
12 equivalent to those protected by” copyright where infringer allegedly “wrongfully
13 misappropriated, sold and distributed unauthorized duplications” of work); *Garman v. Sterling*
14 *Publ’g Co., Inc.*, No. C-91-0882 SBA, 1992 WL 12561293, at *7-8 (N.D. Cal. Nov. 5, 1992)
15 (Armstrong, J.) (finding plaintiff’s state unfair competition claim preempted by Copyright Act
16 where complaint alleged “defendants published, sold, or distributed the infringing works”); *Blue*
17 *Nile, Inc. v. Ice.com, Inc.*, 478 F. Supp. 2d 1240, 1247-48, 1250 (W.D. Wash. 2007) (dismissing as
18 preempted by the Copyright Act state law claims for unfair competition and unjust enrichment
19 based on alleged copying of the “look and feel” of plaintiff’s website); *Higher Gear Group, Inc. v.*
20 *Rockenbach Chevrolet Sales, Inc.*, 223 F. Supp. 2d 953, 959 (N.D. Ill. 2002) (holding that the
21 Copyright Act preempted Illinois state law unfair competition claims, because “[t]he crux of the
22 claim [is that defendants] made unauthorized copies of Higher Gear’s software, which is the same
23 conduct necessary to support a copyright infringement claim.”).

24 **B. The Unfair Competition Claim Involves a Work Within the Subject Matter of**
25 **the Copyright Act—Specifically, a Computer Video Game.**

26 Likewise, Psycho Monkey’s unfair competition claim meets the second prong of the
27 preemption test, because the work in which Psycho Monkey’s rights are asserted is a copyrighted
28 computer software program. *See* FAC ¶¶ 9, 10, 14 (“Psycho Monkey registered its work, ‘Mob

1 Wars’, with the United States Copyright Office.”). It is well-settled that software “comes within
2 the subject matter of copyright for the purpose of a section 301(a) preemption analysis.” *Firoozye*
3 *v. Earthlink Network*, 153 F. Supp. 2d 1115, 1125 (N.D. Cal. 2001) (dismissing certain of
4 plaintiff’s state law claims, including unfair competition claims, where they sounded in
5 Copyright); *Higher Gear Group*, 223 F. Supp. 2d at 957 (“It is well established that computer
6 software is fixed in a tangible medium of expression and within the subject matter of copyright.”)

7 **C. Having Met Both Prongs of the Preemption Test, Psycho Monkey’s Unfair**
8 **Competition Claim Is Subject to Dismissal.**

9 Where, as here, a state law claim is preempted by the Copyright Act, it is subject to
10 dismissal without more. *See Sybersound Records*, 517 F.3d at 1152 (“[T]o the extent the improper
11 business act complained of is based on copyright infringement, the claim was properly dismissed
12 because it is preempted.”); *Smith & Hawken*, 2004 WL 2496163, at *4-5 (Armstrong, J.)
13 (dismissing California statutory and common law unfair competition claims where “based on
14 rights equivalent to those protected by the Copyright Act”); *McCoy v. Scantlin*, No. CV 04-371-
15 GHK, 2004 WL 5502111, at *3-4 (C.D. Cal. June 1, 2004) (dismissing state law claims, including
16 claims for unfair business practices, as preempted by the Copyright Act); *Firoozye*, 153 F. Supp.
17 2d at 1132 (dismissing certain of plaintiff’s state law claims, including unfair competition claims,
18 as preempted by the Copyright Act). Accordingly, Psycho Monkey’s unfair competition claim
19 should be dismissed on preemption grounds.¹
20
21
22
23

24 ¹ That Psycho Monkey’s unfair competition claim has pleaded other conduct besides alleged
25 copyright infringement is of no consequence—this Court may still dismiss those portions of the
26 claim that are preempted. *See Sybersound Records*, 517 F.3d at 1152 (finding that “[t]o the extent
27 the improper business act complained of [in a Section 17200 claim] is based on copyright
28 infringement, the claim was properly dismissed because it is preempted”); *Firoozye*, 153 F. Supp.
at 1131 (dismissing Section 17200 claim to the extent it relies on preempted conversion claim, but
denying motion to dismiss Section 17200 to the extent it relies on claims that are not preempted).

1 **III. PSYCHO MONKEY’S UNFAIR COMPETITION CLAIM FAILS TO ALLEGE AN**
2 **INCIPIENT VIOLATION OF THE ANTITRUST LAWS, AS IT MUST TO STATE**
3 **A CLAIM.**

4 Psycho Monkey alleges no facts suggesting that Zynga’s conduct threatens an incipient
5 violation of an antitrust law, as it must to state a claim under the “unfair” prong of a Section 17200
6 claim brought against a competitor.

7 In actions between direct competitors, “the word ‘unfair’ in [Section 17200] means
8 conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of
9 one of those laws because its effects are comparable to or the same as a violation of the law, or
10 otherwise significantly threatens or harms competition.” *Cel-Tech Commc’ns, Inc. v. L.A.*
11 *Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999). This requires “some actual or threatened impact on
12 competition,” not just harm to a competitor. *Id.* at 186-87.

13 To determine whether the challenged conduct threatens competition, Section 17200
14 borrows from the standards in § 5 of the Federal Trade Commission Act (“FTC Act”). *Id.* at 186.
15 The FTC Act “can prohibit practices ‘which conflict with the basic policies of the Sherman and
16 Clayton Acts even though such practices may not actually violate these laws.’” *Parrish v. Nat’l*
17 *Football League Players Ass’n*, 534 F. Supp. 2d 1081, 1092 (N.D. Cal. 2007) (quoting *FTC v.*
18 *Brown Shoe Co.*, 384 U.S. 316, 321 (1966)). Accordingly, a plaintiff cannot survive a motion to
19 dismiss its Section 17200 claim unless it adequately pleads that the defendant’s conduct
20 “threaten[s] significant harm to competition because of a violation of a recognized policy of
21 antitrust law.” *Id.* (citing *Cel-Tech*, 20 Cal. 4th at 186-87). This Psycho Monkey has failed to do.

22 Psycho Monkey’s allegations under the “unfair” prong of Section 17200 are set forth in
23 Paragraph 43 of its amended complaint:

24 Defendants’ actions as alleged above violate the ‘unfair’ prong of the UCL because
25 (a) the utility of such actions is outweighed by the gravity of the harm they cause to
26 Psycho Monkey, (b) such actions are immoral, unethical, oppressive, unscrupulous,
27 and substantially injurious to consumers, and (c) such actions constitute incipient
28 violations of state and federal copyright laws.

1 FAC ¶ 43.² These allegations are patently insufficient for two reasons.

2 First, as discussed in Part II, *supra*, the portion of Psycho Monkey’s Section 17200 claim
3 that is based on alleged violations of the Copyright Act (*see id.* ¶ 43(c)) is completely preempted.

4 Second, the remaining allegations of “unfair” conduct do not include any facts suggesting
5 that Zynga’s alleged conduct constitutes an antitrust violation. *See Sybersound Records*, 517 F.3d
6 at 1153 (affirming dismissal of Section 17200 claim where plaintiff failed to plead incipient
7 violation of antitrust law). Nor does Psycho Monkey identify a relevant market or market share.
8 *See Apple, Inc. v. PsyStar Corp.*, 586 F. Supp. 2d 1190, 1198, 1204 (N.D. Cal. 2008) (dismissing
9 Section 17200 claim where plaintiff failed to allege a relevant market since “a manufacturer’s own
10 products do not themselves comprise a relevant product market”) (quoting *Green Country Food*
11 *Market, Inc. v. Bottling Group*, 371 F.3d 1275, 1282 (10th Cir. 2004)). Nor does the amended
12 complaint allege a contract or agreement in restraint of trade, unfair pricing, or a *prima facie* case
13 of monopolization or attempted monopolization. *See Apple, Inc. v. PsyStar Corp.*, No. C 08-
14 03251 WHA, 2009 WL 303046, at *5 (N.D. Cal. Feb. 6, 2009) (denying leave to amend to assert
15 Section 17200 claim based on copyright misuse because plaintiff failed to explain how tying
16 allegations harm competition absent monopolization); *Girafa.com v. Alexa Internet, Inc.*, No. C-
17 08-02745 RMW, 2008 WL 4500858, at *2 (N.D. Cal. Oct. 6, 2008) (dismissing Section 17200
18 claim where plaintiff’s failure to “establish a *prima facie* case of monopolization or attempted
19 monopolization” meant it has not alleged “an incipient violation of antitrust law”). Psycho
20 Monkey’s amended complaint also fails to allege how Zynga’s purported conduct could harm
21 competition. *See Parrish*, 534 F. Supp. 2d at 1092-93 (dismissing unfair business practices claim
22

23 ² Psycho Monkey’s first two unfair competition allegations are plainly modeled on the pre-
24 *Cel-Tech* tests articulated by the California Court of Appeal. However, because Psycho Monkey
25 has alleged that Zynga is its direct competitor (*see* FAC ¶ 6), the pre-*Cel-Tech* tests are
26 inapplicable. *Cel-Tech*, 20 Cal. 4th at 187 (finding tests (1) where the court “weigh[s] the utility
27 of the defendant’s conduct against the gravity of the harm alleged,” and (2) where the practice is
28 “immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers” are “too
amorphous and provide too little guidance to courts and businesses”). Accordingly, Psycho
Monkey’s “unfair” allegations do not present a cognizable legal theory and are otherwise
immaterial and impertinent. *See* FAC ¶ 43(a)-(b). They should be dismissed or stricken.

1 where plaintiff did not allege harm to competition in relevant market for licensing retired football
2 players' images).

3 At best, Psycho Monkey alleges that, by posting Mafia Wars on various social network
4 websites, Zynga "wrongfully diverted business away from Psycho Monkey." FAC ¶ 42. This
5 allegation is legally insufficient, however, because Zynga's alleged diversion of business
6 "threatens its *competitor* [Psycho Monkey], but that is not the same as threatening *competition*."
7 *Girafa.com*, 2008 WL 4500858, at *2 (citing *Cel-Tech*, 20 Cal. 4th at 186); *see also Townshend v.*
8 *Rockwell Intern. Corp.*, No. C99-0400 SBA, 2000 WL 433505, at *15 (N.D. Cal. Mar. 28, 2000)
9 (Armstrong, J.) (dismissing Section 17200 claim where counterclaimant did "not alleged any
10 injury to competition resulting from [counter-defendants'] conduct").

11 Accordingly, the portion of Psycho Monkey's Section 17200 claim that relies on a
12 violation of the "unfair" prong should be dismissed under *Cel-Tech* and its progeny.
13 Alternatively, the "unfair" allegations in paragraph 43 of the amended complaint should be
14 stricken as immaterial and impertinent. *See* Fed R Civ. P. 12(f).

15 **Conclusion**

16 For the reasons set forth above, Zynga respectfully requests that this Court (1) dismiss with
17 prejudice Psycho Monkey's Section 17200 claim to the extent it is based on alleged violations of
18 the Copyright Act, and (2) dismiss with prejudice Psycho Monkey's Section 17200 claim that
19 Zynga's conduct constitutes an "unfair" business practice or, in the alternative, strike paragraph 43
20 of the amended complaint.

21 DATED: April 2, 2009

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

22
23 By _____ /s/
24 Claude M. Stern
25 Attorneys for Defendant Zynga Game
26 Network, Inc.
27
28