

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SONG FI, INC., JOSEPH N.
BROTHERTON, LISA M. PELLEGRINO,
N.G.B., RASTA ROCK, INC.,

Plaintiffs,

v.

GOOGLE, INC., YOUTUBE LLC,

Defendants.

No. C 14-5080 CW

ORDER GRANTING IN
PART MOTION FOR
SANCTIONS

(Docket Nos. 114
and 123)

_____ /

Defendants Google, Inc. and YouTube LLC move for sanctions against Plaintiffs' counsel under Federal Rule of Civil Procedure 11 for allegations made in the Third Amended Complaint (3AC). Defendants wish to strike several enumerated paragraphs within Plaintiffs' 3AC. They also seek reimbursement for litigation expenses incurred as a result of the Rule 11 violations. As described below, the Court GRANTS in part Defendants' motion.¹

BACKGROUND

Descriptions of Plaintiffs' allegations can be found in the Court's Order Granting Motion to Dismiss Second Amended Complaint and Order on Motion to Dismiss Third Amended Complaint. The disputed allegations were part of Plaintiffs' Cartwright Act and fraud claims, which the Court dismissed with prejudice as the parties were briefing this motion.

¹ The Court also GRANTS Plaintiffs' motion for leave to file a surreply, which the Court considers (Docket No. 123).

United States District Court
For the Northern District of California

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LEGAL STANDARD

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2 Federal Rule of Civil Procedure 11 permits a court to impose
3 sanctions on an attorney when he or she has signed and submitted
4 to the court a pleading that is not, to the attorney's knowledge,
5 information and belief after reasonable inquiry, presented for a
6 proper purpose, warranted by existing law or by a non-frivolous
7 argument for altering the law, or supported or likely to be
8 supported with evidence. Fed. R. Civ. P. 11. Awarding sanctions
9 under Rule 11 "raises two competing concerns: the desire to avoid
10 abusive use of the judicial process and to avoid chilling zealous
11 advocacy." Hudson v. Moore Business Forms, Inc., 836 F.2d 1156,
12 1159-60 (9th Cir. 1987). An award of sanctions is "an
13 extraordinary remedy, one to be exercised with extreme caution."
14 Operating Eng'rs Pension Trust v. A-C Co., 859 F.2d 1336, 1345
15 (9th Cir. 1988). The moving party bears the burden to demonstrate
16 why sanctions are justified. See Tom Growney Equip., Inc. v.
17 Shelly Irrigation Dev., Inc., 834 F.2d 833, 837 (9th Cir. 1987).

18 Where a complaint is the primary focus of a Rule 11 motion, a
19 court must determine that 1) the complaint is legally or factually
20 baseless from an objective perspective and 2) the attorney has not
21 conducted a reasonable and competent inquiry before signing and
22 filing it. Holgate v. Baldwin, 425 F.3d 671, 676 (9th Cir. 2005);
23 In re Keegan Mgmt. Co., Sec. Litig., 78 F.3d 431, 434 (9th Cir.
24 1996). The standard is objective, examined at the time of
25 signing. W. Coast Theater Corp. v. City of Portland, 897 F.2d
26 1519, 1526 (9th Cir. 1990). The existence of a non-frivolous
27 claim in a complaint does not immunize it from Rule 11 sanctions.
28 Holgate, 425 F.3d at 677.

1 A claim is well grounded in fact if an independent
2 examination reveals some credible evidence in support of a party's
3 statements. Himaka v. Buddhist Churches of Am., 917 F. Supp. 698,
4 710 (N.D. Cal. 1995). A claim that has some plausible basis, even
5 a weak one, is sufficient to avoid sanctions under Rule 11. See
6 United Nat'l Ins. Co. v. R&D Latex Corp., 242 F.3d 1102, 1117-18
7 (9th Cir. 2001). "The reasonable inquiry test is meant to assist
8 courts in discovering whether an attorney, after conducting an
9 objectively reasonable inquiry into the facts and law, would have
10 found the complaint to be well-founded." Holgate, 425 F.3d at
11 677.

12 DISCUSSION

13 Defendants argue that four sets of allegations were baseless:
14 that YouTube conspired to allow view count manipulation, that
15 Defendants and their senior executives conspired to remove music
16 videos by independent artists, that Defendants and their senior
17 executives fail to combat view count gaming and how YouTube
18 calculates view counts.

19 I. Alleged conspiracy to allow view count manipulation

20 Defendants take issue with paragraphs 19(a), 22-24, 30, 38,
21 44, 91, 92, 103, 109 and 110 of Plaintiffs' 3AC. Together, these
22 paragraphs alleged that Defendants and their named executives
23 agreed to permit certain record labels to game the view count
24 without enforcement. First, Defendants argue that Plaintiffs have
25 no evidentiary basis for this theory. Plaintiffs respond that
26 significant circumstantial evidence supported their theory. For
27 example, the 3AC described very high view counts for certain
28 videos, and noted that Defendants would have benefitted from such

1 a conspiracy because they shared in advertising revenue. The
2 Court concludes that it was baseless to allege that Defendants
3 conspired to game view counts--the circumstantial evidence does
4 not provide a basis for such an allegation. These allegations
5 violate Rule 11.

6 Second, Defendants argue that, contrary to Plaintiffs'
7 allegations, YouTube has taken action against the alleged
8 conspirator record labels. See 3AC ¶ 22 (alleging that "G-Y and
9 the G-Y Executives refrain from 4H TOS enforcement action against
10 the Major Labels and the other Conspiring Entities"). Publicly-
11 available information demonstrates that Plaintiffs' counsel could
12 not have undertaken an objectively reasonable inquiry before
13 presenting this allegation. For example, Defendants submit an
14 online news article entitled: "YouTube cancels billions of music
15 industry video views after finding that they were fake or 'dead,'"
16 discussing a video by Rihanna, a Universal artist. Haas Dec. Ex.
17 5. Huffington Post published a similar story the following day.
18 Id. Ex. 6. Paragraph 22 violates Rule 11.

19 Third, Defendants argue that Plaintiffs have insufficient
20 factual support for their allegations regarding Google and YouTube
21 executives' actions. Plaintiffs make two arguments in response.
22 They argue that David Drummond's inaction following Plaintiffs'
23 counsel's May 12, 2014 letter to him outlining the sequence of
24 events giving rise to their legal claims could be construed as
25 evidence of his and others' prior awareness of the conspiracy.
26 See Docket No. 101-9. The lack of response to this letter does
27 not serve as a basis for Plaintiffs' specific claims about
28 Defendants' executives' participation in and knowledge of a view

1 count gaming conspiracy. Next, Plaintiffs argue that, if there
2 were a conspiracy, it must have been at the direction of senior
3 management. However, as explained above, there was no basis to
4 allege the view count gaming conspiracy. For these reasons, the
5 allegations pertaining to the actions and knowledge of particular
6 Google and YouTube executives violate Rule 11.

7 II. Allegations regarding removal of independent music videos

8 According to the 3AC, the alleged conspiracy was "designed to
9 prevent the Independent Artists from competing fairly in the
10 relevant market." 3AC ¶ 35. In furtherance of the conspiracy,
11 Defendants allegedly accused these artists of violating the terms
12 of service, removed their videos and associated view counts and
13 posted in their place a defamatory notice still at issue in this
14 case. Id. ¶¶ 23, 80. Defendants argue that these allegations
15 violate Rule 11.

16 Plaintiffs justify their allegations citing Darnaa v. Google,
17 Inc., 2015 WL 7753406 (N.D. Cal.), and Bartholomew v. Youtube,
18 LLC, No. 15-275833 (Cal. Super. Ct. 2015). Joyce Bartholomew is a
19 musician who creates and publishes original Christian ministry
20 music, Docket No. 78-2, and Darnaa is the name of both an
21 independent recording artist and the music label that promotes
22 Darnaa's music, Darnaa, 2015 WL 7753406, at *1. Like Plaintiffs
23 here, the two cases allege libel claims based on the notice that
24 replaced the artists' removed videos stating that they violated
25 YouTube's terms of service.

26 Plaintiffs' allegations that other independent artists
27 experienced a similar sequence of events are not baseless.
28 However, their allegations regarding the motivations and

1 machinations undergirding this repeated take-down sequence are
2 objectively baseless. Plaintiffs present no evidence to support
3 that the events were conspiratorial. Further, that treatment of
4 independent artists stemmed from a conspiracy was not the only
5 logical inference to make in light of Darnaa and Bartholomew; that
6 Defendants were concerned about view count fraud is equally
7 plausible. See Haas Dec. ¶ 9.

8 For this reason, to the extent that paragraphs 35 and 80 of
9 the 3AC connect actions taken against independent artists to a
10 larger conspiracy, the allegations violate Rule 11.

11 III. Allegations regarding combatting view count gaming

12 Paragraph 36 of the 3AC stated that "G-Y, at the direction of
13 G-Y Executives, and as part of the conspiracy, refuses to program
14 any firewall, delay, or minimum time requirement into the View
15 Count algorithm to prevent millisecond Fake Views from instantly
16 showing up in published View Counts . . ." Defendants explain
17 that, contrary to the 3AC, YouTube works to counter view count
18 gaming. On a public page entitled "Frozen view count," YouTube
19 explains that views are "algorithmically validated," which may
20 require YouTube to "temporarily slow down, freeze, or adjust the
21 view count, as well as discard low-quality playbacks." Haas Dec.
22 Ex. 3. This website further explains: "During the first couple of
23 hours after a video has been published, we'll only show views that
24 our systems believe to be valid." Id.

25 Plaintiffs counter that they did not allege that Defendants
26 do nothing to counter view count gaming, but that Defendants
27 refuse to incorporate a mechanism to prevent non-human views from
28 instantly appearing in view counts. This assertion contradicts

1 the frozen view count webpage's statement that, after a video is
2 first posted, views must appear trustworthy before they are
3 included in the view count. Because Plaintiffs provide no
4 evidence to support this allegation, and because Defendants have
5 shown that a reasonable investigation would have uncovered that
6 YouTube takes measures to counter view count fraud, paragraph 36
7 violates Rule 11.

8 IV. Allegations regarding YouTube's view count calculation

9 The 3AC contained the following allegations:

10 Another primary role of G-Y and the G-Y Executives in the
11 conspiracy is to keep the way views are counted in the View
12 Count "top secret" and to never publish any guidelines or
standards as to how views are counted. 3AC ¶ 46.

13 Defendants' counsel has made representations in open Court
14 that "views" are counted every time any user watches a
15 particular video; i.e., if someone watches a video 5 times
16 for a meaningful duration, it is counted as 5 views. This is
17 not the case. Plaintiff Joe Brotherton has observed that the
first time he watches a video on YouTube, the View Count
increases by one, but there are no additional increases in
the View Count for his subsequent views of the same video.
Id. ¶ 47

18 Plaintiffs allege upon information and belief that views are
19 counted only one time per user in the YouTube View Count
prior to any Fake View enhancement. Id. ¶ 49.

20 Defendants point to publicly-available explanations of how
21 views are counted. For example, YouTube's Policy Center page
22 entitled "Increase YouTube views: Buying and getting YouTube views
23 through third-party services" explains that a legitimate view "is
24 an intended watch of a video where the primary purpose is to watch
25 the video; this means that a real human being wishes to see a
26 video, chooses which video to watch and then acts on that choice."
27 Haas Dec. ¶ 27 & Ex. 8. Similarly, the Frozen view count page
28 described above includes a section entitled "How views are

1 counted" which explains that, when a video is first published,
2 views may take awhile to appear because YouTube displays views it
3 believes to be valid. Id. Ex. 3. However, afterwards the view
4 count updates more frequently, and YouTube is "constantly
5 validating views, so view count can always be adjusted." Id.
6 This information runs contrary to Plaintiffs' allegations in that
7 YouTube publishes standards and general methods. YouTube concedes
8 that it does not make public all of the details of its view count
9 methods. However, making any such information public runs counter
10 to the 3AC, which says that YouTube never publicizes any
11 information as to how views are counted. Thus, the allegations in
12 paragraph 46 violate Rule 11.

13 However, the allegations that Defendants counted views on a
14 user basis, rather than a view basis, are not objectively
15 baseless. Here, Plaintiffs present evidence, contrary to
16 Defendants' public statements, that could serve as a basis for
17 their allegations, namely Brotherton's observations. See
18 Brotherton Dec. ¶¶ 3, 5, 6. Brotherton explains that he watched
19 one video repeatedly on different occasions and saw the view count
20 increase only once, on first time he watched the video. Id. A
21 single experiment with undisclosed methodology is meager evidence
22 at best. Although Defendants provide evidence to the contrary and
23 characterize Brotherton's observations as fraud prevention at
24 work, this conflicting interpretation does not render Plaintiffs'
25 allegations baseless or without reasonable investigation.

26 V. Sanctions

27 A sanction imposed "must be limited to what suffices to deter
28 repetition of the conduct or comparable conduct by others

1 similarly situated." Fed. R. Civ. P. 11(c)(4). This can include
2 non-monetary directives or, "if imposed on motion and warranted
3 for effective deterrence, an order directing payment to the movant
4 of part or all of the reasonable attorney's fees . . . directly
5 resulting from the violation." Id.

6 The Court grants attorneys' fees to Defendants for their work
7 on this sanctions motion.

8 VI. Plaintiffs' Requests

9 In their opposition brief, Plaintiffs request expenses in
10 opposing this motion under Rule 11(c)(2). They argue that
11 Defendants brought this motion to intimidate Plaintiffs. However,
12 Plaintiffs failed to satisfy the procedural requirements of Rule
13 11 and to carry their burden of proof that Defendants violated
14 Rule 11. In particular, they never argued that they followed Rule
15 11's safe harbor provision and they did not file this request for
16 sanctions as a separate motion. Therefore, the Court denies
17 Plaintiffs' request.

18 Plaintiffs also request discovery on those who submitted
19 declarations in support of Defendants' motion. Rule 11's Advisory
20 Notes state that discovery "should be conducted only by leave of
21 the court, and then only in extraordinary circumstances."
22 Plaintiffs have cited no legal authority that would permit
23 discovery.

24 CONCLUSION

25 The Court GRANTS in part Defendants' motion for sanctions
26 under Rule 11 and GRANTS Plaintiffs' motion for leave to file a
27 surreply. The Court strikes paragraphs 19(a), 22-24, 30, 36, 38,
28 44, 91, 92, 103, 109 and 110, as well as paragraphs 35 and 80 to

1 the extent they link actions against independent artists to
2 conspiratorial motives and objectives.

3 The Court also awards attorneys' fees to Defendants for their
4 work bringing this motion. Within ten days of the date of this
5 order, Defendants' counsel shall submit documentation supporting
6 hours spent and reasonable rates.

7 Based on the current record, Plaintiffs may not depose Susan
8 Wojcicki, YouTube's CEO, David Drummond, Google's Chief Legal
9 Officer, Larry Page, the CEO of Alphabet, Eric Schmidt, the
10 Executive Chairman of Alphabet, or Sergey Brin, the President of
11 Alphabet Inc. Plaintiffs may not take any discovery relating only
12 to the antitrust or fraud claims.

13 IT IS SO ORDERED.

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15 Dated: August 8, 2016



16 CLAUDIA WILKEN
17 United States District Judge
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