UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CASE NO.: CV 18-07588 SJO (AGRx) **DATE:** March 4, 2019

TITLE: Complex Media, Inc. v. X17, Inc.

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz
Courtroom Clerk

Not Present
Court Reporter

COUNSEL PRESENT FOR PLAINTIFFS:

Not Present

COUNSEL PRESENT FOR DEFENDANT:

Not Present

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PROCEEDINGS (in chambers): ORDER GRANTING DEFENDANT'S MOTION TO STRIKE [Docket No. 19]; **ORDER DENYING AS MOOT DEFENDANT'S MOTION TO DISMISS** [Docket No. 20]

These matters are before the Court on: (1) Defendant X17, Inc.'s ("Defendant") Motion to Strike Complaint Pursuant to Cal. Civ. Proc. Code § 425.16 ("Mot. to Strike"), filed November 27, 2018, and (2) Defendant's Motion to Dismiss Third Cause of Action in Plaintiff's First Amended Complaint ("Mot. to Dismiss"), filed November 27, 2018. Plaintiff Complex Media, Inc. ("Plainitff") opposed Defendant's Motion to Strike ("Pl.'s Opp'n") on December 24, 2018 [1] and filed a non-opposition to Defendant's Motion to Dismiss on December 24, 2018. Plaintiff Complex Media, Inc. ("Plaintiff") filed an Opposition to the Defendant's Motion to Strike ("Pls' Opp'n").(2) Defendant's Motion to Dismiss Third Cause of Action in Plaintiff's First Amended Complaint ("Mot. to Dismiss"), filed November 27, 2018. On December 24, 2018, Plaintiff Complex Media, Inc. ("Plaintiff") filed Statement of Non-opposition to the Defendant's Motion to Dismiss ("Pls' Non-Opp'n").

The Court found these matters appropriate for disposition without oral argument and vacated the hearing scheduled for January 14, 2019. *See* Fed. R. Civ. P. 78(b). For the foregoing reasons,

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[1] As a threshold matter, Plaintiff argues that Defendant's failure to comply with the Local Rule 7-3 and paragraph 23(a) of this Court's Initial Standing Order renders its Motion to Strike defective. (Pls' Opp'n 6-7, ECF 21.) Pursuant to Local Rule 7-3, counsel are required to meet and confer prior to the filing of a motion, and must include in the motion "a declaration by counsel briefly describing the parties' discussion. . . ." L.R. 7-3. It appears that the parties thoroughly discussed the substance of the contemplated Motion to Strike, such as bringing the motion California's anti-SLAP statute and not moving to dismiss FAC's first cause faction. (*See* Decl. of Butler-Swiech in Supp. Pls' Opp'n ¶¶ 22-3.) However, the Court agrees that Defendant violated Local Rule 7-3 by failing to briefly describe the parties' discussion. Notwithstanding this defect, the Court exercises its discretion and accepts the Motion. *See, e.g., Prince-Weithorn v. GMAC Mortg.*, LLC , No. CV 11-00816 SJO, 2011 WL 11651984, at *1 n.1 (C.D. Cal. May 5, 2011).

the Court **GRANTS** Defendant's Motion to Strike, and **DENIES AS MOOT** Defendant's Motion to Dismiss.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff's First Amended Complaint ("FAC") alleges the following. (FAC, ECF No. 18.) Plaintiff is a Delaware corporation that creates, produces, publishes, and distributes news content and commentary through a variety of means, including its website and third party platforms such as Roku and Apple TV, and online video streaming services like Youtube. (FAC ¶¶ 5, 11, 13.) Defendant is a California corporation that "claims to own and license copyrights in photographs and video footage of celebrities." (FAC ¶¶ 1, 6.) Defendant is also an active user and channel operator on Youtube. (FAC ¶ 23.)

Beginning on or about August 15, 2018, Defendant began filing requests that Youtube remove Plaintiff's videos ("Takedown Notices") pursuant to the 17 U.S.C. § 512(c) of the Digital Millennium Copyright Act ("DMCA"). (FAC ¶ 23.) The notices asserted that Plaintiff infringed on Defendant's copyrights by using certain photographs and videos in news reports posted to its Youtube Channel, "Complex News" (the "Channel"). (FAC ¶¶ 1, 24-25.) Within two weeks, "X17 filed at least six DMCA Takedown Notices targeted at videos Complex posted to its Channel." (FAC ¶ 24.) After Defendant filed the DMCA notices, Youtube disabled access to Plaintiff's videos containing the allegedly infringing content. (FAC ¶¶ 19, 37, 45.) Youtube also disabled Plaintiff's ability to upload new content to its Channel and to edit public-facing features of the Channel such as profile and description and threatened to terminate the Channel, which Plaintiff alleges "would result in the loss of all 2.4 million of the Channel's subscribers." (FAC ¶¶ 48-50.)

On August 30, 2018, Plaintiff filed the present action, asserting: (1) misrepresentation of copyright claims under the DMCA, (2) declaration of non-infringement of copyright, and (3) intentional interference with contractual relations. (*See generally* FAC.) On November 27, 2018, Defendant filed the instant Motion to Strike Plaintiff's Complaint. (Mot. to Strike, ECF No. 19.) In the Motion to Strike, Defendant contends that Plaintiff's Third Cause of Action, intentional interference with contractual relations, comes under the scope of Cal. Civ. Proc. Code § 425.16(a), California's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. (*See* Mot. to Strike 2.) Defendant also brought the Motion to Dismiss Plaintiff's Third Cause of Action on November 27, 2018. (Mot. to Dismiss, ECF No. 20.) On December 24, 2018, Plaintiff filed Statement of Non-opposition to the Defendant's Motion to Dismiss. (Pls' Non-Opp'n, ECF No. 22.)

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II. DISCUSSION

A. Anti-SLAPP Motion to Strike

In its Motion to Strike, Defendant argues that the third cause of action in the FAC, intentional interference with contractual relations, is subject to motion to strike pursuant to California Code of Civil Procedure Section 425.16 (the "Anti-SLAPP" statute). (Mot. to Strike, ECF No. 19.) The Court considers the merits of Defendant's Motion to Strike despite Plaintiff's Non-Opposition to the Defendant's Motion to Dismiss as a successful Anti-SLAPP motion would entitle Defendant to recover its attorneys' fees and costs. *See eCash Technologies, Inc. v. Guagliardo*, 127 F. Supp. 2d 1069, 1083-85 (C.D. Cal. 2000), *aff'd*, 35 F. App'x 498 (9th Cir. 2002) (court proceeds with motion to strike despite voluntary dismissal).

1. Legal Standard

California's anti-SLAPP statute was enacted as an attempt to curb the increasing number of lawsuits being "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Cal. Code Civ. Proc. § 425.16(a). In passing § 425.16(a), "[t]he Legislature f[ound] and declare[d] that it [was] in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." *Id.* In light of the public policy at stake, "[t]he statute is to 'be broadly construed . . . .'" *Bleavins v. Demarest*, 196 Cal. App. 4th 1533, 1539 (2011)(quoting *Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi*, 141 Cal. App. 4th 15, 22 (2006))*; see also Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 596 (9th Cir. 2010); Cal. Code Civ. Proc. § 425.16(a). Section 425.16(b) provides:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Cal. Code Civ. Proc. § 425.16(b). "Motions to strike a state law claim under California's anti-SLAPP statute may be brought in federal court." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003).[2]

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[2] If a defendant moves to strike based on purely legal arguments and the fact that a complaint does not allege sufficient facts to support its stated causes of action, courts analyze the motion under the standards set out for motion to dismiss in Federal Rule of Civil Procedure 8 and 12(b)(6). *See Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med.*

"A court considering a motion to strike under the anti-SLAPP statute must engage in a two-part inquiry." *Vess*, 317 F.3d at 1110. First, "a defendant must make an initial prima facie showing that the plaintiff's suit arises from an act in furtherance of the defendant's rights of petition or speech." *Id.* Second, "once the defendant has made a prima facie showing, 'the burden shifts to the plaintiff to demonstrate a probability of prevailing on the challenged claims.'" *Id.*

With respect to the first prong, as held by the California Supreme Court, "[t]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech." *Freeman v. Schack*, 64 Cal.Rptr.3d 867, 873 (2007) (emphasis in original) (citing *City of Cotati v. Cashman*, 29 Cal.4th 69, 78 (2002)).

If a defendant meets its initial burden with respect to the first prong of the analysis, courts proceed to the second prong. *Baharian-Mehr v. Smith*, 117 Cal.Rptr.3d 153, 159 (2010). The second prong requires that the plaintiff "demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Hilton v. Hallmark Cards*, 599 F.3d 894, 903 (9th Cir.2010) (internal quotation marks omitted).

2. Plaintiff's Intentional Interference With Contractual Relations Claim Relates to Defendant's Right of Free Speech

California's anti-SLAPP statute defines an "act in furtherance of a person's right of petition or free speech" as:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
>
> (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
>
> (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest;

Progress, 890 F.3d 828, 833–34 (9th Cir. 2018). Here, Defendant's Motion to Strike is analogous to a motion to dismiss because it is founded on purely legal arguments and does not provide alternate facts challenging allegations made in the FAC . (*See generally* Mot. to Strike.) As such, the Court applies a Rule12(b)(6) motion to dismiss standard to Defendant's Motion to Strike.

> (4) or any other conduct in furtherance of the exercise of the constitutional right to petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Cal. Civ. Proc. Code § 425.16(e). It is the fourth category that is most directly at issue in this case. Defendant contends that its filing of DMCA Takedown Notices constitutes "conduct in furtherance of the exercise of the constitutional right to petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."[3] Cal. Civ. Proc. Code § 425.16(e)(4).

Defendant argues that filing of the notices is an exercise of its right of free speech. (Mot. to Strike at 6.) Generally, speech is protected under the First Amendment unless it falls within "a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 337, 382-83 (1992) (quoting *Chaplinsky v. State of N.H.*, 315 U.S. 568, 572 (1942)). "First Amendment standards must give the benefit of any doubt to protecting rather than stifling speech." *Citizens United v Fed. Election Com'n*, 558 U.S. 310, 327 (2010). Applying this broadly defined freedom of speech, the Court agrees with Defendant that filing of a takedown notices is constitutionally protected speech. *See e.g., Lenz v. Universal Music Corp.*, No. C 07-03783, 2008 WL 962102, at *4 (N.D. Cal. 2008) (filing of DMCA takedown notice constitutes free speech). Thus, the Court must next determine whether its filing of DMCA takedown notices is a conduct "in connection with a public issue or an issue of public interest." Cal. Code Civ. Proc. § 425.16(e)(4).

While Section 425.16 does not define "public interest," courts considering the issue have construed the term broadly, in some cases finding that it "governs even private communications, so long as they concern a public issue." *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 897 (2004); *see Nyard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1039 (2008) (discussing the Legislature amending the anti-SLAPP statute in 1997 to include a directive to construe the statute broadly). Further, courts have held that the definition of "public interest" under the anti-SLAPP statute includes "conduct that could directly affect a large number of people beyond the direct participants." *Rivero v. Am. Fed'n of State, Cty., and Mun. Emp., AFL-CIO*, 105 Cal. App. 4th 913,

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[3] Defendant also argues that its filing of Takedown Notices constitutes an "oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body, or any other official proceeding authorized by law." Cal. Code Civ. Proc. § 425.16(e)(2). The Court need not address this argument because the Court finds that Defendant's filing of DMCA takedown notices in this case is a "conduct in furtherance of the exercise of the constitutional . . . right of free speech in connection with a public issue or an issue of public interest." Cal. Civ. Proc. Code § 425.16(e)(4).

924 (2003). For example, in *Damon v. Ocean Hills Journalism Club*, the court concluded that homeowners' statements about the management of their homeowners association were connected with an issue of public interest because the governance of the association was an issue of concern for each of the 3,000 individuals who belong to the association. 85 Cal. App. 4 468, 479-80 (2000). Similarly, the court in *Ludwig v. Superior Court* concluded that the development of a mall, "with potential environmental effects such as increased traffic and impaction on natural drainage, was clearly a matter of public interest." 43 Cal. App. 4th 8, 15 (1995); *see also Church of Scientology v. Wollersheim*, 42 Cal. App. 4 628, 650 (1996) ("[T]he Church is a matter of public interest, as evidenced by media coverage and the extent of the Church's membership and asset.")

Plaintiff contends that Defendant's filing of DMCA notice is not protected as "an issue of public interest" under California's anti-SLAPP statute because the notice itself did not involve a topic of public interest. (Pl.'s Non-Opp'n at 13-15.) To support this argument, Plaintiff relies on *Lenz.* (Pl.'s Non-Opp'n at 14.) In *Lenz*, defendant Universal submitted a DMCA notice alleging that plaintiff Lenz' video of her son dancing to a Prince song infringed its copyrights. *Lenz*, 2008 WL 962102, at *1. Lenz sued Universal alleging misuse of the DMCA takedown notice, and intentional interference with her contract with Youtube. *Id.* In response, Universal filed an anti-SLAPP motion to strike Lenz' intentional interference with contract claim, arguing that its filing of the DMCA takedown notice was "an issue of public interest" because after filing the suit, Lenz discussed her experience on television news shows and her personal blog show. *Id.* at *3-4. The court rejected this argument, reasoning that "Universal's speech does not fall within the protections of the anti-SLAPP statute simply because Lenz appeared on television to discuss her case and wrote about her case on her blog," and denied the motion. *Id.* at *4.

However, *Lenz* is distinguishable from the instant case. *Lenz* involved a home video posted to a personal Youtube channel. *See Lenz*, 2008 WL 962102, at *1. No facts suggested that Lenz' Youtube channel had a large number subscribers. *See generally id.* Therefore, unlike the present matter, the availability of the targeted video would not be an issue of concern to a large online community of followers. Further, Lenz' appearances on television and publishing of blog shows commenting on the suit did not transform Universal's DMCA notices into an issue that affects a large number of people, rather, it merely publicizes a conduct that affects a limited audience. Indeed, the courts have established that "[a] person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people." *Weinberg v. Feisel*, 110 Cal. App. 4 1122, 1133 (2003); *see also Rivera*, 105 Cal. App. 4th at 926 ("If the mere publication of information in a union newsletter distributed to its numerous members were sufficient to make that information a matter of public interest, the public-issue limitation would be substantially eroded . . . .").

The instant case is more closely analogous to *Damon* and *Ludwig* because Defendant's filing of DMCA notices in this case is also a conduct that directly impacts a large community of

people. Defendant's Takedown Notices are requests for removal of videos containing allegedly infringing content on Plaintiff's channel. (*See* FAC ¶¶ 19, 24.) At that time, Plaintiff had already built a channel with a large community of 2.4 million subscribers and the DMCA notices, when granted, directly affected every subscribers' access to the targeted videos on that Chennel. (*See* FAC ¶¶ 48-50.) Conduct affecting the availability of videos in this large online community is a concern for each subscribing member of the public and thus,"an issue of public interest."

Accordingly, Defendant has met its burden of showing that the filing of the DMCA notices is a conduct made in connection with "in connection with a public issue or an issue of public interest" pursuant to Cal. Code Civ. Proc. § 425.16(e)(4).

3. Plaintiff Fails to Establish a *Prima Facie* Case for Intentional Interference With Contractual Relations

The Court next analyzes whether Plaintiff has established a *prima facie* case for intentional interference with contractual relations. Plaintiff argues that Defendant interfered with its contractual relationship with Youtube by improperly using the DMCA takedown process.[4] (*See* FAC ¶¶ 72-76.) Defendant counters that Plaintiff cannot show a probability that it will prevail on the merits of its claim because Plaintiff's state law claim for intentional interference with contractual relations is preempted by the DMCA.[5] (Mot. to Strike at 10-14.)

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[4] Plaintiff contends that it disabled one of the videos upon receiving Defendant's Takedown Notice, but alleges that the other five videos are not infringing. (FAC ¶ 24.) Plaintiff argues that "X17 did not own the rights in the photographs and videos it claimed Complex infringed at the time X17 filed the DMCA takedown notices." (FAC ¶ 25.) It points to documents produced by Defendant on September 12, 2018 titled "Copyright Transfer Agreement," in which photographers purportedly transferred to Defendants all rights, title and interest in the photographs and videos at issue in Defendant's DMCA takedown notices. (FAC ¶ 26.) The earliest date of execution for any of these Copyright Transfer Agreements was August 31, 2018, "sixteen days after X17 filed its first DMCA notice against Complex." (FAC ¶ 26.) The Copyright Transfer Agreements did not indicate that any of the photographers authorized Defendant to make claims under the DMCA on their behalf prior to the agreements' effective dates. (FAC ¶ 27.) Additionally, Plaintiff alleges that the five videos were not infringing because the videos made fair use of the photographs and videos at issue. (FAC ¶ 28.)

[5] In its Opposition, Plaintiff relies on *Rossi v. Motion Picture Ass'n of Am., Inc* for the proposition that its state law claim is not preempted by federal law. (Pls' Opp'n at 18.)

The Court agrees with Defendant that Plaintiff's state law claim is preempted by federal law. Numerous courts within the 9th Circuit have held that 17 U.S.C. § 512(f) of the DMCA preempts state law claims based on DMCA takedown notifications. *See e.g., Online Policy Group v. Diebold,* 337 F. Supp. 2d 1195 (N.D. Cal. 2004); *see Lenz*, 2008 WL 962102, at *4; *Amaretto Ranch Breedables, LLC v. Ozimals, Inc.*, No. C 10-05696, 2011 WL 2690437, at *4 (N.D. Cal. 2011). Applying the doctrine of conflict preemption, one such court found that:

> Even if a copyright holder does not intend to cause anything other than the removal of allegedly infringing material, compliance with the DMCA's procedures nonetheless may result in disruption of a contractual relationship: by sending a letter, the copyright holder can effectuate the disruption of ISP service to clients. If adherence to the DMCA's provisions simultaneously subjects the copyright holder to state tort law liability, there is an irreconcilable conflict between state and federal law. To the extent that Plaintiffs argue that there is no conflict because [Defendant's] use of the DMCA in this case was based on misrepresentation of [Defendant's] rights, their argument is undercut by the provisions of the statute itself.

Online Policy Group, 337 F.Supp. 2d at 1205-06. As the court in *Lenz* noted, "'[g]iven that a special provision of the Copyright Act itself regulates misrepresentation in such notifications, that provision constitutes the sole remedy for a customer who objects to its contents and their effects.'" *Lenz*, 2008 WL 962102, at *4 (quoting 1 Melville B. Nimmer & David Nimmer, 1 *Nimmer on Copyright* § 1.18[A][1] (2019). Accordingly, the Court **GRANTS** Defendant's motion to strike Plaintiff's state law claim and **STRIKES** Plaintiff's claim for intentional interference with contractual relations.

B. Attorney's Fees

Having granted the Motion to Strike, the Court finally holds that Defendant is entitled to attorney's fees. California law is unambiguous that "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." Cal. Code Civ. Proc. § 425.16(c)(1); *Macias v. Hartwell*, 55 Cal. App. 4th 669, 675 (1997). However, the prevailing party "fee provision applies only to the motion to strike, and not to the entire action." *S. B. Beach Prop. v. Berti*, 39 Cal.4th 374, 138 (2006) (citations omitted). Nor does voluntary

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Plaintiff's reliance on *Rossi* is misplaced because, while the court does consider intentional interference with contract in the context of a DMCA notice, it never addresses the issue of whether DMCA preempts a state law claim. *See Rossi v. Motion Picture Ass'n of Am., Inc.*, 391 F.3d 1000, 1006-07 (9th Cir 2004).

dismissal of the claim absolve the Plaintiff of liability for fees and costs incurred by Defendant striking the claim. *See eCash,* 127 F. Supp. 2d at 1084.

III. RULING

For the foregoing reasons, the Court **GRANTS** X17, Inc.'s Motion To Strike, **STRIKES** Plaintiff's third cause of action for intentional interference with contractual relations, and **DENIES AS MOOT** Defendant's Motion to Dismiss Third Cause of Action in Plaintiff's First Amended Complaint. Defendant is entitled to attorney's fees under Cal. Code Civ. Proc. § 425.16(c)(1). Defendant shall file within **FOURTEEN (14) DAYS** of the issuance of this order an accounting of fees expended in opposition to Plaintiff’s third cause of action.

IT IS SO ORDERED.