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14 **UNITED STATES DISTRICT COURT**

15 **NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

16 MARIA SCHNEIDER and PIRATE  
17 MONITOR LTD, individually and on behalf of  
all others similarly situated;

18 Plaintiffs,

19 vs.

20 YOUTUBE, LLC; GOOGLE LLC; and  
21 ALPHABET INC.;

22 Defendants.

23 YOUTUBE, LLC and GOOGLE LLC;

24 Counter-Plaintiffs,

25 v.

26 PIRATE MONITOR LTD,  
27 Counter-Defendant.

CASE NO. 3:20-cv-04423-JD

**COUNTER-DEFENDANT PIRATE  
MONITOR'S NOTICE OF MOTION  
AND RULE 12(B)(1)&(6) MOTION TO  
DISMISS COUNTERCLAIMS**

**HEARING DATE: JANUARY 21, 2021**

**TIME: 10:00 A.M.**

**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

	<b>Page</b>
NOTICE OF MOTION AND MOTION .....	1
ISSUES PRESENTED.....	3
MEMORANDUM OF POINTS AND AUTHORITIES .....	4
INTRODUCTION .....	4
I. FACTUAL BACKGROUND .....	6
II. LEGAL STANDARD .....	7
III. ARGUMENT .....	8
A. Defendant Do Not Plausibly Allege an Agency Relationship Between Pirate Monitor and the Unidentified Individuals .....	8
B. Defendants’ Fraud and Section 512(f) Claims are Not Pleaded with the Particularity Required by Rule 9(b) .....	11
1. Rule 9(b) applies to Defendants’ Section 512(f) Counterclaim.....	11
2. Defendants’ Counterclaims for Fraud and a Violation of Section 512(f) Must Be Dismissed.....	13
i. Defendants’ Fraud and Section 512(f) Counterclaims Fail to Identify the Individual Alleged to Have Made Any Misrepresentation .....	13
ii. Defendants’ Fraud and Section 512(f) Counterclaims Fail to Plead Justifiable Reliance.....	14
C. Defendants Lack Article III Standing to Seek Injunctive Relief .....	15
IV. CONCLUSION .....	17

**TABLE OF AUTHORITIES**

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(s)**

**Cases**

*Am. Nat’l Red Cross v. United Way California Capital Region*,  
No. Civ. S-07-1236, 2007 WL 4522967 (E.D. Cal. Dec. 19, 2007) ..... 10

*Ashcroft v. Iqbal*,  
556 U.S. 662 (2009) ..... 8, 9, 10

*Automattic Inc. v. Steiner*,  
82 F. Supp. 3d 1011 (N.D. Cal. 2015) ..... 12

*Axon Solutions, Inc. v. San Diego Data Processing Corp.*,  
No. 09-cv-2543, 2010 WL 582139 (S.D. Cal. Feb. 12, 2010) ..... 10

*Bates v. United Parcel Serv., Inc.*,  
511 F.3d 974 (9th Cir. 2007)..... 16

*Celebrity Chefs Tour, LLC v. Macy’s, Inc.*,  
16 F. Supp. 3d 1141 (S.D. Cal. 2014) ..... 14

*Dart Indus., Inc. v. Liberty Mut. Ins. Co.*,  
484 F.2d 1295 (9th Cir. 1973)..... 8

*Dyson, Inc. v. Garry Vacuum, LLC*,  
No. 10-cv-01626, 2010 WL 11595882 (C.D. Cal. July 19, 2010)..... 12

*F.T.C. v. Lights of Am., Inc.*,  
760 F. Supp. 2d 848 (C.D. Cal. 2010)..... 11

*Fernandez v. UBS AG*,  
222 F. Supp. 3d 358 (S.D.N.Y. 2016)..... 12

*Friedman v. U.S. Bank Nat’l Ass’n*,  
No. 2:16-cv-02265, 2016 WL 6745149 (C.D. Cal. Nov. 14, 2016)..... 9

*Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*,  
528 U.S. 167 (2000) ..... 15

*Gil v. City of Pensacola, Florida*,  
396 F. Supp. 3d 1059 (N.D. Fla. 2019) ..... 16

*Gonzalez v. United States Immigration & Customs Enf’t*,  
No. 20-55175, 2020 WL 5494324 (9th Cir. Sept. 11, 2020) ..... 16

*Hoffman v. 162 N. Wolfe LLC*,  
175 Cal. Rptr. 3d 820 (Cal. App. 2014) ..... 14

1	<i>Izquierdo v. Panera Bread Co.</i> , 450 F. Supp. 3d 453 (S.D.N.Y. 2020).....	16
2		
3	<i>Kearns v. Ford Motor Co.</i> , 567 F.3d 1120 (9th Cir. 2009).....	11
4	<i>Lazar v. Superior Court</i> , 909 P.2d 981 (Cal. 1996) .....	14
5		
6	<i>Littlejohn v. SF City</i> , No. C 09-05021-SI, 2010 WL 5158330 (N.D. Cal. Dec. 14, 2010) .....	16
7		
8	<i>Lopez v. Candaele</i> , 630 F.3d 775 (9th Cir. 2010).....	15
9	<i>Mauia v. Petrochem Insulation, Inc.</i> , No. 18-cv-01815, 2018 WL 3241049 (N.D. Cal. July 3, 2018).....	16
10		
11	<i>Miranda v. Coach, Inc.</i> , No. 14-cv-02031, 2015 WL 636373 (N.D. Cal. Feb. 13, 2015) (Donato, J.) .....	16
12		
13	<i>Mun. Employees’ Ret. Sys. of Michigan v. Pier 1 Imports, Inc.</i> , 935 F.3d 424 (5th Cir. 2019).....	13
14	<i>Neubronner v. Milken</i> , 6 F.3d 666 (9th Cir. 1993).....	8, 15
15		
16	<i>Noll v. eBay, Inc.</i> , 282 F.R.D. 462 (N.D. Cal. 2012) .....	15
17	<i>OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.</i> , 68 Cal. Rptr. 3d 828 (2007).....	14
18		
19	<i>Palomares v. Bear Stearns Residential Mortg. Corp.</i> , No. 07-cv-01899, 2008 WL 686683 (S.D. Cal. Mar. 13, 2008) .....	10
20		
21	<i>Pan Asian Commercial Consulting Grp., LLP v. Montage Int’l Importing Inc.</i> , No. 14-cv-04905, 2014 WL 12688420 (C.D. Cal. Nov. 10, 2014).....	14
22		
23	<i>In re Rigel Pharm., Inc. Sec. Litig.</i> , 697 F.3d 869 (9th Cir. 2012).....	12
24	<i>Smith v. McCullough</i> , 270 U.S. 456 (1926) .....	15
25		
26	<i>Snell v. Deutsche Bank Nat. Tr. Co.</i> , No. 2:13-cv-02178, 2014 WL 325147 (E.D. Cal. Jan. 29, 2014) .....	13
27	<i>Swartz v. KPMG LLP</i> , 476 F.3d 756 (9th Cir. 2007).....	10
28		

1	<i>TransFresh Corp. v. Ganzerla &amp; Assoc., Inc.</i> ,	
	862 F. Supp. 2d 1009 (N.D. Cal. 2012) .....	11
2	<i>United States ex rel. Bunk v. Gov't Logistics N.V.</i> ,	
3	842 F.3d 261 (4th Cir. 2016).....	13
4	<i>Vess v. Ciba-Geigy Corp. USA</i> ,	
5	317 F.3d 1097 (9th Cir. 2003).....	8, 11
6	<i>Washington Gas-Light Co. v. Lansden</i> ,	
	172 U.S. 534 (1899) .....	9
7	<i>Wilhelm v. Pray, Price, Williams &amp; Russell</i> ,	
8	231 Cal. Rptr. 355 (Cal. App. 1986) .....	14
9	<i>World Surveillance Grp. Inc. v. La Jolla Cove Inv'rs, Inc.</i> ,	
10	66 F. Supp. 3d 1233 (N.D. Cal. 2014) (Donato, J.) .....	8
11	<i>Xia Bi v. McAuliffe</i> ,	
	927 F.3d 177 (4th Cir. 2019).....	15
12	<b>Statutes</b>	
13	17 U.S.C. § 512(f) .....	4, 6, 7, 11
14	<b>Other Authorities</b>	
15	5A FED. PRAC. & PROC. CIV. § 1297 (4th ed.) .....	13
16	Fed. R. Civ. P. 9(b).....	6, 13
17		
18		
19		
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**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that on January 21, 2021, at 10:00 a.m., or as soon thereafter as the matter can be heard by the above-titled court, Counter-Defendant Pirate Monitor LTD will move the Court for an order dismissing the Counterclaims of Counter-Plaintiffs YouTube and Google LLC, and each separately stated claim for relief alleged therein, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Specifically, Pirate Monitor moves to dismiss Counter-Plaintiffs' request for injunctive relief for lack of Article III standing, and their substantive claims for failure to state a claim on which relief can be granted.

The motion will be based on this Notice and Motion, the attached Memorandum of Points and Authorities In Support of Motion to Dismiss, and such oral argument as may be made at the hearing.

Dated: November 20, 2020

Respectfully submitted,

/s/ Steven M. Berezney

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**ISSUES PRESENTED**

1. Whether this Court should dismiss Defendants’ counterclaims, where they fail to plausibly allege an agency relationship between Pirate Monitor and the unidentified individuals who allegedly created false YouTube accounts and uploaded infringing material.

2. Whether this Court should dismiss Defendants’ counterclaims for fraud and takedown-notice abuse, where they fail to allege those claims with the particularity required by Fed. R. Civ. P. 9(b).

3. Whether this Court should dismiss Defendants’ request for injunctive relief for lack of Article III standing, where they fail to allege facts showing a reasonable likelihood of future harm.



1 MEMORANDUM OF POINTS AND AUTHORITIES

2 INTRODUCTION

3 This case is about Google and YouTube's systematic monetization of content that infringes on  
4 copyrights and Google and YouTube's willingness to allow repeat copyright infringers on the YouTube  
5 platform in order to increase user volume and thus increase advertising revenue and profit. Plaintiffs  
6 Maria Schneider, Pirate Monitor LTD, and the putative Class hold the exclusive copyrights to works  
7 that have been displayed on YouTube in violation of the 1976 Copyright Act, (17 U.S.C. § 501 *et seq.*),  
8 despite having notified Defendants that these works were being infringed. These works, as well as  
9 millions of other works by Plaintiffs and the Class, have been reproduced, distributed, displayed, and  
10 publicly performed on YouTube without Plaintiffs' and the Class members' authorization in violation  
11 of the Copyright Act.

12 Defendants fail to protect Plaintiffs' or the Class's copyrights, and instead directly facilitate the  
13 infringement of their works. Specifically, YouTube employs a two-tiered copyright enforcement system  
14 whereby the rights of large copyright holders, such as major studios and record labels, are protected  
15 while ordinary copyright owners, like Plaintiffs, are not. The large copyright holders are provided with  
16 access to Content ID, a sophisticated digital fingerprint tool that compares videos uploaded to YouTube  
17 to a catalogue of copyrighted material provided by those large copyright owners. When an uploaded  
18 video matches with a copyrighted work protected by Content ID, the copyright holder then has the  
19 opportunity to decide what to do about the infringement—block the infringing video from being  
20 uploaded or viewed entirely, monetize the infringing video by running ads against it (in some cases  
21 sharing revenue with the uploader), or track the infringing video's viewership statistics.

22 Ordinary rights holders, including Plaintiffs and the Class, who have not signed a deal with  
23 YouTube to license vast catalogues of copyrighted works, are denied access to Content ID or receive  
24 no response to their applications for Content ID, regardless of how many times they notify YouTube  
25 that their copyrighted works are being infringed. Such ordinary rights holders are thus relegated to a  
26 vastly inferior means of trying to police and manage their copyrights, which includes locating the  
27 infringing material through manual searches and then filing a takedown notice with YouTube. Once  
28

1 an ordinary rights holder without access to Content ID identifies infringing content on YouTube, their  
2 only option is to file an individual takedown notice with YouTube via a web-form, email, or postal mail  
3 for each video their searches identify. Accordingly, Plaintiffs and the putative Class are denied any  
4 meaningful opportunity to prevent infringement of their works on YouTube and must fight to have  
5 infringing works removed from YouTube after affirmatively and manually identifying those works  
6 themselves—a time-consuming and ultimately impossible endeavor.

7 Defendants perpetuate this two-tiered enforcement system in order to increase their profits by  
8 maximizing user volume (including many users that are drawn to pirated content) and thus advertising  
9 revenue. YouTube coordinates and profits from a two-sided market in which it drives both viewers  
10 and content providers to its platform to maximize “network effects.” Put simply, as the volume of  
11 videos increases, the volume of video viewers increases, and the YouTube platform thus becomes more  
12 attractive to advertisers. YouTube’s walled garden of copyright enforcement—providing adequate and  
13 efficient protection to only those rights holders that will sign deals with YouTube and Google to jointly  
14 monetize their catalogues—thus results in massive revenues to YouTube at the expense of ordinary  
15 copyright holders, like Plaintiffs and the Class.

16 In an attempt to spin this case away from being about YouTube’s facilitation and inducement  
17 of copyright infringement, and make it instead about who can and cannot be “trusted” to use Content  
18 ID, Defendants filed three barebones counterclaims against Plaintiff Pirate Monitor LTD. Defendants  
19 accuse Pirate Monitor of perpetrating a complex, fraudulent scheme with the goal of obtaining access  
20 to Defendants’ copyright management tool, Content ID, and seek various relief, including a permanent  
21 injunction to prevent Pirate Monitor from protecting its intellectual property rights. All three  
22 counterclaims are legally deficient.

23 First, all three of Defendants’ counterclaims rest solely on conclusory allegations that the  
24 unidentified individuals who allegedly uploaded several videos to YouTube were, in fact, “authorized  
25 agents” of Pirate Monitor. But the existence of an agency relationship is a legal conclusion that must  
26 be disregarded on a motion to dismiss, unless it is supported by specific allegations that demonstrate an  
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1 agency relationship. Accordingly, courts have repeatedly rejected allegations of agency that are  
2 tantamount to legal conclusions as insufficient at the motion to dismiss stage.

3 Second, Defendants have not pled their counterclaims for common law fraud and fraudulent  
4 misrepresentation under 17 U.S.C. § 512(f) with the heightened level of particularity required by Fed. R.  
5 Civ. P. 9(b). These counterclaims require specificity in pleading, including alleging facts identifying the  
6 “who, what, when, and where” of the alleged fraud. But Defendants have alleged *none* of these  
7 particulars. Rather, Defendants’ allegations rest solely on conclusory allegations made upon  
8 information and belief, which is not enough to satisfy the requirements of Rule 9(b). As to their fraud  
9 counterclaim, Defendants also fail to plead with particularity facts showing that they were justified in  
10 their reliance on the unidentified individuals’ representations.

11 Third, Defendants have failed to allege any facts plausibly showing that they have Article III  
12 standing as to their request for injunctive relief, depriving the Court of subject-matter jurisdiction over  
13 that claim. Specifically, Defendants have failed to include a single allegation in their counterclaims  
14 suggesting any reasonable likelihood of future harm, and instead include solely conclusory allegations  
15 about past harm, thus failing to satisfy the injury-in-fact prong of Article III standing.

16 The Court should dismiss Defendants’ counterclaims in their entirety.

#### 17 **I. FACTUAL BACKGROUND.**

18 In their counterclaims, Defendants allege that unidentified individuals “created a series of  
19 accounts on YouTube” using “bogus account registration information.” ECF No. 34 at 27 ¶ 22. The  
20 unidentified individuals then allegedly used those accounts to upload “hundreds of videos to the  
21 YouTube service,” *id.* at 27 ¶ 23, including “clips from the very works that Pirate Monitor now accuses  
22 Google and YouTube of infringing,” *id.* at 28 ¶ 24, each time claiming “that the video did not infringe  
23 anyone’s copyrights” and “that [they] owned or had the rights to upload and license the material  
24 contained in the videos,” *id.* at 28 ¶ 26. Shortly afterward, Pirate Monitor allegedly “sent YouTube  
25 hundreds of takedown requests under the DMCA, in many instances for the same videos [the  
26 unidentified individuals] had just uploaded.” *Id.* at 28 ¶ 28. Defendants allege that those notices  
27 “represented that the videos that were the subject of the notices—videos that [the unidentified  
28

1 individuals] had uploaded—infringed its copyrights or the copyrights of a party whom Pirate Monitor  
2 was authorized to represent. YouTube processed the substantial volume of DMCA takedown requests  
3 and removed the videos.” *Id.* Defendants do not allege any facts whatsoever as to the relationship  
4 between these unidentified individuals and Pirate Monitor. The counterclaims contain no factual  
5 allegations indicating whether the unidentified individuals were, for example, employees, officers,  
6 agents, or independent contractors of Pirate Monitor, or the scope of their authority to purportedly act  
7 on Pirate Monitor’s behalf. Defendants merely alleged that the unidentified individuals were “agents  
8 using aliases.” *Id.* at 24 ¶ 1.

9 Based on these allegations, Defendants bring three counterclaims against Pirate Monitor. The  
10 first is for breach of contract, based on Defendants’ allegations that Pirate Monitor breached YouTube’s  
11 terms of service when the unidentified individuals created the “bogus” accounts and uploaded pirated  
12 content. R. 34 at 30 ¶ 41. The second is for common law fraud, claiming that, when creating the  
13 “bogus” YouTube accounts, the unidentified individuals falsely promised that any content they  
14 uploaded would not violate third-party copyrights. *Id.* at 30 ¶46. The third counterclaim is for  
15 fraudulent misrepresentations regarding takedown notices in violation of 17 U.S.C § 512(f); Defendants  
16 claim that the unidentified individuals truthfully stated during the account-creation and upload  
17 processes that the videos they were uploading did not violate third-party copyrights, ECF No. 34 at 32  
18 ¶¶ 59-60, but that Pirate Monitor’s subsequent takedown notices fraudulently claimed that those videos  
19 violated its copyrights, *id.* at 32-33 ¶¶ 62-64. This third claim is pled in the alternative to Defendants’  
20 breach of contract and common law fraud counterclaims. *Id.* ¶ 58. Defendants request compensatory  
21 damages, punitive damages, and an “injunction barring Pirate Monitor and all those in active concert  
22 with it from submitting notices of alleged infringement to YouTube that misrepresent that material on  
23 the YouTube service is infringing copyrights held or claimed to be held by Pirate Monitor or anyone it  
24 claims to represent.” *Id.* at 34.

## 25 **II. LEGAL STANDARD.**

26 Under Federal Rule of Civil Procedure 12(b)(6), a complaint will not survive a motion to dismiss  
27 unless it states sufficient factual material, accepted as true, to state a claim for relief that is plausible on  
28

1 its face. *Asbcroft v. Iqbal*, 556 U.S. 662, 678 (2009). For purposes of this motion, the Court must accept  
 2 as true all the well-pleaded factual allegations in the Defendants’ counterclaims, but not Defendants’  
 3 legal conclusions, which must be disregarded. *Id.* As a result, the Court should disregard Defendants’  
 4 conclusory allegation that the unidentified individuals were “authorized agents” of Pirate Monitor as  
 5 well as their improper references to the unidentified individuals as “Pirate Monitor.”

6 A claim of fraud must satisfy the heightened pleading requirements of Rule 9(b) of the Federal  
 7 Rules of Civil Procedure, and will be dismissed unless it “specif[ies] such facts as the times, dates, places,  
 8 benefits received, and other details of the alleged fraudulent activity.” *Neubronner v. Milken*, 6 F.3d 666,  
 9 672 (9th Cir. 1993); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)  
 10 (“Averments of fraud must be accompanied by ‘the who, what, when, where, and how’ of the  
 11 misconduct charged.”); *World Surveillance Grp. Inc. v. La Jolla Cove Inv’rs, Inc.*, 66 F. Supp. 3d 1233, 1236  
 12 (N.D. Cal. 2014) (Donato, J.) (holding that allegations that “fail[ed] to state the time, place, specific  
 13 content of the representations and identities of the parties to the misrepresentation” were insufficient  
 14 to meet the “heightened pleading requirements” of Rule 9(b)).

15 Finally, and as explained more fully below, Rule 9(b)’s heightened pleading standard also applies  
 16 to Defendants’ section 512(f) claim for abuse of takedown requests—which Defendants plead in the  
 17 alternative to their breach of contract and fraud counterclaims—because it too sounds in fraud. *See*  
 18 *Vess*, 317 F.3d at 1104 (explaining that all claims sounding in fraud are also subject to Rule 9(b)).

### 19 **III. ARGUMENT**

#### 20 **A. Defendants Do Not Plausibly Allege an Agency Relationship Between** 21 **Pirate Monitor and the Unidentified Individuals.**

22 Under any pleading standard—whether Rule 8 or Rule 9(b)’s heightened standard—all of  
 23 Defendants’ counterclaims fail because Defendants have failed to adequately allege the relationship  
 24 between Pirate Monitor and the unidentified individuals under rudimentary principles of agency. It is  
 25 settled beyond all reasonable dispute that a corporate entity such as Pirate Monitor “can act only through  
 26 its agents.” *Dart Indus., Inc. v. Liberty Mut. Ins. Co.*, 484 F.2d 1295, 1296 (9th Cir. 1973). Equally well  
 27 settled is the proposition that a corporate entity is liable for the acts of its agents only when those agents  
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1 have acted in the course of and within the scope of their authority. *See, e.g., Washington Gas-Light Co. v.*  
2 *Lansden*, 172 U.S. 534, 544 (1899).

3 Defendants do not offer a single well-pleaded fact showing that any of the unidentified  
4 individuals were agents of Pirate Monitor acting in the course of and within the scope of their authority  
5 when they engaged in any of the actions alleged in Defendants' counterclaims. Defendants offer only  
6 a cursory, unexplained declaration that the unidentified individuals were "authorized agents" of Pirate  
7 Monitor, ECF No. 34 at 27 ¶ 22, a legal conclusion that the Court must disregard, *Iqbal*, 556 U.S. at  
8 678. Defendants then define Pirate Monitor and its alleged authorized agents collectively as "Pirate  
9 Monitor," in an attempt to attribute conduct to Pirate Monitor carried out by individuals whose  
10 relationship with Pirate Monitor is not even alleged. ECF No. 34 at 27 ¶22. After stating that the  
11 unidentified individuals are "authorized agents" of Pirate Monitor, and defining them collectively with  
12 Pirate Monitor as "Pirate Monitor," Defendants say nothing more about the unidentified individuals.

13 Courts routinely dismiss breach of contract claims that allege that defendants are liable for the  
14 conduct of their agents in only a conclusory manner, and without alleging any facts demonstrating such  
15 an agency relationship. *See, e.g., Friedman v. U.S. Bank Nat'l Ass'n*, No. 2:16-cv-02265, 2016 WL 6745149,  
16 at \*7 (C.D. Cal. Nov. 14, 2016) (dismissing claims for breach of contract dependent on agency  
17 relationship between defendant and third party where plaintiff did not allege "any facts demonstrating  
18 an agency relationship"). Yet that is precisely what Defendants have done here—without alleging a  
19 single fact demonstrating or describing any agency relationship, they contend that unidentified  
20 "authorized agents" of Pirate Monitor "created a series of accounts on YouTube;" that the unidentified  
21 authorized agents agreed to YouTube's Terms of Service when they created such accounts, contractually  
22 binding themselves to the Terms of Service; and that Pirate Monitor is liable for those unidentified  
23 authorized agents' alleged breaches of the Terms of Service by means of its agency relationship with  
24 those unidentified individuals who created the "bogus" accounts at issue. *See* ECF No. 34 at 27 ¶ 22;  
25 *id.* at 28 ¶ 30. Defendants thus allege only legal conclusions to purportedly establish the agency  
26 relationship between Pirate Monitor and the unidentified individuals and cannot therefore support a  
27 claim against Pirate Monitor for breaches of agreements where only the unidentified individuals, and  
28

1 not Pirate Monitor, were parties. *See Axon Solutions, Inc. v. San Diego Data Processing Corp.*, No. 09-cv-  
2 2543, 2010 WL 582139, \*2 (S.D. Cal. Feb. 12, 2010) (“Axon claims ‘[defendant] was and is the agent of  
3 the City,’ but fails to allege sufficient facts regarding the agency relationship between [defendant] and  
4 the City. Therefore, because Axon insufficiently alleges facts to support the legal conclusion that the  
5 City is a party to the [contract], the City’s motion to dismiss Axon’s breach of contract claim [ ] is  
6 granted.”).

7 Such barebones allegations of an agency relationship will not suffice. To the contrary, because  
8 legal conclusions will not be accepted as true on a motion to dismiss, *Iqbal*, 556 U.S. at 678, a complaint  
9 merely asserting the existence of an agency relationship between a corporate entity and an individual  
10 cannot survive a corporate entity’s motion to dismiss. *See, e.g., Am. Nat’l Red Cross v. United Way California*  
11 *Capital Region*, No. Civ. S-07-1236, 2007 WL 4522967, at \*10 (E.D. Cal. Dec. 19, 2007) (“In arguing that  
12 the claims are properly asserted against Volen, Red Cross first draws the court’s attention to paragraph  
13 14 of its complaint, which alleges that an agency relationship existed between United Way and Volen.  
14 The FAC does not, however, allege one fact that suggests such an agency relationship. This bare legal  
15 conclusion is not sufficient to withstand a motion to dismiss.”).

16 The agency allegations supporting Defendants’ fraud and section 512(f) counterclaims—which  
17 are both subject to Rule 9(b)’s heightened pleading standard, as explained more fully below—are  
18 similarly deficient. Rule 9(b) requires that the factual allegations showing an agency relationship  
19 between a corporate entity and the individual who allegedly perpetrated a fraud on the plaintiff be  
20 pleaded with particularity. *See, e.g., Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th Cir. 2007) (holding  
21 that, when fraud is claimed, general and conclusory allegations of agency “are insufficient as a matter of  
22 law”); *Palomares v. Bear Stearns Residential Mortg. Corp.*, No. 07-cv-01899, 2008 WL 686683, at \*4 (S.D.  
23 Cal. Mar. 13, 2008) (“When a plaintiff alleges that a defendant is liable for intentional misrepresentation  
24 under either an agency or civil conspiracy theory, Rule 9(b) requires that the plaintiff allege with  
25 particularity facts that support the existence of an agency relationship or civil conspiracy.” (citing *Swartz*,  
26 476 F.3d at 764-65)). Indeed, to satisfy Rule 9(b), Defendants needed to allege their fraud-based claims  
27 with enough particularity “to provide [Pirate Monitor] with adequate notice to allow [it] to defend the  
28

1 charge.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). By wholly failing to allege any  
2 specifics as to the purported “agency” relationship between Pirate Monitor and the unidentified  
3 individuals, Pirate Monitor is unable to respond to Defendants’ counterclaims.

4 Because Defendants fail to offer any well-pleaded facts plausibly showing that the unidentified  
5 individuals are (1) agents of Pirate Monitor; and (2) were acting in the course of and within the scope  
6 of that agency relationship when they engaged in the conduct alleged in Defendants’ three  
7 counterclaims, those counterclaims fail as a matter of law and should be dismissed.

8 **B. Defendants’ Fraud and Section 512(f) Claims are Not Pled with the**  
9 **Particularity Required by Rule 9(b).**

10 Even beyond their deficient agency allegations, Defendants’ fraud and section 512(f)  
11 counterclaims must be dismissed because they are not pled with the particularity required by Rule 9(b).

12 **1. Rule 9(b) Applies to Defendants’ Section 512(f) Counterclaim.**

13 Rule 9(b)’s heightened pleading standard applies to Defendants’ section 512(f) counterclaim for  
14 abuse of takedown requests—which Defendants plead in the alternative to their breach of contract and  
15 fraud counterclaims—because it sounds in fraud. All claims sounding in fraud are subject to Rule 9(b).  
16 *See Vess*, 317 F.3d at 1104. Defendants’ section 512(f) claim requires a “knowing[] material[]  
17 misrepresent[ation],” 17 U.S.C. § 512(f), and Defendants allege that Pirate Monitor violated section  
18 512(f) by “knowingly and materially misrepresent[ing]” information to YouTube in submitting  
19 takedown notices. *See* ECF No. 34 at 33 ¶ 64. Courts in the Ninth Circuit have held that when a  
20 plaintiff brings claims based on allegations of knowing or intentional misrepresentations, Rule 9(b)  
21 applies. *See, e.g., Kearns*, 567 F.3d at 1126–27 (holding that Rule 9(b) applies to claims for violations of  
22 California’s Consumers Legal Remedies Act and Unfair Competition Law alleging misrepresentations  
23 by seller regarding “certified pre-owned” vehicle program); *TransFresh Corp. v. Ganzlerla & Assoc., Inc.*,  
24 862 F. Supp. 2d 1009, 1017–18 (N.D. Cal. 2012) (holding that plaintiff’s claims sounded in fraud and  
25 must meet 9(b) standards because “[t]he crux of plaintiff’s] claims are that [defendant] has made  
26 numerous misleading and false representations” and that defendants did so “willfully, maliciously and  
27 intentionally”); *F.T.C. v. Lights of Am., Inc.*, 760 F. Supp. 2d 848, 852–53 (C.D. Cal. 2010) (applying Rule  
28



1 9(b) to FTC Act claim alleging that defendant knowingly distributed deceptive promotional materials);  
2 *Dyson, Inc. v. Garry Vacuum, LLC*, No. 10-cv-01626, 2010 WL 11595882, at \*5 (C.D. Cal. July 19, 2010)  
3 (applying Rule 9(b) to Lanham Act claim for false advertising where claim was “based on allegations of  
4 intentional and ongoing misrepresentations”). Here, the crux of Defendants’ section 512(f)  
5 counterclaim is that Pirate Monitor violated section 512(f) (through its unidentified agents) by making  
6 knowing and material misrepresentations when submitting takedown notices to YouTube. Thus, the  
7 section 512(f) counterclaim sounds in fraud.<sup>1</sup>

8 A complaint also sounds in fraud if it is based on a “unified course of fraudulent conduct.” *In*  
9 *re Rigel Pharm., Inc. Sec. Litig.*, 697 F.3d 869, 885-86 (9th Cir. 2012) (citing *Ves*). If the basis of a claim  
10 relies entirely on the same alleged conduct central to a separate fraud count, Rule 9(b) will apply. *Id.* at  
11 886 (holding that plaintiff’s section 11 claim was subject to Rule 9(b) because it “merely relies on the  
12 same alleged misrepresentations from the December 13, 2007 press release that are central to Plaintiff’s  
13 section 10(b) fraud claim”).<sup>2</sup> Here, Defendants have alleged such a unified course of fraudulent  
14 conduct, basing their section 512(f) counterclaim entirely on the same factual allegations supporting  
15 their fraud counterclaim.

16 Defendants cannot escape their obligation to meet the heightened pleading requirements of  
17 Rule 9(b) by pleading a violation of section 512(f) in the alternative to their fraud counterclaim; their  
18 counterclaim under section 512(f) sounds in fraud, is based on the same conduct as their fraud claim,  
19 and is thus subject to the same pleading standards as their fraud claim.

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24 <sup>1</sup> Accordingly, at least one court in this District has characterized a section 512(f) claim as concerning  
25 an “allegedly fraudulent takedown notice” and as involving allegedly “fraudulent conduct.” *See*  
26 *Automatic Inc. v. Steiner*, 82 F. Supp. 3d 1011, 1022 (N.D. Cal. 2015).

27 <sup>2</sup> *Accord Fernandez v. UBS AG*, 222 F. Supp. 3d 358, 385-87 (S.D.N.Y. 2016) (holding that main thrust  
28 of plaintiff’s breach of fiduciary duty claim was not mere negligence but essentially fraud and was  
therefore subject to Rule 9(b)).

1                   **2. Defendants’ Counterclaims for Fraud and a Violation of Section 512(f)**  
 2                   **Must Be Dismissed.**

3                   Defendants’ fraud and section 512(f) counterclaims are woefully inadequate under the  
 4 heightened pleading standard of Rule 9(b). In addition to failing to sufficiently plead facts supporting  
 5 an agency relationship between the unidentified individuals and Pirate Monitor, Defendants’ fraud and  
 6 section 512(f) Counterclaims fail under Rule 9(b) because Defendants have failed to identify the person  
 7 alleged to have made any misrepresentation and because Defendants wholly fail to plead justifiable  
 8 reliance on such misrepresentations with any particularity. Defendants’ failure to even attempt to plead  
 9 multiple elements of their counterclaims demonstrates that they were filed not to recover damages from  
 10 Pirate Monitor, but as a smear campaign to turn what this case is about on its head.

11                   **i. Defendants’ Fraud and Section 512(f) Counterclaims Fail to**  
 12                   **Identify the Individual Alleged to Have Made Any**  
 13                   **Misrepresentation.**

14                   As explained above, conspicuously absent from the counterclaims is any allegation containing  
 15 the identities of the individuals who allegedly perpetrated the alleged fraud upon Defendants. Under  
 16 Rule 9(b), “a party must state with particularity the circumstances constituting fraud or mistake,” Fed.  
 17 R. Civ. P. 9(b), with those “circumstances” encompassing, among other things, “the identity of the  
 18 person making the misrepresentation.” 5A FED. PRAC. & PROC. CIV. § 1297 (4th ed.) (footnotes  
 19 omitted). As a result, a party pleading fraud must allege “the identity of the person making the  
 20 misrepresentation and what that person obtained thereby.” *E.g., Mun. Employees’ Ret. Sys. of Michigan v.*  
 21 *Pier 1 Imports, Inc.*, 935 F.3d 424, 429 (5th Cir. 2019) (quotation marks omitted); *United States ex rel. Bunk*  
 22 *v. Gov’t Logistics N.V.*, 842 F.3d 261, 275 (4th Cir. 2016) (“[A] plaintiff complies with Rule 9(b) by, at a  
 23 minimum, describing the time, place, and contents of the false representations, as well as the identity of  
 24 the person making the misrepresentation and what he obtained thereby”); *Snell v. Deutsche Bank Nat. Tr.*  
 25 *Co.*, No. 2:13-cv-02178, 2014 WL 325147, at \*10 (E.D. Cal. Jan. 29, 2014) (“To survive a motion to  
 26 dismiss, Plaintiff must allege facts . . . such as . . . the identity of the person making the misrepresentation,  
 27 and other details of the alleged fraudulent activity.”). Moreover, “merely attributing a misrepresentation  
 28

1 to a corporate entity is inadequate; a specific person must be identified.” *Celebrity Chefs Tour, LLC v.*  
 2 *Macy’s, Inc.*, 16 F. Supp. 3d 1141, 1150 (S.D. Cal. 2014) (quotation marks and ellipses omitted); *accord*  
 3 *Pan Asian Commercial Consulting Grp., LLP v. Montage Int’l Importing Inc.*, No. 14-cv-04905, 2014 WL  
 4 12688420, at \*10 (C.D. Cal. Nov. 10, 2014) (“Plaintiff failed to identify the specific person who made  
 5 the misrepresentation; the name of the corporation is not sufficient.”).

6 Exactly who allegedly engaged in fraudulent conduct, and the nature of those individuals’  
 7 relationships to Pirate Monitor, is not pled anywhere in the Counterclaims. Defendants have not  
 8 identified *any* of the unidentified individuals who allegedly defrauded them, but instead seek to  
 9 wrongfully attribute that fraud to Pirate Monitor without any facts connecting it to those individuals’  
 10 allegedly fraudulent conduct. Nor have Defendants included any descriptive facts about the  
 11 unidentified individuals, such as their alleged roles at or alleged specific relationship with Pirate Monitor,  
 12 allegations required in order for Pirate Monitor to respond to the counterclaims in any meaningful way.

13 **ii. Defendants’ Fraud and Section 512(f) Counterclaims Fail to Plead**  
 14 **Justifiable Reliance.**

15 Defendants also fail to plead with particularity facts showing that they were justified in their  
 16 reliance on the unidentified individuals’ representations. Under California law, “justifiable reliance” is  
 17 a necessary element of any fraud claim. *Lazar v. Superior Court*, 909 P.2d 981, 984 (Cal. 1996). And to  
 18 show that reliance was “justifiable,” a plaintiff must show that “circumstances were such to make it  
 19 *reasonable* for plaintiff to accept defendant’s statements without an independent inquiry or investigation.”  
 20 *Wilhelm v. Pray, Price, Williams & Russell*, 231 Cal. Rptr. 355, 358 (Cal. App. 1986). “The reasonableness  
 21 of the plaintiff’s reliance is judged by reference to the plaintiff’s knowledge and experience.” *OCM*  
 22 *Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.*, 68 Cal. Rptr. 3d 828, 856 (2007); *see also*  
 23 *Hoffman v. 162 N. Wolfe LLC*, 175 Cal. Rptr. 3d 820, 833-34 (Cal. App. 2014) (“If the conduct of the  
 24 plaintiff in the light of his own intelligence and information was manifestly unreasonable ... he will be  
 25 denied a recovery.”). Because justifiable reliance is one of the “circumstances” of a fraud claim, and  
 26 because a plaintiff’s basis for relying on a representation is a matter peculiarly in its personal knowledge,  
 27 the facts showing that a plaintiff justifiably relied on a misrepresentation must be alleged with  
 28

1 particularity under Rule 9(b). *See, e.g., Xia Bi v. McAuliffe*, 927 F.3d 177, 184-85 (4th Cir. 2019); *see also*  
2 *Noll v. eBay, Inc.*, 282 F.R.D. 462, 468 (N.D. Cal. 2012) (fraud “plaintiff must plead reliance on alleged  
3 misstatements with particularity by alleging facts ‘of sufficient specificity.’”). These pleading  
4 requirements are fatal to Defendants’ fraud counterclaim because they have not alleged *any* facts  
5 showing they were justified in relying on the representations of individuals they cannot identify to this  
6 day, let alone the particularized facts necessary to avoid dismissal under Rule 9(b).

7       Instead of including factual allegations that meet Rule 9(b)’s heightened requirement in the  
8 counterclaims, Defendants support the two counterclaims sounding in fraud based “on personal  
9 knowledge as to [YouTube’s] own actions and on information and belief as to the actions of others.”  
10 *See* ECF No. 34 at 23-24. It is settled in this circuit that a party asserting a claim subject to Rule 9(b)  
11 on the basis of information and belief “must state the factual basis for the belief.” *Neubronner v. Milken*,  
12 6 F.3d 666, 672 (9th Cir. 1993). But nowhere do the counterclaims identify the factual basis for their  
13 belief in *any* of the allegations Defendants make against Pirate Monitor. Because Defendants have failed  
14 to comply with even a “relaxed version of Rule 9(b),” *id.* at 672, their fraud and section 512(f) claims  
15 should be dismissed.

### 16       **C. Defendants Lack Article III Standing to Seek Injunctive Relief.**

17       Defendants’ request for injunctive relief must be dismissed because they have failed to show  
18 Article III standing. Standing goes to a federal court’s subject-matter jurisdiction, *Lopez v. Candaele*, 630  
19 F.3d 775, 785 (9th Cir. 2010), and a claimant must include in its complaint all information necessary to  
20 establish the existence of federal jurisdiction, *Smith v. McCullough*, 270 U.S. 456, 459 (1926). Although  
21 Defendants have Article III standing to seek money damages, that does not mean they also have  
22 standing to seek injunctive relief. To the contrary, it is settled that a claimant “must demonstrate  
23 standing separately for each form of relief sought.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC),*  
24 *Inc.*, 528 U.S. 167, 185 (2000). To demonstrate Article III standing to seek injunctive relief, a claimant

25       must demonstrate that he has suffered or is threatened with a concrete and  
26 particularized legal harm, coupled with a sufficient likelihood that he will again be  
27 wronged in a similar way. As to the second inquiry, he must establish a real and  
28 immediate threat of repeated injury. Past wrongs do not in themselves amount to a real  
and immediate threat of injury necessary to make out a case or controversy.

1 *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (citations, quotation marks, and  
2 alterations omitted); accord *Gonzalez v. United States Immigration & Customs Enf't*, No. 20-55175, 2020 WL  
3 5494324, at \*9 (9th Cir. Sept. 11, 2020) (“past injury does not provide standing to seek prospective  
4 injunctive relief absent a sufficient likelihood that the plaintiff will again be wronged in a similar way”)  
5 (quotations and alterations omitted).

6 Courts, including this one, routinely dismiss claims seeking prospective injunctive relief for  
7 failure to allege a reasonable likelihood of future harm. See, e.g., *Mania v. Petrochem Insulation, Inc.*, No.  
8 18-cv-01815, 2018 WL 3241049, at \*11 (N.D. Cal. July 3, 2018) (dismissing request for injunctive relief  
9 due to lack of Article III standing because plaintiff “cannot demonstrate a credible threat of future  
10 injury”); *Miranda v. Coach, Inc.*, No. 14-cv-02031, 2015 WL 636373, at \*3 (N.D. Cal. Feb. 13, 2015)  
11 (Donato, J.) (dismissing claim for injunctive relief where plaintiffs failed to show “any likelihood  
12 whatsoever of future injury, let alone a real and immediate threat”); *Littlejohn v. SF City*, No. C 09-05021-  
13 SI, 2010 WL 5158330, at \*1 (N.D. Cal. Dec. 14, 2010) (dismissing amended complaint with prejudice  
14 because plaintiff failed to allege “that he faces a real or immediate threat that he will be subjected to  
15 unwarranted parole searches sufficient to confer standing on him to seek injunctive and declaratory  
16 relief”); see also *Izquierdo v. Panera Bread Co.*, 450 F. Supp. 3d 453, 456, 460 (S.D.N.Y. 2020) (granting  
17 motion to dismiss request for injunctive relief for lack of standing “[b]ecause Plaintiff has failed to allege  
18 any future injury”); *Gil v. City of Pensacola, Florida*, 396 F. Supp. 3d 1059, 1063 (N.D. Fla. 2019) (dismissing  
19 claim for injunctive relief due to lack of Article III standing because “Plaintiff has not adequately alleged  
20 a real and immediate threat of future injury”).

21 Defendants fail to satisfy the injury-in-fact prong of Article III standing as to their claim for  
22 injunctive relief. Rather, Defendants expressly base their request for injunctive relief on alleged past  
23 wrongs—namely, Pirate Monitor’s past, allegedly-false DMCA takedown notices, ECF No. 34 at 33 ¶  
24 66—and nowhere allege even a single fact showing a real and immediate threat that Pirate Monitor will  
25 commit those alleged wrongs in the future. Absent a showing of such a threat, Defendants lack standing  
26 to seek injunctive relief, depriving this Court of subject-matter jurisdiction over that request and  
27 requiring its dismissal under Rule 12(b)(1).  
28

1 **IV. CONCLUSION**

2 Pirate Monitor respectfully requests that the Court dismiss Defendants' counterclaims in their  
3 entirety.

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Respectfully submitted,

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