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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE OPENAI CHATGPT LITIGATION

This Document Relates To:

Case No. 3:23-cv-03223-AMO

Case No. 3:23-cv-03416-AMO

Case No. 3:23-cv-04625-AMO

Master File No. 3:23-cv-03223-AMO

**DEFENDANTS' NOTICE OF MOTION,
MOTION TO DISMISS FIRST
CONSOLIDATED AMENDED
COMPLAINT, AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: August 1, 2024

Time: 2:00 pm

Place: Courtroom 10 - 19th Floor

Before: Hon. Araceli Martínez-Olguín

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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on August 1, 2024 at 2:00 p.m., or as soon thereafter as
3 the matter may be heard, in the United States District Court for the Northern District of California,
4 Courtroom 10, 19th Floor, located at 450 Golden Gate Ave., San Francisco, CA 94102, Defendants
5 OpenAI, Inc., OpenAI, L.P., OpenAI OpCo, L.L.C., OpenAI GP, L.L.C., OpenAI Startup Fund
6 GPI, L.L.C., OpenAI Startup Fund I, L.P., and OpenAI Startup Fund Management, LLC (together,
7 “OpenAI”), through their undersigned counsel, will, and hereby do, move to dismiss Count II of
8 the First Consolidated Amended Complaint (“Amended Complaint”) pursuant to Federal Rule of
9 Civil Procedure (“FRCP”) 12(b)(6).

10 OpenAI’s Motion to Dismiss is based on this Notice, the supporting Memorandum of
11 Points and Authorities, the complete files and records in this action, and any additional material
12 and arguments as may be considered in connection with the hearing on the Motion.

13 **STATEMENT OF RELIEF SOUGHT**

14 OpenAI seeks an order pursuant to FRCP 12(b)(6) dismissing Count II of the Amended
15 Complaint for failure to state a claim upon which relief can be granted.

16 **ISSUES TO BE DECIDED**

17 The Motion presents the following issue to be decided: Whether Count II of the Amended
18 Complaint, for violation of Cal. Bus. & Prof. Code § 17200, *et seq.*, should be dismissed for failure
19 to state a predicate violation of law, failure to allege fraudulent business practices, and preemption
20 by Section 301 of the Copyright Act.

21 Dated: March 27, 2024

Respectfully submitted,

22 By: /s/ Joseph C. Gratz

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1 *Welgus v. TriNet Grp., Inc.*,
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14 **OTHER AUTHORITIES**

15 William F. Patry, PATRY ON COPYRIGHT § 18:16 (Mar. 2024 update)5
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1 **I. INTRODUCTION**

2 Plaintiffs previously filed scattershot complaints asserting five different claims beyond
 3 their core theory that it is copyright infringement to use books as part of the corpus of training
 4 material from which a generative AI model learns factual information about the operation of
 5 human language and facts in our world. Defendants moved to dismiss those ancillary claims, and,
 6 on February 12, the Court granted that motion with respect to all but one—a claim that the same
 7 conduct giving rise to the core copyright infringement claim may also violate one of the prongs of
 8 California’s Unfair Competition Law (“UCL”). Even as to that sole surviving ancillary claim,
 9 however, the Court expressly noted that “to the extent the UCL claim alleges the same violation
 10 as the copyright claim, it may be preempted by the Copyright Act.” Dkt. 104 (“MTD Order”) at
 11 10 n.6.

12 Shortly thereafter, Plaintiffs filed an Amended Complaint in which they did not attempt to
 13 replead any of the claims the Court dismissed, but did reassert the same UCL claim. OpenAI now
 14 moves to dismiss that claim on the basis the Court identified: that 17 U.S.C. § 301 expressly
 15 preempts it. Plaintiffs have alleged no new facts that would avoid that result. And their continued
 16 assertion of the claim effectively ignores four other rulings in which courts in this district have
 17 rejected similar claims on preemption grounds in recent AI cases filed by the same counsel. *See*
 18 *Doe I v. GitHub, Inc.*, No. 22-cv-06823, 2024 WL 235217, at *7 (N.D. Cal. Jan. 22, 2024); *Kadrey*
 19 *v. Meta Platforms, Inc.*, No. 23-cv-03417, 2023 WL 8039640, at *2 (N.D. Cal. Nov. 20, 2023);
 20 *Andersen v. Stability AI Ltd.*, No. 23-cv-00201, 2023 WL 7132064, at *14 (N.D. Cal. Oct. 30,
 21 2023); *Doe I v. GitHub, Inc.*, 672 F. Supp. 3d 837, 857 (N.D. Cal. 2023).

22 **II. BACKGROUND**

23 On June 28, 2023, Paul Tremblay and Mona Awad¹ filed a class action complaint against
 24 seven entities that they collectively refer to as “OpenAI.” Dkt. 1 (“Tremblay Compl.”). That
 25 Complaint asserted a cause of action for direct copyright infringement based on the allegation that
 26 OpenAI used Plaintiffs’ books “during the training process” of its AI models. *Id.* ¶ 55. It also
 27 alleged five other causes of action (the “Ancillary Claims”), including a claim of unfair

28 ¹ Awad voluntarily dismissed her claims without prejudice on August 11, 2023.

1 competition under California’s UCL. *Id.* ¶¶ 68–72 (Count IV). That claim was based entirely on
2 Plaintiffs’ allegation that OpenAI’s use of their books constituted an “unlawful business
3 practice[.]” *Id.* ¶ 69 (“Defendants have engaged in unlawful business practices . . .”); *see also id.*
4 ¶¶ 70 (“unlawful business practices”), 71 (“unlawful business practices”), 72 (“unlawful business
5 practices”). On July 7, 2023, the same counsel filed an identical complaint on behalf of three other
6 plaintiffs. *See* No. 23-cv-03416, Dkt. 1 (“Silverman Compl.”).

7 On August 28, 2023, OpenAI moved to dismiss the Ancillary Claims. Dkt. 33. Based on
8 the numerous references to “unlawful business practices” in the Tremblay and Silverman
9 Complaints, *see supra*—and the absence of any direct allegations relating to “unfair” or
10 “fraudulent” business practices—OpenAI understood Count IV to be based on the UCL’s
11 “unlawful” prong, which “borrows violations of other laws and treats them as unlawful practices.”
12 *Armstrong-Harris v. Wells Fargo Bank, N.A.*, No. 21-cv-07637, 2022 WL 3348426, at *3 (N.D.
13 Cal. Aug. 12, 2022) (citation omitted). OpenAI’s motion pointed out that, because the “sole
14 predicate violation” was a violation of the Digital Millennium Copyright Act (“DMCA”), and
15 because Plaintiffs had failed to plead such a violation, the claim should be dismissed. Dkt. 33 at
16 19. OpenAI also argued that, to the extent the UCL claim was based on the alleged copyright
17 infringement claim, that claim was preempted. *Id.* at 19 n.11. Because Plaintiffs’ Complaints only
18 referenced the UCL’s “unlawful” prong, OpenAI’s motion did not address that law’s other prongs.

19 In their opposition, Plaintiffs insisted for the first time that, in addition to a claim under the
20 UCL’s “unlawful” prong, they also alleged a claim under that law’s “unfair” and “fraudulent”
21 prongs. Dkt. 48 at 19–20. On February 12, 2024, the Court dismissed all of the Ancillary Claims
22 in full other than Count IV. MTD Order. The Court dismissed Count IV to the extent it was based
23 on the UCL’s “unlawful” prong because it had already “dismissed the predicate DMCA claims.”
24 *Id.* at 8. It also dismissed the claim to the extent it was based on the UCL’s “fraudulent” prong
25 because Plaintiffs “fail[ed] to indicate where they have pleaded allegations of fraud.” *Id.* at 9. The
26 Court, however, held that Plaintiffs arguably had alleged a claim under the UCL’s “unfair” prong,
27 and declined to dismiss that element of Count IV. But the Court noted “that to the extent the UCL
28 claim alleges the same violations as the copyright claim, it may be preempted.” *Id.* at 10 & n.6.

1 On March 13, 2024, Plaintiffs filed the First Consolidated Amended Complaint. Dkt. 120
2 (“Am. Compl.”). Plaintiffs realleged the cause of action for direct copyright infringement that
3 OpenAI did not move to dismiss. *See id.* ¶¶ 62–69 (Count I). Additionally, despite the Court’s
4 language regarding preemption, Plaintiffs realleged a UCL claim—this time expressly using the
5 language of that law’s “unfair” prong. *See, e.g., id.* ¶ 71 (“Defendants engaged in unfair business
6 practices . . .”). Their amended pleading also includes a number of offhand references to the words
7 “unlawful” and “deceptive[,]” which suggests that Plaintiffs might also intend to replead the
8 dismissed claims under the UCL’s “unlawful” and “fraudulent” prongs. *See id.* ¶¶ 73–74.

9 **III. LEGAL STANDARD**

10 To survive a Rule 12(b)(6) motion to dismiss, “a complaint must contain sufficient factual
11 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,
12 556 U.S. 662, 678 (2009) (cleaned up). “[A] formulaic recitation of the elements of a cause of
13 action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Court should
14 disregard conclusory allegations, legal characterizations, unreasonable inferences, and
15 unwarranted factual deductions. *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

16 **IV. ARGUMENT**

17 This motion seeks dismissal with prejudice of Count II of the Amended Complaint for
18 violation of California’s UCL. To the extent Count II’s offhand references to the words “unlawful”
19 and “deceptive” suggest that Plaintiffs are attempting to replead claims under the UCL’s
20 “unlawful” or “fraudulent” prongs, Plaintiffs have failed to do so because (1) they still have not
21 alleged a valid predicate to support an “unlawful” claim, *see infra* Section A.1; and (2) as before,
22 they have made no attempt to “plead[] allegations of fraud,” *see* MTD Order at 9; *see also infra*
23 Section A.2. To the extent Count II alleges a claim under the UCL’s “unfair” prong, that claim is
24 preempted by Section 301 of the Copyright Act, for the reasons previewed by this Court, *see* MTD
25 Order at 10 n.6; *see also infra* Section A.3. Finally, the dismissal should be with prejudice because
26 further amendment would be futile. *Infra* Section B.

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1 **A. The Amended Complaint Does Not State a UCL Claim**

2 1. Plaintiffs Do Not Allege An “Unlawful” UCL Claim

3 As mentioned, the UCL’s “unlawful” prong “borrows violations of other laws and treats
4 them as unlawful practices.” *Armstrong-Harris*, 2022 WL 3348426, at *3 (citation omitted).
5 Plaintiffs make a single passing reference to “unlawful business practices” that “violate the UCL
6 because consumers are likely to be deceived.” Am. Compl. ¶ 74.

7 Plaintiffs, however, make no attempt to identify a predicate violation for this claim. In
8 fact, the only other violation of law that the Amended Complaint alleges is direct copyright
9 infringement. Am. Compl. ¶¶ 62–69. But copyright infringement is not a valid predicate for a
10 UCL “unlawful” claim. *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1213 (9th Cir. 1998)
11 (UCL claim “expressly base[d] . . . on . . . the Copyright Act” was “clear[ly]” preempted); *Kadrey*,
12 2023 WL 8039640, at *2 (same). Because Plaintiffs’ Amended Complaint does not plead a
13 violation of law that could serve as a valid predicate for an “unlawful” UCL claim, that claim fails
14 on its face. *See Eidmann v. Walgreen Co.*, 522 F. Supp. 3d 634, 647 (N.D. Cal. 2021) (dismissing
15 UCL claim based on “unlawful” prong where plaintiff failed to allege predicate violations of law);
16 *Flores v. EMC Mortg. Co.*, 997 F. Supp. 2d 1088, 1119 (E.D. Cal. 2014) (dismissing UCL claim
17 with prejudice, including because pleading failed to state predicate violation); *see also Asencio v.*
18 *Miller Brewing Co.*, 283 F. App’x. 559, 562 (9th Cir. 2008) (affirming district court’s dismissal of
19 UCL claim based on “unlawful” prong because “there was no statutory violation”).

20 2. Plaintiffs Do Not Allege A “Fraudulent” UCL Claim

21 Like Plaintiffs’ original Complaints, the Amended Complaint makes no mention of the
22 word “fraud.” *See generally* Dkt. 1, Am. Compl. Nonetheless, in the event that Plaintiffs again
23 attempt to rely on offhand references to the word “deceptive[.]” to argue that they have alleged a
24 claim under the UCL’s “fraudulent” prong, *see, e.g.*, Dkt. 48 at 19–20, this Court should dismiss
25 that claim for the same reasons expressed in its prior order, *see* MTD Order at 9. Plaintiffs have
26 made no attempt to supplement their allegations on this score: indeed, the allegations in the
27 Amended Complaint regarding alleged “decepti[on]” are a carbon copy of the allegations
28 prompting dismissal of Plaintiffs’ original Complaints. *Compare* Dkt. 1 ¶ 72, *with* Am. Compl.

¶ 74. Accordingly, the Court’s prior order resolves this claim: Because Plaintiffs’ pleading “fail[s] to satisfy the heightened pleading requirements of Rule 9(b) which apply to UCL fraud claims,” the “UCL claim based on fraudulent conduct also fails.” MTD Order at 9; *see also Kadrey*, 2023 WL 8039640, at *2 (dismissing all three UCL prongs in similar complaint filed by Plaintiffs’ counsel).

3. The UCL Claim Under the “Unfair” Prong Is Preempted

Finally, Plaintiffs’ claim for “unfair business practices” under the UCL is preempted by the Copyright Act, as this Court previewed. MTD Order at 10 n.6; Am. Compl. ¶¶ 70–74. Section 301 of the Act preempts state-law claims if (1) the “subject matter” of the claim falls within the “subject matter of copyright as specified by [§] 102” of the Act and (2) if the rights asserted under state law are functionally “equivalent to” the rights in Section 106 of the Copyright Act. 17 U.S.C. § 301(a); *Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1010 (9th Cir. 2017); *see also United States ex rel. Berge v. Bd. Of Tr. of the Univ. of Ala.*, 104 F.3d 1453, 1463 (4th Cir. 1997) (“[T]he shadow actually cast by the [Copyright] Act’s preemption is notably broader than the wing of its protection.”). Plaintiffs’ “unfair” UCL claim satisfies both prongs and cannot survive preemption.

Subject Matter of Copyright. Like in the original Complaints, Plaintiffs’ UCL claim is explicitly based on their “Infringed Works,” which are books. *See* Am. Compl. ¶¶ 71 (UCL claim), 22 (defining “Infringed Works”). Books meet the definition of “literary works,” which fall within the “subject matter of copyright” under Section 102. 17 U.S.C. § 101 (listing “books” as an example of “literary works”); § 102 (listing “literary works” as a category of the subject matter of copyright). Accordingly, the “subject matter” of the UCL claim falls within the “subject matter of copyright.” *Id.* § 301(a). Plaintiffs have never disputed this point.

Equivalent Rights. To survive preemption under Section 301, a plaintiff must also show that the rights the state-law claim seeks to vindicate are “qualitatively different from” the rights protected by Section 106 of the Copyright Act. *Laws v. Sony Music Ent., Inc.*, 448 F.3d 1134, 1143–44 (9th Cir. 2006). “The state right may be narrower, broader, or contain somewhat different elements, yet it will still be preempted if its essence is the same as the federal right.” 6 PATRY ON COPYRIGHT § 18:16 (Mar. 2024 update).

1 Plaintiffs’ UCL claim is qualitatively indistinguishable from their direct copyright
2 infringement claim. The essence of the UCL claim, in Plaintiffs’ own words, is OpenAI’s “us[e]
3 [of] Plaintiffs’ Infringed Works to train ChatGPT.” Am. Compl. ¶ 71. According to Plaintiffs,
4 this “use” occurs when OpenAI “cop[ies] . . . text” from their books in order to “extract[]
5 expressive information” from them. Am. Compl. ¶ 33. But the right to control the
6 “cop[ying]...[of] text” and “extract[ion] [of] expressive information” from copyrighted works, *see*
7 Am. Compl. ¶ 33, is equivalent to the right to control reproduction of those works, *see* 17 U.S.C.
8 § 106(1), regardless of whether that copying is labeled a “use.”

9 Indeed, the factual bases of the two claims are indistinguishable. The basis of Plaintiffs’
10 UCL claim is the creation of “reproductions” of Plaintiffs’ books and use of those “unauthorized
11 copies” to create a language model. *See* Am. Compl. ¶¶ 73–74. Those are the same allegations
12 that supply the factual basis for Plaintiffs’ copyright claim. *See id.* ¶¶ 65–66 (alleging that OpenAI
13 “made copies of Plaintiffs’ books” to use “during the training process”); *see also id.* ¶ 68 (alleging,
14 in copyright claim, that creation of a language model based on books violates the 17 U.S.C.
15 § 106(2) right to prepare “derivative works”), *id.* ¶ 73 (alleging, in UCL claim, that creation of a
16 “commercial product based on . . . stolen writings and ideas” is “unfair”).

17 In other words, the “underlying nature of [the] state law claim[]” is identical to Plaintiffs’
18 copyright claim, which renders the state-law claim subject to preemption. *See Laws*, 448 F.3d at
19 1144 (finding plaintiff’s UCL claim preempted because the “alleged misappropriation by the
20 defendants [] are part and parcel of the copyright claim”); *Kodadek*, 152 F.3d 1209, 1213 (finding
21 plaintiff’s UCL claim preempted where it was “based solely on rights equivalent to those protected
22 by the federal copyright laws”). In a similar case involving OpenAI’s alleged “use” of plaintiffs’
23 source code to train large language models, this Court has held on two separate occasions that
24 claims “principally concern[ing] the unauthorized reproduction of [plaintiffs’ works] to prepare
25 derivative works—not the unlawful use of an end-product or output . . . fall under the purview of
26 the Copyright Act.” *GitHub, Inc.*, 2024 WL 235217 at *7-8 (finding state law claims preempted);
27 *GitHub, Inc.*, 672 F. Supp. 3d 837, 857 (same). Accordingly, Plaintiffs’ UCL claim, which
28 fundamentally concerns the rights of reproduction and preparation of derivative works of

1 Plaintiffs' copyrighted works, also fails.

2 **B. The Dismissal Should Be With Prejudice**

3 "[W]here the plaintiff has previously been granted leave to amend and has subsequently
4 failed to add the requisite particularity to its claims, the district court's discretion to deny [further]
5 leave to amend is particularly broad." *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981,
6 1007 (9th Cir. 2009). Here, Plaintiffs have made no attempt to supply the Court with additional
7 allegations that could support a UCL claim under that law's "unlawful" and "fraudulent" prongs.
8 *See supra*. Instead, Plaintiffs simply reassert the "same theor[ies]" and allegations that this Court
9 (and multiple others in this district) have already rejected. *Welgus v. TriNet Grp., Inc.*, No. 15-cv-
10 03625, 2017 WL 6466264, at *6 (N.D. Cal. Dec. 18, 2017) (dismissing with prejudice), *aff'd*, 765
11 Fed. App'x 239 (9th Cir. 2019); MTD Order at 8–9. That is grounds for dismissal with prejudice.

12 As to Plaintiffs' claim under the UCL's "unfair" prong, "dismissal [] without leave to
13 amend" is appropriate because the claim's defect "lies in the legal theory, not the factual
14 allegations." *Brown v. Van's Int'l Foods, Inc.*, No. 22-cv-00001, 2022 WL 1471454, at *6 (N.D.
15 Cal. May 10, 2022). Courts routinely dismiss such claims with prejudice after finding that a
16 plaintiff cannot simply plead around Copyright Act preemption. *See, e.g., Young Money*
17 *Entertainment, LLC v. Digerati Holdings, LLC*, No. 12-cv-07663, 2012 WL 5571209, at *9 (C.D.
18 Cal. Nov. 15, 2012) (dismissing UCL claim with prejudice because "the First Amended Complaint
19 expressly bases the claims on equivalent rights granted by the Copyright Act" such that "any
20 attempt to amend the UCL claim to avoid preemption would be futile"); *Comparison Med.*
21 *Analytics, Inc. v. Prime Healthcare Servs., Inc.*, No. 14-cv-3448, 2015 WL 12746228, at *7 (C.D.
22 Cal. Apr. 14, 2015) (finding that "unfair competition claim" is "premised on use of [plaintiff's]
23 copyrighted work" and dismissing with prejudice because "amendment would be futile"). That is
24 particularly appropriate here, where Plaintiffs were aware that their claim "may be preempted by
25 the Copyright Act," *see* MTD Order at 10 n.6, and nevertheless were unable to supplement their
26 pleadings with any allegations that might remove the claim from the scope of preemption, *see*
27 *generally* Am. Compl.

28

1 **V. CONCLUSION**

2 For the foregoing reasons, OpenAI requests dismissal of Count II of the First Consolidated
3 Amended Complaint with prejudice.

4
5 Dated: March 27, 2024

Respectfully submitted,

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ATTESTATION

I, Andrew M. Gass, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred in its filing.

Dated: March 27, 2024

/s/ Andrew M. Gass