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7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION  
10

11 ATARI INTERACTIVE, INC.,

12 Plaintiff,

13 vs.

14 SUNFROG, LLC,

15 Defendant.

16 AND RELATED ACTIONS  
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Case No. 3:18-cv-04949-JST  
*[Related to Case Nos. 3:18-cv-03451- JST;  
3:18-cv-03843-JST & 3:18-cv-04115-JST]*

Hon. Jon S. Tigar

**PLAINTIFF ATARI INTERACTIVE,  
INC.'S MEMORANDUM OF LAW IN  
OPPOSITION TO DEFENDANT  
SUNFROG, LLC'S PARTIAL  
MOTION TO DISMISS**

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1 Plaintiff Atari Interactive, Inc. (“Atari”) submits this memorandum of law in  
2 opposition to the motion by Defendant SunFrog, LLC (“SunFrog”) for an order  
3 pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing Atari’s  
4 claim for unfair competition (Count V).

5 **I. Introduction**

6 Atari is one of the most iconic video game brands in history, and it owns a  
7 portfolio comprising many valuable intellectual properties emanating from its long  
8 term commercial success. SunFrog hosts a website on which it has brazenly  
9 promoted and offered for sale goods depicting many of these properties without  
10 Atari’s consent. Atari thus sued SunFrog, asserting such theories as trademark  
11 counterfeiting, copyright infringement, and, as relevant to the present motion,  
12 common law unfair competition.

13 In its motion, SunFrog contends that Atari’s claim for unfair competition is  
14 preempted by section 230 of the Communications Decency Act. This case does not  
15 mark the first time SunFrog has been sued for the sorts of activities Atari complains  
16 of; in fact, as SunFrog itself describes, it has faced “a slew of lawsuits.” Def. Mem.  
17 at 3:9. SunFrog has attempted to raise this preemption argument to defeat an unfair  
18 competition claim at this early stage in at least one case from within this “slew.” As  
19 before, the attempt should fail.

20 **II. Argument**

21 **A. Legal Standard**

22 Atari does not dispute SunFrog’s recitation of the legal standard surrounding  
23 courts’ evaluation of motions to dismiss under Rule 12(b)(6) of the Federal Rules of  
24 Civil Procedure as far as it goes. However, Atari notes that SunFrog’s challenge  
25 does not appear to emanate from the sufficiency Atari’s factual allegations. Rather,  
26 the theory appears to be that the *legal theory* as to Count V is defective as a matter  
27 of law. As such, the more relevant legal standard applicable to SunFrog’s motion  
28 comes from the first, not the second, prong of the Ninth Circuit’s language in

1 *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013): “Dismissal under Rule  
 2 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or  
 3 (2) fails to allege sufficient facts to support a cognizable legal theory.” The legal  
 4 theory supporting Atari’s allegations as to unfair competition is indeed cognizable.

5 **A. Atari’s Claim For Unfair Competition Is Not Preempted**

6 SunFrog’s motion is predicated upon the theory that Atari’s unfair  
 7 competition claim emanates from SunFrog’s activities as nothing more than “a  
 8 provider . . . of an interactive computer service.” *See* Def. Mem. at 5:21. Indeed,  
 9 absent that status, the company would fail to meet the first element it acknowledges  
 10 must be satisfied for section 230 of the Communications Decency Act to apply,  
 11 which is a prerequisite for preemption. To support its conclusion that it is simply an  
 12 interactive computer service provider, SunFrog points to allegations in the  
 13 complaint acknowledging that SunFrog operates a website that hosts designs  
 14 uploaded by users, not created by SunFrog itself. These allegations, SunFrog  
 15 alleges, constitute admissions that conclusively establish this prong of the section  
 16 230 analysis.

17 The problem with SunFrog’s theory is that Atari never stated this was *all*  
 18 SunFrog had done. On the contrary, Atari also plainly alleged that SunFrog *creates*  
 19 and *distributes* the infringing products in a physical form. *See, e.g.*, Compl. at ¶ 16  
 20 (“SunFrog is . . . creating . . . massive quantities of counterfeit Atari products.”)  
 21 SunFrog’s arguments may well suffice to establish that it is not the publisher or  
 22 speaker of information so long as that information merely appears on its website.  
 23 But the complaint adequately alleges that SunFrog itself creates and distributes  
 24 physical products incorporating these infringing designs. Section 230 has no  
 25 application whatsoever to these activities.

26 Indeed, the foregoing was precisely the court’s conclusion when SunFrog  
 27 raised identical arguments in *Bravado International Group Merchandising Services,*  
 28 *Inc. v. Gearlaunch, Inc.*, No. 16-civ-8657 (MWF), 2018 WL 6017035 (C.D. Cal.

1 Feb. 9, 2018). There, the court rejected SunFrog's motion based on its recognition  
2 that "the gravamen of Plaintiffs' claims is not that Defendants are 'publishers' or  
3 'speakers' of information that is provided by other content providers, but that that  
4 Defendants manufacture and sell infringing merchandise, the designs for which are  
5 provided by third parties." *Id.* at \*6. The Court further noted that none of the cases  
6 SunFrog cited in support of its motion—many of which it has cited here as well—  
7 involved claims based on the actual production and sale of goods. The sound  
8 reasoning of the *Bravado* court should be adopted here as well.

9 **III. Conclusion**

10 For the foregoing reasons, SunFrog's attempt to resuscitate a preemption  
11 argument that was previously and justifiably rejected should be denied. Atari  
12 respectfully requests that the partial motion to dismiss be denied, and that Sunfrog  
13 be ordered to answer Count V of the Complaint within ten days of the denial of its  
14 motion to dismiss.

15  
16 Dated: July 18, 2019

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19 By: /s/ Keith J. Wesley

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**PROOF OF SERVICE**

**Atari Interactive, Inc. v SunFrog. LLC**  
**USDC, Northern District of California - Case No. 3:18-CV-04949-JST**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 2121 Avenue of the Stars, Suite 2800, Los Angeles, CA 90067.

On July 18, 2019, I served true copies of the following document(s) described as **PLAINTIFF ATARI INTERACTIVE, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT SUNFROG, LLC'S PARTIAL MOTION TO DISMISS** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on July 18, 2019, at Los Angeles, California.



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Diane Torosyan

**SERVICE LIST**

***Atari Interactive, Inc. v SunFrog, LLC***  
**USDC, Northern District of California - Case No. 3:18-CV-04949-JST**  
**[Related to Case Nos. 3:18-cv-03451- JST; 3:18-cv-03843-JST; and 3:18-cv-04115-JST]**

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