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 10 *CLOUDFLARE, INC.*

11 **UNITED STATES DISTRICT COURT**  
 12 **CENTRAL DISTRICT OF CALIFORNIA**  
 13 **WESTERN DIVISION—LOS ANGELES**

14 DENIECE WAIDHOFER, an  
 individual; MARGARET  
 15 MCGEHEE, an individual; and  
 RYUU LAVITZ, LLC, a  
 16 Massachusetts limited liability  
 company,

17 Plaintiffs,

18 vs.

19 CLOUDFLARE, INC., a Delaware  
 20 corporation; BANGBROS.COM,  
 INC., a Florida corporation;  
 21 SONENTA TECHNOLOGIES,  
 INC., a Florida corporation; MULTI  
 22 MEDIA LLC, a California limited  
 liability company; CRAKMEDIA  
 23 INC., a Canadian corporation; and  
 JOHN DOES 1-21,

24 Defendants.

Case No. 2:20-cv-06979-FMO-AS

**DEFENDANT CLOUDFLARE’S  
 NOTICE OF MOTION AND MOTION  
 FOR SANCTIONS PURSUANT TO  
 RULE 11**

Judge: Hon. Fernando M. Olguin  
 Date: January 28, 2021  
 Time: 10:00 a.m.  
 Place: Courtroom 6D – 6th Floor  
 350 W. 1st Street  
 Los Angeles, CA 90012

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

2 PLEASE TAKE NOTICE THAT on Thursday, January 28, 2021 at 10:00 a.m.  
3 or as soon thereafter as this matter may be heard before the Honorable Fernando M.  
4 Olguin, U.S. District Court Judge, Defendant Cloudflare, Inc. (“Cloudflare”) will, and  
5 hereby does, move this Court under Rule 11 of the Federal Rules of Civil Procedure  
6 and the Court’s inherent power, for an Order imposing sanctions against Plaintiffs and  
7 their counsel (collectively “Plaintiffs”) for making false representations in pleadings to  
8 this Court, for failure to reasonably investigate Plaintiffs’ allegations before filing their  
9 First Amended Complaint, and for pursuing their false allegations after notice without  
10 a reasonable basis, in bad faith, and for an improper purpose.

11 Cloudflare’s Motion is based on this Notice of Motion and Motion, the  
12 accompanying Memorandum of Points and Authorities, the Declaration of Jennifer A.  
13 Golinveaux filed herewith, the pleadings and papers on file herein, other records on file,  
14 and any further material and argument presented to the Court at the time of the hearing.  
15 This Motion is made following notice to counsel by motion served on Plaintiffs on  
16 December 4, 2020. Pursuant to Rule 11(c)(2), Plaintiffs’ counsel was given 21 days to  
17 withdraw or correct their misrepresentations but failed to do so.

18 In light of the foregoing, Cloudflare respectfully requests that the Court  
19 (1) sanction Plaintiffs and their counsel pursuant to Rule 11 of the Federal Rules of  
20 Civil Procedure and the Court’s inherent power, by striking Plaintiffs’ false and baseless  
21 allegations from the First Amended Complaint as set forth in Cloudflare’s Motion;  
22 (2) award Cloudflare its reasonable attorneys’ fees associated with this Motion, and  
23 hold Plaintiffs and their counsel, Reese Marketos LLP and Reiter Gruber LLP, jointly  
24 and severally liable for same; and (3) award any other relief deemed appropriate by the  
25 Court pursuant to Rule 11(c)(4) and the Court’s inherent authority to deter repetition of  
26 Plaintiffs’ conduct or comparable conduct by others similarly situated.

27 ///

28 ///

1 Dated: December 29, 2020

WINSTON & STRAWN LLP

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By: /s/ Jennifer A. Golinveaux  
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1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs’ First Amended Complaint (“FAC”) attempts to shore up a fatally  
4 flawed theory of contributory copyright infringement claim against Cloudflare, Inc.  
5 (“Cloudflare”) by inventing a set of new “allegations” that are simply false. Moreover,  
6 it is evident that Plaintiffs failed to conduct a reasonable investigation, and thus lacked  
7 an objectively reasonable basis for those allegations. Even within the context of the  
8 admittedly permissive nature of the Federal Rules, which permits Plaintiffs to make  
9 plausible claims based on reasonable beliefs and take broad-ranging discovery in the  
10 attempt to support those claims, Plaintiffs are not permitted to invent facts out of whole  
11 cloth in the attempt to sweep in a defendant that is not directly tied to the underlying  
12 offense. Still less are they permitted to stubbornly refuse to alter their course when they  
13 are *repeatedly* called on their false statements. That is why the extraordinary remedies  
14 available under Rule 11 are appropriate here.

15 Plaintiffs’ FAC attempts to reach out and implicate Cloudflare under a dubious  
16 theory of secondary copyright liability, based on the false allegation that Cloudflare  
17 created and deployed a product (Argo Tunnel) for the purpose of supporting the alleged  
18 violations of the direct infringers. But it is clear that Argo Tunnel is a cyber security  
19 product of general applicability, created for and used by thousands of users. And fatal  
20 to Plaintiffs’ claims, Argo Tunnel *was never used by the Thothub.tv website* or any of  
21 its subdomains, which were the alleged source of the direct infringement.

22 Plaintiffs and their counsel have been given multiple chances to avoid this  
23 motion, when Cloudflare’s counsel repeatedly asked by letter and email that they either  
24 justify the allegations or correct them, and again when Cloudflare served this motion  
25 on Plaintiff pursuant to Rule 11. Rather than taking these warnings seriously, however,  
26 Plaintiffs and their counsel refused to provide any basis for the false allegations and  
27 doubled down on their misguided strategy of asserting and maintaining baseless claims.  
28 Plaintiff has now had three strikes: (1) a fabricated RICO conspiracy complaint that



1 they withdrew without even attempting to defend against a motion to dismiss, (2) a FAC  
2 that fabricates a completely new set of facts essential to their claims about the services  
3 provided by Cloudflare, and (3) a refusal to correct any of these issues when Cloudflare  
4 pointed them out repeatedly, in both discovery responses and a Rule 11 letter.  
5 Cloudflare has already been put to considerable cost and distraction responding in good  
6 faith to Plaintiffs' claims, but having had its initial motion to dismiss ignored  
7 completely, and based on Plaintiffs' persistence in creating new fabrications in the FAC,  
8 as well as its failure to act in good faith in response to Cloudflare's Rule 11 letter,  
9 Cloudflare has no other recourse than to bring a formal motion under Rule 11.

10 As set forth below, Plaintiffs and their counsel should be sanctioned for two  
11 reasons:

12 *First*, Plaintiffs and their counsel violated Rule 11(b)(3) by failing to conduct a  
13 reasonable investigation before filing the FAC; and

14 *Second*, Plaintiffs and their counsel violated Rule 11(b)(1) and abused the judicial  
15 process by knowingly or recklessly maintaining false and frivolous allegations for the  
16 improper purpose of harassing Cloudflare with overbroad copyright infringement  
17 claims, evading an early dispositive motion and forcing Cloudflare to defend at great  
18 cost, or settle, factually baseless claims.

19 The Court should sanction Plaintiffs and their counsel under Rule 11(c) and the  
20 Court's inherent powers, strike the false allegations from the FAC, and hold Plaintiffs  
21 and their counsel jointly and severally liable for Cloudflare's reasonable attorneys' fees  
22 associated with defending against these false allegations.

## 23 **II. STATEMENT OF FACTS**

### 24 **A. The Initial Complaint and Cloudflare's Motion to Dismiss**

25 Plaintiff Denise Waidhofer, an online model, originally filed suit against  
26 Cloudflare and several other unrelated companies, after her self-published adult images  
27 were allegedly leaked by her own subscribers and fans (to whom she made them  
28 available) and posted on the Thothub.tv website. ECF 1 ("Complaint" or "Compl.").

1 Waidhofer’s initial Complaint attempted to spin these vague allegations of copyright  
2 infringement by unidentified third parties into multiple federal racketeering claims  
3 based on a fanciful “conspiracy” between Cloudflare, the Thothub.tv website domain,  
4 two apparently unrelated media companies, and twenty-one Doe defendants (identified  
5 only by online pseudonyms). Compl. ¶¶ 14, 17. She also brought direct and secondary  
6 copyright infringement claims, as well as a state law unfair negligence claim, against  
7 Cloudflare. Waidhofer’s Complaint was riddled with unfounded speculation, much of  
8 it false. Notably, for example, she falsely alleged “on information and belief” that  
9 unidentified Cloudflare representatives discussed “Thothub’s operations and goals”  
10 with unidentified members of its “leadership team” before entering into a contract for  
11 services. Compl. ¶ 168.

12 On October 14, 2020, Cloudflare moved to dismiss Waidhofer’s Complaint in its  
13 entirety. Among other issues, Cloudflare noted that the Complaint’s allegation about  
14 the supposed negotiation between Cloudflare and Thothub was false and had apparently  
15 been invented for purposes of the Complaint. ECF 57 (Cloudflare’s Mot. to Dismiss) at  
16 21. Cloudflare also pointed out numerous flaws in Plaintiffs’ contributory infringement  
17 claim: among other things, that the services Cloudflare allegedly provided for the  
18 Thothub.tv website are available from other online service providers, and Cloudflare  
19 lacked the ability to “take simple measures to prevent further damage to copyrighted  
20 works,” a bedrock requirement for contributory infringement liability in the Ninth  
21 Circuit. *Perfect 10, Inc. v. Giganews, Inc.*, 847 F. 3d 657, 671 (9th Cir. 2017) (citation  
22 omitted).

23 **B. Plaintiffs’ First Amended Complaint (“FAC”)**

24 After letting the deadline to oppose Cloudflare’s motion pass without comment,  
25 Waidhofer joined with two new Plaintiffs to file a First Amended Complaint (“FAC”)  
26 on November 4, 2020. The FAC dropped Waidhofer’s far-fetched RICO claims and  
27 state law negligence claim against Cloudflare and named a new Defendant having no  
28 connection whatsoever to Cloudflare. The FAC also dropped the thothub.tv web domain

1 as a named defendant, since Waidhofer had conceded in response to the Court’s Order  
2 to Show Cause that Thothub was “simply a web domain,” ECF 67 at 2. Tellingly, the  
3 FAC also omitted the Complaint’s allegations of the non-existent negotiations between  
4 Cloudflare and the so-called “leadership team” of the thothub.tv website.

5 The new FAC contains two claims against Cloudflare, for direct and contributory  
6 copyright infringement. As in the original Complaint, the FAC relies heavily on  
7 conclusory statements and unsourced allegations, most of them simply repeated from  
8 the Complaint. But the FAC also contains a new set of false allegations.

9 As Plaintiffs acknowledge in their FAC, Cloudflare offers a security service it  
10 calls the “Argo Tunnel,” which encrypts data as it moves between a customer’s origin  
11 web server and Cloudflare’s nearest data center. FAC ¶ 203 (quoting Cloudflare’s  
12 website, *see* “Argo Tunnel” description at <https://www.cloudflare.com/products/argo-tunnel/>). For heightened security, the Argo Tunnel service functions without opening  
13 any public, inbound ports, better enabling customers to resist online attacks including  
14 volumetric DDoS (distributed denial of service) attacks, and entirely blocking data  
15 breach attempts such as snooping of data in transit or brute force login attacks. *Id.*;  
16 <https://www.cloudflare.com/products/argo-tunnel/>.

17  
18 Thothub never subscribed to or used Cloudflare’s Argo Tunnel service.  
19 Plaintiffs’ allegation to the contrary is plainly an attempt to patch over the weaknesses  
20 Cloudflare pointed to in their contributory infringement claim—indeed, it is essential  
21 to the legal theory they present in the FAC. But a reasonable investigation would have  
22 shown that Plaintiffs’ speculative allegation lacks factual support.

23 Among other things, the FAC falsely alleges:

- 24 • That “Cloudflare set up an Argo Tunnel for Thothub.” FAC ¶ 206.
- 25 • That when the Argo Tunnel service was in place, “[a]ll public traffic accessing  
26 Thothub was directed through Cloudflare[,]” *id.* ¶ 206, and “[u]sers could not  
27 access Thothub except through Cloudflare[,]” *id.* ¶ 203.
- 28 • That “[i]f Cloudflare had ‘closed’ the Thothub tunnel (and ceased delivering

1 Thothub content that Cloudflare already had stored on its servers), as a  
 2 practical matter, Thothub would no longer have been available on the  
 3 Internet.” *Id.* ¶ 207.

4 The first allegation, purportedly made “on information and belief,” is simply  
 5 false. The second is based on the false premise that Cloudflare provided Argo Tunnel  
 6 services to thothub.tv. The third allegation is likewise false, and also both speculative  
 7 and implausible. The only conceivable purpose of these false allegations is to shore up  
 8 Plaintiffs’ contributory infringement claim, and thereby evade a motion to dismiss, by  
 9 presenting a fabricated basis on which to argue that Cloudflare should be held  
 10 contributorily liable for the alleged infringement on Thothub .

11 **C. Plaintiff Waidhofer’s Discovery Requests, and Cloudflare’s**  
 12 **Responses, Show That Plaintiffs’ “Argo Tunnel” Allegations Are**  
 13 **False**

14 On October 15, 2020, the day after Cloudflare’s motion to dismiss was filed,  
 15 Plaintiff Waidhofer served her First Set of Requests for Admission (“Plaintiff’s First  
 16 RFAs”) on Cloudflare pursuant to Fed. R. Civ. Pro. 36. Declaration of Jennifer A.  
 17 Golinveaux (Golinveaux Dec.) ¶ 2 & Ex. A. Among other things, she demanded that  
 18 Cloudflare admit or deny that it “provided Argo Tunnel services with respect to  
 19 Thothub.” *Id.*, Ex. A at 3 (Request No. 6). Cloudflare timely responded to Plaintiff’s  
 20 First RFAs on November 16. *Id.* at ¶ 3 & Ex. B. In response to Request for Admission  
 21 No. 6, Cloudflare “denie[d] that it provided Argo Tunnel services for the thothub.tv  
 22 website.” *Id.*, Ex. B at 7.<sup>1</sup>

23  
 24  
 25  
 26 <sup>1</sup> Plaintiffs’ attorney will likely attempt to argue that Cloudflare’s response to RFA 6 is  
 27 irrelevant to this Motion, *because* Cloudflare’s response focused on “the thothub.tv  
 28 website” instead of including unidentified “related forums, URLs, and web  
 domains.” *See* (Golinveaux Dec. Ex. B at 7). But since it is *precisely*, and *only*, “the  
 Thothub.tv website” that is the subject of Plaintiffs’ false allegations, that argument  
 carries no weight.

1           **D.     The Parties’ Correspondence and Plaintiffs’ Failure to Provide a**  
2                           **Reasonable Basis for Their False “Argo Tunnel” Allegations**

3           On November 18, 2020, Cloudflare’s counsel informed Plaintiffs’ counsel by  
4 letter that the FAC’s allegations concerning Cloudflare’s alleged provision of the “Argo  
5 Tunnel” service to Thothub were false. Golinveaux Dec. ¶ 4 & Ex. C (“Cloudflare’s  
6 Rule 11 Letter”). Cloudflare’s Rule 11 Letter asked that Plaintiffs’ counsel “either  
7 explain the basis for the purported reasonable basis for [their] belief, or confirm that  
8 [they] will withdraw these allegations.” *Id.* Ex. C at 3.

9           Plaintiffs responded by email the same day, flatly refusing Cloudflare’s request.  
10 *Id.* ¶ 5 & Ex. D. Instead of arguing that the allegations were true, or explaining why  
11 Plaintiffs believed they had a reasonable basis to make them, Plaintiffs’ counsel simply  
12 claimed, in conclusory fashion, to “have a good-faith basis for all of the factual  
13 allegations in the First Amended Complaint” and to be “aware of specific evidence that  
14 supports these allegations.” *Id.* Ex. D at 1. But counsel refused to provide any  
15 information about any such “good-faith basis” or “specific evidence,” on the basis that  
16 they “d[id] not have an obligation to disclose details about the conduct or results of  
17 [their] factual investigation” or their “discussions with consulting technical experts[.]”  
18 *Id.* Similarly, counsel refused to provide any information to support that Plaintiffs had  
19 a reasonable basis for their allegations, instead vaguely stating that the FAC made it  
20 “plain to any fair-minded observer” that “Plaintiffs’ counsel has conducted a  
21 substantial, in-depth investigation into the relevant facts[.]” *Id.*

22           Plaintiffs’ counsel then accused *Cloudflare* of having disobeyed unspecified  
23 “rules” by failing “to investigate the factual basis for Plaintiffs’ allegations,” failing to  
24 serve discovery requests on Plaintiffs, and “fail[ing] to conduct a reasonable and  
25 competent inquiry” into *Plaintiffs’* own allegations. *Id.* Ex. D at 1-2. He argued that  
26 Cloudflare was being “misleading and evasive” by focusing on the thothub.tv website—  
27 even though the FAC’s allegations *expressly concerned* the “website called  
28 Thothub.tv.” FAC ¶¶ 1 (defining “Thothub” as “a pirate website called Thothub.tv”),

1 206 (alleging “[o]n information and belief” that “Cloudflare set up an Argo Tunnel for  
2 Thothub.”). Finally, he demanded that Cloudflare, or its counsel, “represent that  
3 Cloudflare never provided Argo Tunnel services with respect to thothub.tv,  
4 forum.thothub.tv, or any other URLs associated with these web domains[.]” Golinveaux  
5 Dec. Ex. D at 2.

6 In response, Cloudflare’s counsel confirmed that Cloudflare had not provided  
7 Argo Tunnel services to the thothub.tv website, or to *any* of its subdomains,<sup>2</sup> including  
8 forum.thothub.tv. Golinveaux Dec. ¶ 6 & Ex. E.

9 Plaintiffs’ counsel still refused to withdraw the false allegations, instead asserting  
10 that “forum.thothub.tv” was “a different and separately hosted domain from  
11 Thothub.tv,” and arguing that Cloudflare’s counsel “still ha[d] not ... represent[ed] that  
12 Cloudflare did not provide Argo Tunnel services for forum.Thothub.tv[.]” *Id.* Ex. E at 2.  
13 Cloudflare’s counsel again responded, explaining that forum.thothub.tv was, in fact, a  
14 subdomain of the thothub.tv website, and reiterating that her earlier email had therefore  
15 “answered [Plaintiffs’] question with respect to *that and any other subdomain.*” *Id.* at 1  
16 (emphasis added). In other words, even if “forum.Thothub.tv” were not a  
17 “subdomain”—and regardless of whether Plaintiffs’ attorney clearly understands what  
18 a “subdomain” is—that question has been asked and answered.

19 To date, Plaintiffs have refused to withdraw or correct their false allegations.

### 20 **III. ARGUMENT**

#### 21 **A. Legal Standard**

##### 22 **1. Rule 11 of the Federal Rules of Civil Procedure**

23 “[T]o deter baseless filings in district court ... Rule 11 imposes a duty on  
24 attorneys to certify that they have conducted a reasonable inquiry and have determined  
25 that any papers filed with the court are well grounded in fact, legally tenable, and not

26 <sup>2</sup> A “subdomain,” as the name implies, is simply a domain that is a part of another  
27 (main) domain. *See* <https://en.wikipedia.org/wiki/Subdomain> (defining “subdomain”).  
28 A subdomain is typically indicated by placing a period between the name of the  
subdomain and the name of the “main” domain. *See id.* (noting that, “[f]or example,  
[in] the english wikipedia domain: en.wikipedia.org ... [t]he *en* is a subdomain.”).

1 ... [presented] for any improper purpose.” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S.  
2 384, 393 (1990) (internal quotation marks and citation omitted). Merely prefacing an  
3 allegation with the words “on information and belief” is insufficient: the plain language  
4 of Rule 11 requires that the filer’s “knowledge, information, and belief... [must be]  
5 formed after *an inquiry reasonable under the circumstances.*” Fed. R. Civ. P. 11(b)  
6 (emphasis added); *see Delphix Corp. v. Actifo, Inc.*, 2014 WL 4628490, at \*2 & n.3  
7 (N.D. Cal. Mar. 19, 2014) (“Using the phrase [‘on information and belief’] provides no  
8 ... protection as it cannot lessen the requirements of reasonable pre-suit investigation  
9 under the [Federal] rules.”). Because “[t]he attorney’s conduct” must be “reasonable  
10 under the circumstances,” a mere “good faith belief in the merits of a case is insufficient  
11 to avoid sanctions.” *Tahfs v. Proctor*, 316 F.3d 584, 594 (6th Cir. 2003) (citations  
12 omitted); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829 (9th Cir. 1986), *abrogated*  
13 *on other grounds by Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (same,  
14 agreeing with authority that “[t]here is no room for a pure heart, empty head defense  
15 under Rule 11”) (citation omitted); *Hudson v. Moore Business Forms Inc.*, 836 F.2d  
16 1156, 1159 (9th Cir. 1987) (motions based on unsupported factual allegations may  
17 violate Rule 11’s “improper purpose” standard irrespective of plaintiff’s subjective  
18 intent). The signing attorney must “conduct an adequate investigation *before* filing the  
19 complaint.” *Holgate v. Baldwin*, 425 F.3d 671, 677 (9th Cir. 2005) (emphasis added);  
20 *Bus. Guides Inc. v. Chromatic Comms. Enter.*, 498 U.S. 533, 551 (1991).

21 “[S]anctions must be imposed on the signer of a paper if ... [the filing] is *both*  
22 *baseless and* made without a reasonable and competent inquiry.” *In re Keegan Mgmt.*  
23 *Co., Sec. Litig.*, 78 F.3d 431, 434 (9th Cir. 1996) (quoting *Townsend v. Holman*  
24 *Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1990) (*en banc*)) (emphases in original);  
25 *Avedisian v. Mercedes-Benz USA, LLC*, 2014 WL 47466, at \*1 (C.D. Cal. Jan. 2, 2014)  
26 (Gee, D.J.) (same). “The word ‘frivolous’ ... is a shorthand that [the Ninth Circuit] has  
27 used to denote” such a filing. *In re Keegan*, 78 F.3d at 434. Rule 11 sanctions are not  
28 limited to instances in which the pleading as a whole is frivolous or of a harassing

1 nature; rather, sanctions may be imposed for any improper or unwarranted allegations  
 2 even where one nonfrivolous claim has been pled, if the attorney has not conducted a  
 3 reasonable inquiry under the circumstances. *Townsend*, 929 F.2d at 1362-65. “Either  
 4 the improper purpose or frivolousness ground is sufficient to sustain a sanction[,]”  
 5 although “whether the paper is only frivolous or both harassing and frivolous could  
 6 affect the nature of the sanction or the amount of damages awarded as a result of the  
 7 sanction.” *Id.* at 1362 (9th Cir. 1990).

8 A party moving for Rule 11 sanctions bears the burden “to demonstrate why  
 9 sanctions are justified.” *O’Hagin’s, Inc. v. UBS AG*, 2017 WL 2992445, at \*2 (C.D.  
 10 Cal. April 3, 2017) (citing *Tom Growney Equip., Inc. v. Shelley Irr. Dev., Inc.*, 834 F.2d  
 11 833, 837 (9th Cir. 1987)). “A sanction imposed under [Rule 11] must be limited to what  
 12 suffices to deter repetition of the conduct or comparable conduct by others similarly  
 13 situated. The sanction may include nonmonetary directives[.]” Fed. R. Civ. P. 11(c)(4).  
 14 Monetary sanctions “may be composed of either or both a penalty payable to the court,  
 15 and/or an award of reasonable attorneys’ fees to the opposing party for those ‘fees and  
 16 other expenses incurred as a direct result of the violation.’” *Truesdell v. S. Cal.*  
 17 *Permanente Med. Grp.*, 209 F.R.D. 169, 175 (C.D. Cal. 2002) (quoting Fed. R. Civ. P.  
 18 11(c)(2)). The court may impose sanctions on “any attorney, law firm, or party that  
 19 violated the rule or is responsible for the violation.” Fed. R. Civ. P. 11(c)(1); *see also*  
 20 *Beam System, Inc. v. Checkpoint Systems, Inc.*, 1997 WL 423113, at \*8 (C.D. Cal. July  
 21 16, 1997) (imposing “joint and several” “responsibility of plaintiffs and their counsel  
 22 for payment of the [Rule 11] sanctions”). “Absent exceptional circumstances, a law firm  
 23 must be held jointly responsible for a violation committed by its partner, associate, or  
 24 employee.” Fed. R. Civ. P. 11(c)(1).

## 25 2. The Court’s Inherent Power to Sanction

26 “It is well established that courts have the inherent power to issue sanctions in  
 27 response to abusive litigation practices.” *In re Marshall*, 2013 WL 2370711, at \*6 (C.D.  
 28 Cal. May 29, 2013) (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-66



1 (1980)), *vacated in part on other grounds*, 2013 WL 12250539 (C.D. Cal. Dec. 9, 2013).  
 2 “Courts may levy sanctions against attorneys [and] clients[.]” *Id.* at \*6 (citing *Alkeyska*  
 3 *Pipeline Serv. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975)).

4 Sanctions under a court’s inherent powers “are available if the court specifically  
 5 finds bad faith or conduct tantamount to bad faith.” *Fink v. Gomez*, 239 F.3d 989, 994  
 6 (9th Cir. 2001). Thus, a court may impose “fee-based sanctions when a party has acted  
 7 in bad faith, vexatiously, wantonly, or for oppressive reasons, ... or has taken actions  
 8 in the litigation for an improper purpose.” *Id.* at 992 (citing *Chambers v. NASCO, Inc.*,  
 9 501 U.S. 32, 45-46 & n.10 (1991)). “Bad faith is present where an attorney knowingly  
 10 or recklessly raises a frivolous argument[.]” *Estate of Blas v. Winkler*, 792 F.2d 858,  
 11 860 (9th Cir. 1986) (citations omitted). Sanctions under the court’s inherent powers are  
 12 also available “for a variety of types of willful actions, including recklessness when  
 13 combined with an additional factor such as frivolousness, harassment, or an improper  
 14 purpose.” *B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091, 1108 (9th Cir. 2002) (quoting  
 15 *Fink*, 239 F.3d at 994). Thus, “an attorney’s reckless misstatements of law and fact,  
 16 when coupled with an improper purpose ... are sanctionable under a court’s inherent  
 17 power.” *Id.* (quoting *Fink*, 239 F.3d at 994). “[C]ases that have considered the district  
 18 court’s inherent power to sanction attorneys for litigating in bad faith have related such  
 19 sanctions to the amount of fees incurred by the opposing party...” *U.S. v. Blodgett*, 709  
 20 F.2d 608, 611 (9th Cir. 1983).

21 **B. Plaintiffs Failed to Reasonably Investigate Before Making Their**  
 22 **False Allegations That Cloudflare Provided Its “Argo Tunnel”**  
 23 **Service to Thothub**

24 “Where, as here, the complaint is the primary focus of Rule 11 proceedings, a  
 25 district court must conduct a two-prong inquiry to determine (1) whether the complaint  
 26 is legally or factually ‘baseless’ from an objective perspective, and (2) if the attorney  
 27 has conducted ‘a reasonable and competent inquiry’ before signing and filing it.”  
 28 *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002) (quoting *Buster v.*

1 *Greisen*, 104 F.3d 1186, 1190 (9th Cir. 1997)). “The inquiry whether the complaint is  
2 factually baseless” is an objective one, asking whether a “reasonable attorney” would  
3 “have believed plaintiff’s complaint to be well-founded in fact based on what a  
4 reasonable attorney would have known at the time[.]” *Willis v. City of Oakland*, 231  
5 F.R.D. 597, 598 (N.D. Cal. 2005). Assessing what a reasonable attorney would have  
6 known at the time of filing, in turn, assumes that the attorney has conducted a reasonable  
7 inquiry *before filing*. *See id.* at 600 (“[H]ad an investigation of the type made *after* the  
8 filing of defendants’ Rule 12(c) motion been conducted *prior* to the filing of plaintiff’s  
9 complaint,” it would have been clear that “the complaint was, objectively, factually  
10 baseless. After a reasonable investigation, a reasonable lawyer would have known the  
11 complaint was not well founded in fact.”) (emphases in original).

12 In their FAC, Plaintiffs falsely allege that Cloudflare “set up” its Argo Tunnel  
13 security service for a website that third parties allegedly used to store and display  
14 infringing content (the thothub.tv website, or “Thothub”). FAC ¶¶ 9, 203-207. Building  
15 on this false allegation, Plaintiffs make additional false allegations, claiming that this  
16 non-existent service made Cloudflare “the only way to access” the infringing website  
17 (FAC ¶¶ 203-204), and arguing that Cloudflare could have made the infringing content  
18 “no longer ... available on the Internet” by withdrawing its non-existent service from  
19 the website (FAC ¶ 207). As Cloudflare has repeatedly informed Plaintiffs’ counsel,  
20 each of these allegations is false because Cloudflare never provided Argo Tunnel  
21 services to the thothub.tv website, or any of its subdomains. Plaintiffs can point to no  
22 evidence that Cloudflare provided its Argo Tunnel service for the Thothub.tv website,<sup>3</sup>  
23 and have flatly refused to explain their basis for this false allegation. Their attorney’s  
24 repeated, vague claim that “there is a good faith basis for our allegations” carries no  
25 weight: a party’s subjective good faith belief in the truth of factual allegations is  
26 irrelevant to Rule 11, which requires an *objectively reasonable* investigation.

27 <sup>3</sup> Nor do Plaintiffs have any evidence that Cloudflare provided the Argo Tunnel service  
28 for any subdomain of thothub.tv (including the “forum.thothub.tv” subdomain)—  
although their allegations in the FAC concern only the thothub.tv website.

1 It is apparent that (i) there is no factual basis for Plaintiffs’ claims that Cloudflare  
2 provided its Argo Tunnel services to the Thothub.tv website, and (ii) no reasonable  
3 inquiry was conducted to determine whether a factual basis existed. Plaintiffs and their  
4 counsel should be sanctioned under Rule 11(b)(3) and 11(c) for filing and maintaining  
5 frivolous allegations in a vain attempt to support their weak contributory copyright  
6 infringement claim against Cloudflare.

7 First, there is no question of Plaintiffs’ allegations being factually *correct*: to the  
8 contrary, the only evidence available conclusively shows that Cloudflare did not  
9 provide Argo Tunnel service to Thothub. Cloudflare’s RFA Responses could not be  
10 clearer: Cloudflare “denie[d] that it provided Argo Tunnel services for the thothub.tv  
11 website”—precisely the opposite of what Plaintiffs baselessly allege. Golinveaux Dec.  
12 Ex. B at 7. And Cloudflare’s counsel has repeatedly confirmed that Cloudflare did not  
13 provide Argo Tunnel services to the thothub.tv website, or to *any* of Thothub’s  
14 subdomains. *Id.* Ex. E. Plaintiffs have failed to provide any evidence to the contrary.<sup>4</sup>

15 Second, it is evident that Plaintiffs and their counsel failed to conduct a  
16 reasonable investigation before making these false allegations. In response to  
17 Cloudflare’s letter and emails requesting an explanation of what reasonable steps  
18 Plaintiffs took to investigate before making their false allegations, Plaintiffs’ counsel  
19 simply reiterated that “there is a good faith basis for our allegations,” but refused to  
20 provide any further information on the grounds that Defendants “have no right to the  
21 products of our investigation.” *Id.* Ex. E at 1-2. But a subjective “good faith belief” in  
22 one’s own allegations is not sufficient to avoid sanctions under Rule 11.<sup>5</sup> Plaintiffs’  
23 counsel also failed to explain what if any relevance there is in his cryptic reference to a  
24 “Cloudflare Error 1003,” how it pertains to Plaintiffs’ pre-filing investigation, or how

25 \_\_\_\_\_  
26 <sup>4</sup> Plaintiffs’ counsel also went so far as to “encourage” Cloudflare’s counsel “to conduct  
27 due diligence on the veracity of [its] client’s representations.” Golinveaux Dec. Ex. E  
28 at 2. Calling one’s litigation opponent a liar is not evidence of any kind.

<sup>5</sup> Even if the subjective “good faith belief” of Plaintiffs’ counsel were relevant—which  
it is not—nothing supports counsel’s conclusory, fact-free claim that he had such a  
belief. *See generally* Golinveaux Dec. Ex. E.

1 it supports Plaintiffs’ allegations.<sup>6</sup> In an email, he alluded vaguely to “discussions with  
 2 consulting technical experts” as part of a purported “substantial, in-depth investigation  
 3 into the relevant facts and law in this case.” Golinveaux Dec. Ex. E at 3-4. But simply  
 4 relying on “experts” does not fulfill a plaintiff’s obligation to conduct an investigation  
 5 that is reasonable under the circumstances. *See, e.g., Ideal Instruments, Inc. v. Rivard*  
 6 *Instruments, Inc.*, 243 F.R.D. 322, 342–43 (N.D. Iowa 2007) (“Under the circumstances  
 7 of this case, it is simply no excuse for [a party] and its counsel to assert that they relied  
 8 on an ‘expert’ for the basis for their original preliminary injunction motion, precisely  
 9 because the flaws in the ‘expert’s’ evidence should have been so readily apparent on  
 10 any reasonable examination or inquiry.”) It is unclear (and Plaintiffs’ counsel makes no  
 11 effort to explain) how a reasonable investigation could have led a purported expert to a  
 12 false conclusion, or why a reasonable attorney would have relied on such an “expert.”

#### 13 **IV. CONCLUSION**

14 Baseless speculation and facts-optional assertions by Plaintiffs’ counsel  
 15 notwithstanding, it is plain—and the only evidence available shows—that Cloudflare  
 16 did not provide Argo Tunnel service for the Thothub.tv website. Although Cloudflare  
 17 has repeatedly informed Plaintiffs of the fact, Plaintiffs’ counsel has responded only  
 18 with bluster, vague generalities, and baseless demands that *Cloudflare* shoulder the  
 19 burden to investigate and disprove *Plaintiffs’* allegations. It is patent that Plaintiffs and  
 20 their counsel simply failed to conduct a reasonable pre-filing investigation, and that they  
 21 lack an objectively reasonable basis for these allegations in the FAC. Their allegations  
 22 are frivolous, but they refuse to withdraw them. Under both Rule 11 and the Court’s  
 23 inherent powers, sanctions are warranted.

24 \_\_\_\_\_  
 25 <sup>6</sup> A 1003 error occurs when a user attempts to access a specific Cloudflare IP address  
 26 by typing the IP address (instead of the website’s URL) into a web browser. *See*  
 27 <https://support.cloudflare.com/hc/en-us/articles/360029779472-Troubleshooting-Cloudflare-1XXX-errors#error1003>. Plaintiffs do not allege that users were unable to  
 28 access the Thothub.tv website via its URL—indeed, their entire theory of infringement  
 would collapse if the Thothub.tv website were not available to its users. In any event,  
 the 1003 error code says nothing, one way or another, about whether a website is using  
 the Argo Tunnel service.

1 Accordingly, Cloudflare respectfully requests that the Court:

2 (1) Strike the last sentence of FAC Paragraph 9, and FAC Paragraphs 203 through  
3 207, from the First Amended Complaint;

4 (2) Award Cloudflare its reasonable attorneys’ fees associated with this Motion,  
5 and hold Plaintiffs and their counsel, Reese Marketos LLP and Reiter Gruber LLP,  
6 jointly and severally liable for the same; and

7 (3) Award any other relief deemed appropriate by the Court pursuant to Rule  
8 11(c)(4) and the Court’s inherent authority to deter repetition of Plaintiffs’ conduct or  
9 comparable conduct by others similarly situated.

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