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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

)	
In re:)	Chapter 11
)	
FRONTIER COMMUNICATIONS)	Case No. 20-22476 (MG)
CORPORATION, et al., ¹)	
)	
Reorganized Debtors.)	(Jointly Administered)
)	

**FRONTIER’S NOTICE OF MOTION FOR JUDGMENT ON THE
PLEADINGS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(C)**

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law in Support of the above-captioned reorganized debtors (collectively, “Frontier” or the "Reorganized Debtors") Motion For Judgment on the Pleadings Pursuant to Federal Rule of Civil Procedure 12(c) (the "Motion"), and such other and further papers and proceedings as may be filed or had, Frontier, by and through undersigned counsel, pursuant to the *Case Management Order # 1 After Conference In Contested Matters of Copyright Claims Objections* (the "Order") [ECF No. 2229], moves this Court before the Honorable Martin Glenn, United States Bankruptcy Judge, U.S. Bankruptcy Court,

¹ The last four digits of Debtor Frontier Communications Corporation’s tax identification number are 9596. Due to the large number of debtor entities in these chapter 11 cases, which are jointly administered, a complete list of the debtor entities and the last four digits of their federal tax identification numbers are not provided herein. A complete list of such information may be obtained on the website of the Debtors’ proposed claims and noticing agent at <https://cases.ra.kroll.com/ftc>. The location of the Debtors’ service address for purposes of these chapter 11 cases is: 50 Main Street, Suite 1000, White Plains, New York 10606.

Southern District of New York, One Bowling Green, New York, New York 10004-1408, Courtroom 523, for an Order granting judgment in Frontier's favor pursuant to Federal Rule of Civil Procedure 12(c) and dismissing with prejudice all claims filed by certain Record Company Claimants² and Movie Company Claimants, and for such other and further relief as this Court deems just and proper.

PLEASE TAKE FURTHER NOTICE THAT, pursuant to the *Order*, the Record Company Claimants and the Movie Company Claimants Opposition Briefs (not to exceed 25 pages) (the "Opposition Brief(s)") shall be filed and served within twenty-eight (28) days after service of the Motion and Frontier may file and serve a Reply Brief (not to exceed 10 pages for each Opposition Brief) within fourteen (14) days after service of the Opposition Brief(s).

PLEASE TAKE FURTHER NOTICE THAT, the Court will schedule argument, if necessary, after conferring with counsel.

PLEASE TAKE FURTHER NOTICE that a copy of the Motion and other pleadings filed in these chapter 11 cases may be obtained free of charge by visiting the website of Prime Clerk LLC at <https://cases.ra.kroll.com/ft>. You may also obtain copies of the Motion and other pleadings filed in these chapter 11 cases by visiting the Court's website at <http://www.nysb.uscourts.gov> in accordance with the procedures and fees set forth therein.

[Remainder of page intentionally left blank]

² Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Brief in Support of their Motion for Judgment as a Matter of Law, filed contemporaneously herewith.

Dated: New York, New York
December 5, 2023

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By: /s/John P. Campo

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2023, I caused a true and accurate copy of the foregoing document to be served upon counsel the Record Companies and Movie Companies by filing the foregoing via the Court's ECF system.

/s/ John P. Campo _____
John P. Campo

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:)	
)	Chapter 11
)	
FRONTIER COMMUNICATIONS)	Case No. 20-22476 (MG)
CORPORATION, et al.,)	
)	
Reorganized Debtors.)	(Jointly Administered)

**REORGANIZED DEBTORS' BRIEF IN SUPPORT OF THEIR MOTION
FOR JUDGMENT AS A MATTER OF LAW
ON ALL CLAIMS OF COPYRIGHT INFRINGEMENT**

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I. INTRODUCTION

The Record Company Claimants¹ and Movie Company Claimants² (collectively, “Claimants”) ask this Court to accept a theory of secondary liability for an internet company that just last term the U.S. Supreme Court unanimously rejected. The Claimants allege that the Reorganized Debtors (collectively “Frontier”), which through its operating entities merely connects people to the internet, is secondarily liable for alleged wrongdoing by their customers. Specifically, the Claimants allege that Frontier’s provision of internet service to people who may commit copyright infringement in cyberspace triggers Frontier’s liability because, the Claimants’ argument goes, Frontier was notified of it and had a duty to stop them. Accepting the Claimants’ allegations as true, their claims fail as a matter of law.

In May 2023, the Supreme Court dismissed claims of secondary liability against communication providers of the online platforms Twitter, Facebook, and YouTube alleged to have

¹ The “Record Company Claimants” are Claimants UMG Recordings, Inc., Capitol Records, LLC, and ABKCO Music & Records, Inc. (collectively, the “Universal Claimants”); Sony Music Entertainment, Arista Music, Arista Records LLC, LaFace Records LLC, Sony Music Entertainment US Latin, Volcano Entertainment III, L.L.C., and Zomba Recording LLC (collectively, the “Sony Claimants”); and Atlantic Recording Corporation, Atlantic Records Group LLC, Bad Boy Records LLC, Big Beat Records Inc., Elektra Entertainment Group Inc., Fueled by Ramen LLC, Maverick Recording Company, Nonesuch Records Inc., Rhino Entertainment Company, Rhino Entertainment LLC, Roadrunner Records, Inc., Warner Music Inc., Warner Music International Services Limited, Warner Music Nashville LLC, and Warner Records Inc. (collectively, the “Warner Claimants”).

² The “Movie Company Claimants” are Rambo V Productions, Inc., Millennium Funding, Inc., Fun Mom Dinner, LLC, Bedeviled, LLC, SF Film, LLC, Rise Up, LLC, Status Update LLC, Dallas Buyers Club, LLC, After Productions, LLC, AMBI Distribution Corp., The Rest of Us, Inc., Ace in the Hole Productions, LP, Killing Link Distribution, LLC, Fallen Productions, Inc., Shock and Awe, LLC, Justice Everywhere Productions LLC, Family of the Year Productions, LLC, Gunfighter Productions, LLC, TBV Productions, LLC, Screen Media Ventures, LLC, LHF Productions, Inc., Definition Delaware LLC, American Cinema International, Inc., Groove Tails Productions, LLC, Dead Trigger Movie, LLC, Laundry Productions, Inc., Rupture CAL, Inc., YAR Productions, Inc., Hannibal Classics Inc., Cell Film Holdings, LLC, Venice PI, LLC, Eve Nevada, LLC, Hunter Killer Productions, Inc., Voltage Holdings, LLC, UN4 Productions, Inc., Colossal Movie Productions, LLC, After II Movie, LLC, HB Productions, Inc., I Am Wrath Productions, Inc., Badhouse Studios, LLC, Future World One, LLC, Wonder One, LLC, Bodyguard Productions, Inc., MON, LLC, Backmask, LLC, Millennium IP, Inc., Millennium Media, Inc., Dubious Productions, Inc., Morgan Creek Productions, Inc., Black Butterfly Film, LLC, WWE Studios Finance Corp., Outpost Productions, Inc., Nikola Productions, Inc., and Union Patriot Capital Management, LLC.

knowingly permitted customers to use their online platforms to commit wrongdoing, concluding that “we generally do not think that internet or cell service providers incur culpability merely for providing their services to the public writ large.” *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 499 (2023). The Court thus held that an online service provider cannot be liable merely for knowing that the wrongdoers were using its services and failing to stop them. The Court reasoned that “a contrary holding would effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them,” which “would run roughshod over the typical limits on tort liability.” *Id.* at 503.

Twitter, particularly when read in combination with the Supreme Court’s copyright-specific cases, bars the Claimants’ claims. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) (holding that “the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes.”); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 932-933 (2005) (confirming the holding of *Sony* that copyright law “absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one’s products will be misused.”). Yet the Claimants attempt to do exactly what *Twitter*, *Sony*, and *Grokster* foreclose: hold Frontier, a company that merely connects people to the internet, liable simply because it allegedly knows about wrongdoing on the internet by its customers but fails to terminate their accounts.

Rather than plausibly allege copyright infringement under the controlling common law principles of secondary tort liability, the Claimants instead jump directly to the “Digital Millennium Copyright Act,” 17 U.S.C. § 512 (hereafter “§ 512” or “DMCA”). But the DMCA

does not create any cause of action, prescribe any standard of liability, or impose any duty upon mere providers of internet service like Frontier to receive, process, or act upon notices of its customers' alleged copyright infringement. Nor does the DMCA require a service provider to “monitor[] its service or affirmatively seek[] facts indicating infringing activity.” 17 U.S.C. § 512(m). The DMCA is not a freestanding law but instead is a section that Congress added to the preexisting Copyright Act, 17 U.S.C. § 101 *et. seq.* And it does not even come into play unless and until secondary copyright infringement is plausibly alleged (and ultimately proven) in the first instance under common law principles of tort liability. *See* 17 U.S.C. § 512(l) (“The failure of a service provider’s conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider’s conduct is not infringing under this title or any other defense.”). To the contrary, the DMCA, which is aptly titled “*Limitations* on liability relating to material online,” *added* protections for online providers that might otherwise be found liable for secondary copyright infringement. 17 U.S.C. § 512(a) – (d) (emphasis added). However, the Court need not and should not reach issues specific to the DMCA, and if the Court were to do so, the DMCA offers the Claimants no refuge.

II. CLAIMANTS’ ALLEGATIONS

Instead of suing peer-to-peer file sharing companies or online piracy platforms whose primary purpose and use is to infringe copyrighted works, the Claimants seek hundreds of millions of dollars from Frontier, a mere provider of essential services to the public just as it is getting back on its feet after emerging from bankruptcy. As is at issue here, Frontier connects people to the internet. Nothing more, nothing less. It is simply an Internet Service Provider (“ISP”)—a mere conduit to a sprawling online system “which transmits information by billions of people, most of

whom use the platforms for interactions that once took place via mail, on the phone, or in public areas.” *Twitter*, 598 U.S. at 503.³

The Claimants do not allege that Frontier itself committed any direct acts of copyright infringement. Rather, the Claimants allege that Frontier “materially contributes” to its customers’ alleged infringements—and thus is secondarily liable—by providing them with internet service knowing that some of them are using that service to commit copyright infringement. The Record Companies allege that, “***Through the provision of its services***, Frontier knowingly contributed to, and reaped substantial profits from, massive copyright infringement committed by hundreds, if not thousands, of its subscribers...” (Rec. Cos. Am. Proof of Claim, ECF No. 2130 at 1, ¶ 3.) (emphasis added). *See also id.* at 5 ¶ 20 (“***Frontier’s provision of high-speed Internet service*** materially contributed to these direct infringements.”) (emphasis added). The Movie Companies likewise allege that Frontier “***provides the means such as Internet service*** for the [Frontier] subscribers to infringe the copyright protected Works.” *E.g.*, Mov. Cos. Proof of Claim, Claim No. 2283, attached hereto as **Exhibit 1**, at 4 ¶ 16 (emphasis added), Mov. Cos. Proof of Claim, Claim No. 3812, attached hereto as **Exhibit 2**, at 7 ¶ 26.⁴

³ The acronym “ISP” is used imprecisely throughout the case law and does not actually appear in the DMCA. Section 512 defines only “Service Providers” but distinguishes between companies like Frontier that merely connect users *to* the internet and companies that provide services *over* the internet. *See* 17 U.S.C. §§ (k)(1)(A) & (k)(1)(B). The Copyright Office thus distinguishes between “Online Service Providers (OSPs)” generally and “ISPs” specifically, which are a subcategory of OSP. *See Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System, FAQs for “I operate an OSP (or think I do),”* U.S. Copyright Office, www.copyright.gov/512/ (last visited Dec. 5, 2023).

⁴ The Movie Companies have advanced over fifty separate Proofs of Claim that do not materially differ in their substantive allegations or grounds for relief. Exhibit 1 is illustrative of the Prepetition Proofs of Claim and Exhibit 2 is illustrative of the Administrative Proofs of Claim. The Movie Company Claims were not filed on the ECF docket, but with the claims agent, and therefore examples are attached hereto for the Court’s convenience.

Based on Frontier’s provision of internet service to customers who themselves allegedly directly infringed, the Claimants bring counts against Frontier for contributory and vicarious copyright infringement. *See* Rec. Cos. Am. Proof of Claim, ECF No. 2130 at 5-6, ¶¶ 23-30 and at 6-7, ¶¶ 31-37); *e.g.*, Exhibit 1, Mov. Cos. Proof of Claim, Claim No. 2283, at 4-5, ¶¶ 20-24). In their Administrative Claims, the Movie Company Claimants also include a claim unique to them: That someone allegedly tweaked the electronic titles to their works, which they allege somehow induced, enabled, facilitated, or concealed infringements of their works under 17 U.S.C. § 1202(b)(3). **Exhibit 2**, Mov. Cos. Proof of Claim, Claim No. 3812, at 6, ¶¶ 20-23. But the basis for Frontier’s alleged liability for that claim is the same as all the others, namely, that Frontier’s delivery of internet service “provided the means” for those supposed violations to occur. *Id.* at 7 ¶ 26.

The Claimants’ “DMCA notices” are fundamental to their claims. The Claimants allege that their notices alerted Frontier to its customers’ alleged copyright infringement and required Frontier to take the extreme measure of terminating accounts, which in this day and age of remote meetings, virtual classes, and online social interactions is nothing short of draconian. The Record Companies allege, for example, that “[t]he infringing activity of Frontier’s subscribers that is the subject of Claimants’ claims, and for which Frontier is secondarily liable, occurred after Frontier received multiple notices of a subscriber’s infringing activity.” Rec. Cos. Am. Proof of Claim, ECF No. 2130 at 2 ¶ 8. The Movie Companies likewise allege that Frontier “failed to terminate any repeat infringers and/or take any meaningful actions against these subscribers in response to these Notices[.]” Exhibit 1, Mov. Cos. Proof of Claim, Claim No. 2283, at 3 ¶ 6. Although the Claimants allege that Frontier has the power to terminate customer accounts, the Claimants cannot plausibly allege that Frontier has a right or ability to supervise and control its customers’ activities

on the internet. The Claimants cannot and do not allege, for example, that Frontier has the technological ability to monitor what people do on the internet.

As explained below, accepting the Claimants' allegations as true, they fail as a matter of law to plausibly allege secondary copyright liability on the part of Frontier.

III. LEGAL STANDARD

On November 21, 2023, this Court allowed Frontier to file a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Case Management Order, ECF No 2229, at 3-4 ¶ 8. The standard for a Rule 12(c) motion for judgment on the pleadings is identical to a Rule 12(b)(6) motion for failure to state a claim. *Lively v. WAFRA Inv. Advisory Grp., Inc.*, 6 F.4th 293, 301 (2d Cir. 2021). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (internal quotation marks and citation omitted). A claim is plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Determining whether a claim is plausible is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. As such, “[f]actual allegations must be enough to raise a right to relief above the speculative level[.]” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

The Copyright Act affords copyright owners certain exclusive rights, including the right to reproduce copies of their works and to distribute them to the public. 17 U.S.C. §§ 106(1) & (3). Under the Copyright Act, “[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright[.]” 17 U.S.C. § 501(a). The Record Company Claimants mention §§ 106 and 501 only in passing and conclusory fashion, Rec. Cos. Am. Proof of Claim,

ECF No. 2130 at 5 ¶ 24, at 6 ¶ 32; the Movie Companies do not cite them all, *see generally*, Mov. Cos. Proof of Claim, Claim No. 2283, Ex. 1. The Claimants do not allege that Frontier directly infringed any of their rights under the Copyright Act. Rather, the Claimants allege that Frontier secondarily infringed by not stopping alleged direct infringement by Frontier’s internet customers. Unlike the Patent Act, 35 U.S.C. §§ 271(b) & (c), the Copyright Act makes no mention of secondary liability—it “does not expressly render anyone liable for infringement committed by another.” *Sony*, 464 U.S. at 434, 440. Thus, secondary liability for copyright infringement, of which contributory and vicarious liability are a subspecies, is determined according to common law principles of tort law. *Id.* at 435.

In *Twitter*, the Court held that a provider of online services cannot be liable merely for knowing that the wrongdoers were using its services and failing to terminate their accounts. The Court acknowledged that a person may be responsible for the wrongdoing of another if he or she helps to complete its commission. *Twitter*, 598 U.S. at 488. But tort law, like criminal law, “typically sanction[s] only wrongful conduct, bad acts, and misfeasance,” *id.* at 489, which generally requires that the defendant gives “knowing and substantial assistance to the primary tortfeasor.” *Id.* at 491. Though the wrongdoing alleged in *Twitter* was extreme, the conceptual core of secondary liability is that the defendant “consciously and culpably participated in a wrongful act so as to help make it succeed.” *Id.* at 493 (citation and internal quotations omitted).

The common law test specifically for contributory copyright infringement tracks *Twitter*’s recitation of secondary liability generally: Whether a party, “with knowledge of the infringing activity, induce[s], cause[s] or materially contribute[s] to the infringing conduct of another.” *Bus. Casual Holdings, LLC v. YouTube, LLC*, No. 22-3007-CV, 2023 WL 6842449, at *2 (2d Cir. Oct. 17, 2023) (citation omitted); *see also* 3 Nimmer on Copyright § 12.04 (2023) (3)(a) (“However, in

order to be deemed a contributory infringer, the authorization or assistance must bear some direct relationship to the infringing acts, and the person rendering such assistance or giving such authorization must be acting in concert with the infringer.”). The common law test for vicarious copyright liability requires that the accused company has both (1) the right and ability to supervise and control—not just affect—the third party’s infringing activity, and (2) a direct financial interest in such activities. *Hartmann v. Amazon.com, Inc.*, No. 20 CIV. 4928 (PAE), 2021 WL 3683510, at *9 (S.D.N.Y. Aug. 19, 2021) (dismissing vicarious infringement claim where the plaintiff relied on conclusory allegations and failed to allege how the defendant controlled alleged direct infringer); *see also Oban US, LLC v. Nautilus, Inc.*, No. 3:13CV1076 JBA, 2014 WL 2854539, at *8 (D. Conn. June 23, 2014) (granting motion to dismiss and observing that “[i]n order for vicarious liability to attach, however, the defendant must have the right and ability to *supervise* and *control* the infringement, *not just affect it.*”) (emphasis added; internal quotations omitted). “[R]eceiving a onetime set-up fee and flat periodic payments for service,” as is the case with the monthly provision of internet services, ordinarily does not constitute receiving a “financial benefit directly attributable to the infringing activity.” *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004) (quoting S. Rep. No. 105-190, at 44-45).

IV. ARGUMENT

A. Twitter, Sony, and Grokster Require Dismissal With Prejudice.

In *Twitter*, the Supreme Court unanimously (with one concurrence) held that communications providers cannot be held secondarily liable for wrongdoing even if they know specific customers are using their services to do it. As with the Claimants’ allegations that Frontier “materially contributed” to its customers’ unlawful activity, the *Twitter* plaintiffs’ claim was “based on defendant’s provision of the infrastructure which provides material support” to the wrongdoers. 598 U.S. at 499 (citation and internal quotations omitted). Also as here, the *Twitter*

plaintiffs alleged defendants knew that wrongdoers made use of their online platforms and that “defendants failed to stop” them. *Id.* at 505. And like the Claimants here, the plaintiffs in *Twitter* alleged that despite having the ability to terminate those users’ accounts, the defendants did not do so. *Id.* at 501. In *Twitter*, it should be pointed out, terminating an account meant little more than removing the ability to post YouTube videos, for example, whereas the termination of customers’ internet accounts altogether—which is what the Claimants say Frontier should be doing—could have devastating affects for the average family particularly with our increased reliance on online services.

Even though the *Twitter* plaintiffs alleged that the defendants went beyond “passive aid” by, for example, running recommendation algorithms that connected wrongdoers (terrorist groups) with potential new recruits based on the content those organizations posted on their sites and the users’ search habits, *id.* at 498, the Court concluded that “the claim here rests less on affirmative misconduct and more on an alleged failure to stop” wrongdoers from using their internet platforms. *Id.* at 500. But, the Court observed, the law has “long been leery of imposing aiding-and-abetting liability for mere passive nonfeasance.” *Id.* The Supreme Court explained that “the concept of ‘helping’ in the commission of a crime or a tort has never been boundless.” *Id.* at 488. Otherwise, “those who merely deliver mail or transmit emails could be liable for the tortious messages contained therein.” *Id.* at 489. Thus, the Court concluded that “we generally do not think that internet or cell service providers incur culpability merely for providing their services to the public writ large.” *Id.* at 499. The Court reasoned that “a contrary holding would effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them” and would “run roughshod over the typical limits on tort liability[.]” *Id.* at 503.

Though *Twitter* is not a copyright case, its general principle of secondary liability concerning an online provider of services accused of allowing wrongdoing to occur on its systems is on point and, particularly when considered in the context of the Supreme Court’s copyright-specific jurisprudence, is dispositive. For example, in *Sony* the plaintiffs alleged that Sony’s sale of devices that Sony knew were being used to infringe copyrighted works constituted contributory and vicarious infringement. 464 U.S. at 420. The Supreme Court rejected that claim, however, holding that “the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes.” *Id.* at 442. *See also id.* at 440 (noting that the Patent Act likewise “expressly provides that the sale of a ‘staple article or commodity of commerce suitable for substantial noninfringing use’ is not contributory infringement. 35 U.S.C. § 271(c)”). Since Sony’s copying device was “capable of substantial noninfringing uses,” its sale to the general public did not constitute copyright infringement. *Id.* at 456. *See also, Matthew Bender & Co. v. W. Pub. Co.*, 158 F.3d 693, 707 (2d Cir. 1998) (“In any event, we think the ‘substantial noninfringing use’ test is as applicable here as it was in *Sony*. The Supreme Court applied that test to prevent copyright holders from leveraging the copyrights in their original work to control distribution of (and obtain royalties from) products that might be used incidentally for infringement, but that had substantial noninfringing uses.”); *In re AutoHop Litig.*, No. 12 CIV. 4155 LTS KNF, 2013 WL 5477495, at *5 (S.D.N.Y. Oct. 1, 2013) (“Any argument that the mere provision of the technology or system through which customers can make copies constitutes infringement is foreclosed[.]”); *Cobbler Nevada, LLC v. Gonzales*, 901 F.3d 1142, 1149 (9th Cir. 2018) (“Providing internet access can hardly be said to be distributing a product or service that is not ‘capable of substantial’ or ‘commercially significant noninfringing uses.’ ”).

In *Grokster*, the Supreme Court reiterated *Sony's* central holding, stating that “mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability.” *Grokster*, 545 U.S. at 937. The Court in *Grokster* read *Sony* to have “barred secondary liability based on presuming or imputing intent to cause infringement solely from the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement.” *Id.* at 933. The Court reasoned that the doctrine of secondary copyright liability “absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one’s products will be misused.” *Id.* at 932-33. Only “where evidence goes beyond a product’s characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony's* staple-article rule will not preclude liability.” *Id.* at 935. The Court in *Grokster* noted, too, that although “*Sony's* advertisements urged consumers to buy the VCR [the accused device] to ‘record favorite shows’ or ‘build a library’ of recorded programs [], neither of these uses was necessarily infringing.” *Id.* at 931 (internal quotations and citations omitted). Thus, *Sony's* advertisements could not be construed to promote *infringement* as opposed to the product’s functional capabilities and benefits. *See* Rec. Cos. Am. Proof of Claim, ECF No. 2130, at 1, ¶ 2 (“Frontier markets its high-speed service as enabling subscribers to download 10 songs in 3.5 seconds.”).

In the end, the claims in *Grokster* were viable because, unlike a provider of internet service receiving notices of alleged copyright infringement, the defendants there were not “merely passive recipients of information about infringing use” but were distributors of software for which they “clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement.” *Id.* at 923-24. To be sure, the “principal object” of the

defendants' business models in *Grokster* "was use of their software to download copyrighted works," expressly trying to fill the void of the infamous shuttered Napster piracy platform. *Id.* at 924, 926. Put bluntly, "[t]he unlawful objective" of the defendants' product in *Grokster* was "unmistakable." *Id.* at 940. The Court thus unsurprisingly concluded "that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." *Id.* at 936-37.

Twitter, *Sony*, and *Grokster* leave no oxygen for the claims against Frontier to breathe. Frontier is even further removed from liability than the accused companies in those cases, as Frontier hosts no online platform like the defendants in *Twitter*, sells no software designed and promoted specifically to infringe copyrights like the defendant in *Grokster*, and markets no device used to duplicate copyrighted works like the defendant in *Sony*. The Claimants' core claim is that "[b]y purposefully ignoring and turning a blind eye to its subscribers' flagrant and repeated infringements, Frontier knowingly caused and materially contributed to the unlawful reproduction and distribution of Claimants' copyrighted works[.]" Rec. Cos. Am. Proof of Claim ECF 2130, at 6 ¶ 26. That claim runs head-on into *Twitter*, *Sony*, and *Grokster*. As the Supreme Court stressed in *Twitter*, "our legal system generally does not impose liability for mere omissions, inactions, or nonfeasance; although inaction can be culpable in the face of some independent duty to act, the law does not impose a generalized duty to rescue." *Id.* at 489. "The fact that some bad actors took advantage of these platforms [YouTube, Twitter, Facebook] is insufficient to state a claim that defendants knowingly gave substantial assistance" to the wrongdoers' acts. *Id.* at 503.

Likewise, the fact that some Frontier customers allegedly committed copyright infringement using Frontier's internet services cannot amount to a material contribution by

Frontier to the asserted wrongdoing. Merely providing high-speed internet service, whose primary purpose is legitimate and which most people use lawfully, simply cannot be a basis for secondary liability. Conduit ISPs like Frontier are nothing more than a connection to the vastness of the internet. The Claimants' claims against Frontier in 2023 are akin to seeking to hold Ma Bell liable in 1923 simply for providing communication service that She knows some have used to commit offenses. The Court can and should stop here and dismiss the Claimants' unsalvageable claims with prejudice.

B. The DMCA Does Not Create Any Cause Of Action, Prescribe Any Standard Of Liability, Or Impose An Independent Duty Upon Providers Of Internet Service.

The Court need not and should not reach issues specific to the DMCA, as the Claimants' claims fail as a matter of law for the reasons stated above. In all events, the DMCA does not help the Claimants' cause.

1. The DMCA is Not an Independent Basis for Liability.

If, and only if, the Claimants could plausibly allege secondary copyright infringement under traditional common law principles of tort liability—which, as explained above, they cannot—they would then have to grapple with the additional protections of the DMCA—the Safe Harbors in 17 U.S.C. § 512 (a) – (d) of the Copyright Act, which shield qualifying online Service Providers from all monetary liability. The Claimants' contention that, under § 512(i)(1)(A), Frontier did not “adopt and reasonably implement” a “policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers,” and that Frontier therefore does not qualify for the Safe Harbor of § 512(a), is entirely beside the point of whether Frontier is secondarily liable to begin with.

Based on the DMCA's text and history, the Second Circuit has observed that, “[r]ather than embarking upon a wholesale clarification” of various copyright doctrines, Congress elected to

leave current law in its evolving state and, instead, to create a series of ‘safe harbors’ for certain common activities of service providers.” *Viacom Int’l, Inc. v. YouTube*, 676 F.3d 19, 27 (2d Cir. 2012) (internal quotations and citation omitted) (considering the Safe Harbor under § 512(c)). Section 512 plainly states that a failure to satisfy a Safe Harbor does not equate to liability in the first instance:

(l) Other Defenses Not Affected.—

The failure of a service provider’s conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider’s conduct is not infringing under this title or any other defense.

17 U.S.C. § 512(l). Furthermore, 17 U.S.C. § 512(m) sets forth that a service provider is not required to “monitor[] its service or affirmatively seek[] facts indicating infringing activity.”

The contemporaneous Senate Report emphasizes that § 512 did not create any new liabilities or change the doctrines interpreting the Copyright Act under common law principles of secondary liability:

Similarly, new section 512 does not create any new liabilities for service providers or affect any defense available to a service provider. Enactment of section 512 does not bear upon whether a service provider is or is not an infringer when its conduct falls within the scope of section 512. *Even if a service provider’s activities fall outside the limitations on liability specified in the bill, the service provider is not necessarily an infringer;* liability in these circumstances would be adjudicated based on the doctrines of direct, vicarious or contributory liability for infringement as they are articulated in the Copyright Act and in the court decisions interpreting and applying that statute, which are unchanged by section 512.

S. Rep. No. 105-190, 55 (emphasis added). The Senate Report explains further that “[n]ew section 512 does not define what is actionable copyright infringement in the online environment, and does not create any new exceptions to the exclusive rights under copyright law. The rest of the Copyright Act sets those rules.” *Id.* Similarly, the contemporaneous House Report to the DMCA notes that failure to qualify for a DMCA Safe Harbor does not equate to liability, which are to be adjudicated under the unchanged common law doctrines of secondary liability:

Even if a service provider's activities fall outside the limitations on liability specified in the bill, *the service provider is not necessarily an infringer*; liability in these circumstances would be adjudicated *based on the doctrines of direct, vicarious or contributory liability for infringement as they are articulated in the Copyright Act and in the court decisions* interpreting and applying that statute, *which are unchanged by new Section 512*.

H.R. Rep. No. 105-551, 64 (emphasis added). Section 512, the Senate Report makes clear, "simply defines the circumstances under which a service provider, as defined in this Section, may enjoy a limitation on liability for copyright infringement." S. Rep. No. 105-190, 55. The Copyright Office thus advises Online Service Providers as follows:

FAQs for "I Operate an OSP (or think I do)": What happens if I do not qualify for a DMCA safe harbor?

If an OSP does not qualify for a DMCA safe harbor, a copyright owner may bring suit against the OSP seeking to hold the OSP liable either as a direct infringer, or for its users' infringing activities under a secondary liability theory. Failure to qualify for a safe harbor, however, will not automatically result in direct or secondary liability. Only if the court finds sufficient evidence that the OSP's actions constitute either direct infringement or facilitation of its users' infringing activities, may the OSP be liable in a civil case[.]

Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System, FAQs for "I operate an OSP (or think I do)," U.S. Copyright Office, www.copyright.gov/512/ (last visited Dec. 5, 2023).

Accordingly, the Claimants' invocation of the DMCA does not absolve them of the obligation to plausibly and properly allege that Frontier is secondarily liable under basic common law principles. *See Bus. Casual Holdings, LLC v. YouTube, LLC*, No. 21-CV-3610 (JGK), 2022 WL 17177970, at *8 (S.D.N.Y. Nov. 22, 2022) ("Business Casual cannot transform the DMCA's prerequisites for a safe harbor defense into the basis for an affirmative claim against YouTube."), *aff'd*, No. 22-3007-CV, 2023 WL 6842449 (2d Cir. Oct. 17, 2023). Which, as explained above, they cannot do.

2. The Claimants' DMCA Notices Did Not Confer Knowledge of Direct Infringement or Create an Independent Duty to Act.

The “DMCA notices” the Claimants sent to Frontier as a matter of law did not establish Frontier’s knowledge of specific instances of customers’ copyright infringement or create a duty on the part of Frontier to act in response to them. The Second Circuit has never endorsed the Claimants’ theory of applying DMCA notices to a conduit ISP like Frontier under § 512(a), though it has considered notices for online platforms that host or store material under subsection (c), which is where they belong. *See EMI Christian Music Group, Inc. v. MP3Tunes LLC*, 844 F.3d 79 (2d Cir. 2016); *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016); *Viacom*, 676 F. 3d 19.⁵

The Claimants allege they sent Frontier thousands of notices which they contend alerted Frontier to “its subscribers’ blatant and systematic use of Frontier’s Internet service to illegally download, copy, and distribute Claimants’ copyrighted music through illicit BitTorrent sites and other online file-sharing services.” Rec. Cos. Am. Proof of Claim ECF 2130, at 1 ¶ 4. *See also id.*, at 3 ¶ 14 (“Claimants’ DMCA notices advised Frontier of clear and unambiguous infringing activity by Frontier’s subscribers[.]”). The Claimants further contend that “Frontier failed to adequately respond to these notices” and “deliberately refused to take reasonable measure to curb its subscribers from using its service to infringe on the copyrights of others.” Rec. Cos. Am. Proof of Claim ECF 2130 at 2 ¶ 5. *See also id.*, at 4-5 ¶ 20; Ex. 1 at 3 ¶ 6 (alleging that Frontier “failed

⁵ Frontier acknowledges that some courts outside the Second Circuit have concluded that DMCA notices received by mere providers of internet service could be germane. *See, e.g., UMG Recordings, Inc. v. RCN Telecom Servs., LLC*, No. CV1917272MASZNQ, 2020 WL 5204067, at *8 (D.N.J. Aug. 31, 2020); *Sony Music Ent. v. Cox Commc’ns, Inc.*, 426 F. Supp. 3d 217, 232 (E.D. Va. 2019); *UMG Recordings, Inc. v. Grande Commc’ns Networks, LLC*, No. A-17-CA-365-LY, 2018 WL 1096871, at *1 (W.D. Tex. Feb. 28, 2018). This Court need not reconcile those cases, however, because they predate *Twitter* and, in any event, are nonbinding. Regardless, those decisions are plainly wrong for the reasons stated in this brief.

to terminate any repeat infringers and/or take any meaningful actions against these subscribers in response to these Notices....”). Based on all this, the Claimants seek to hold Frontier liable.

Those notices, however, have no legal or practical effect on a provider that simply connects people to the internet—they require no response or action. Under the plain language of § 512, the Claimants’ DMCA notices are a non-sequitur when it comes Frontier, a conduit ISP under § 512(a). Section 512 highlights the distinction between mere conduit ISPs like Frontier under subsection (a) and other types of service providers:

(k) Definitions.—

(1) Service Provider.—

(A) *As used in subsection (a), the term ‘service provider’ means* an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification of the content of the material as sent or received.

(B) As used in this section, *other than subsection (a)*, the term ‘service provider’ means....

17 U.S.C. § 512(k). Based on this distinction in the type of Service Provider, the Second Circuit has explained that the DMCA “established a series of four ‘safe harbors’ that allow qualifying service providers to limit their liability for claims of copyright infringement based on (a) ‘transitory digital network communications,’ (b) ‘system caching,’ (c) ‘information residing on systems or networks at [the] direction of users,’ and (d) ‘information location tools.’ 17 U.S.C. § 512(a)-(d).” *Viacom*, 676 F.3d at 27 (considering the safe harbor under subsection (c)). Section 512(n) emphasizes that the separate and distinction functions and criteria of subsections (a) – (d) must be honored and cabined:

(n) Construction.—

Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections **shall be based solely on the criteria in that subsection**, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.

17 U.S.C. § 512(n) (emphasis added).

The different criteria for the various Safe Harbors in subsections (a), (b), (c), and (d) are critically important to maintain because subsection (a)—the Safe Harbor for conduit ISPs like Frontier—simply does not contemplate “infringement notices” or any action by an ISP in response to them. To the contrary, conduit ISPs like Frontier under § 512(a) are plainly not included in the notice and takedown regime, as the following summary table depicts:

(a) Transitory Digital Network Communications	(b) System Caching	(c) Information Residing on Network at Users’ Direction	(d) Information Location Tools
For service provider that merely transmits, routes, or provides connection.	For service provider that temporarily stores material on its system or network.	For service provider that stores material that resides on its system or network.	For service provider that refers or links users to online location with infringing material.
<i>No notices of claimed infringement contemplated, knowledge imputed, or action to take in response.</i>	(b)(2)(E) Upon notification of claimed infringement as described in (c)(3), service provider must respond expeditiously to remove or disable access to material.	Upon notification of claimed infringement as described in (c)(3), service provider must respond expeditiously to remove or disable access to material.	(d)(3) Upon notification of claimed infringement as described in (c)(3), service provider must respond expeditiously to remove or disable access to material.

The contents of notices to service providers under § 512(b) – (d) are, as noted in the table above, described in § 512(c)(3) **and are specifically limited to that subsection**: “To be effective **under this subsection**, a notification of claimed infringement must. . . .”17 U.S.C. § 512(c)(3) (emphasis

added). DMCA notices are expressly not effective outside of subsection (c). And stating the obvious, subsection (a) is not part of subsection (c).

The Copyright Office thus explains that “[t]hree of the four types of online service providers must comply with the requirements of the notice-and-takedown system in order to qualify for the safe harbors.” www.copyright.gov/512/ (emphasis added). But not “mere conduits” under § 512(a). No notices are contemplated for conduit ISPs like Frontier, much less any action to take in response, as the Copyright Office explained in its 2020 DMCA Report, stating: “An ISP that acts as a mere conduit for online transmissions qualifies for the limitation on liability provided by section 512(a) ... *without having to participate in a notice-and-takedown process*....” *Id.* at 24-25 (emphasis added). Full Report available here: <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>. Unlike ISPs that serve as mere conduits under § 512(a), in “OSPs [Online Service Providers] seeking protection under the safe harbors in sections 512(b), (c), or (d), must . . . maintain a compliant notice-and-takedown process by responding expeditiously to remove or disable access to material claimed to be infringing upon receipt of proper notice from a copyright owner or the owner’s authorized agent.” *Id.* (emphasis added). Consistent with the above authority, the Eighth Circuit has observed that “Section 512(a) does not reference the notification provision of § 512(c)(3)(A), nor does it contain the remove-or-disable-access provision found in the three safe harbors created for the storage, caching, and linking functions” under § 512(c)-(d). *In re. Charter Communications, Inc., Subpoena Enforcement Matter, v. Charter Communications, Inc.*, 393 F.3d 771, 776 (8th Cir. 2005) (quashing subpoena to conduit ISP for customers’ identities since the subpoena provision of § 512(h)(4) is specifically and inextricably tied to the notice provision of § 512(c), which is

inapplicable to a conduit ISP under subsection (a)). *See also, Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003) (same).

Thus, Frontier need not maintain or abide by a notice-and-takedown process. And its alleged failure to do so in a manner the Claimants demand can trigger no independent duty to act, let alone liability. The Claimants might as well send notices to the Postmaster General identifying addresses suspected of distributing copyrighted works through the mail, or to Con Edison for supplying power to homes from where computers might be used to unlawfully distribute songs. Notices to them would be equally inapposite.

This conclusion, the Eighth Circuit has stated, “makes sense where an ISP merely acts as a conduit for infringing material—rather than directly storing, caching, or linking to infringing material—because the ISP has no ability to remove the infringing material from its system or disable access to the infringing material.” *In re Charter*, 393 F.3d at 776. It makes sense, too, because information provided in a notice intended for parties hosting or storing material does not confer any knowledge upon a conduit ISP of alleged specific infringing activity since there is no way for anyone to know whether a conduit ISP’s customer may have actually shared a copyrighted work with the public and, if they did, with whom. *See Recording Indus. Ass'n of Am.* 351 F.3d at 1235 (“Verizon can not remove or disable one user’s access to infringing material resident on another user’s computer because Verizon does not control the content on its subscribers’ computers.”). *See also, Millennium Funding, Inc. v. 1701 Mgmt. LLC*, 576 F. Supp. 3d 1192, 1213 (S.D. Fla. 2021), *amended on reconsideration in part*, No. 21-CV-20862, 2022 WL 845468 (S.D. Fla. Mar. 22, 2022) (citing *ALS Scan, Inc. v. Steadfast Networks, LLC*, 819 F. App’x 522, 524 (9th Cir. 2020), in which the Ninth Circuit held that the “number of [copyright infringement] notices is legally irrelevant” because “the number of notices that [the defendant] previously received gives

at most a general knowledge that infringement will likely occur again in the future; this does not give notice of any specific acts of infringement that are actually occurring.”).

In contrast, the DMCA notice-and-takedown regime does make sense for Service Providers under § 512(b), (c), and (d) because in those contexts the allegedly infringing content *can* be identified and removed upon proper notification:

- As described above, the Safe Harbor for Service Providers under **subsection (b)** applies to system caching, such as when a Google search displays a copy of a webpage in its search results so a person searching can preview the results of his or her search. *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1110-11 (D. Nev. 2006) (granting summary judgment to Google under the “system cache” Safe Harbor of subsection (b), and on other grounds).

- The Safe Harbor for Service Providers under **subsection (c)** applies to information that is stored or maintained on a party’s servers, and not merely passing through the servers, such as YouTube where users upload videos onto YouTube that are stored on YouTube’s servers and made available on YouTube’s website. *See Viacom Int’l Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 122 (S.D.N.Y. 2013) (granting summary judgment on remand to online host of videos under subsection (c)’s Safe Harbor). *See also EMI Christian Music Grp.*, 844 F.2d at 86 (applying DMCA notice regime to a recidivist online “locker room” host of copyrighted works that touted itself as the “[l]argest copyright infringer of all time back at it again”).

- The Safe Harbor for Service Providers under **subsection (d)** applies to parties who have users that post links to infringing content on third-party websites. *Totally Her Media, LLC v. BWP Media USA, Inc.*, No. CV1308379ABPLAX, 2015 WL 12659912, at *10 (C.D. Cal. Mar. 24, 2015) (finding application of 17 U.S.C. § 512(d) Safe Harbor was warranted).

In short, for Service Providers under subsections (b), (c), and (d), the allegedly infringing materials, or links to infringing materials, do not merely pass through the entity's networks such that they cannot be located at a later time upon receipt of a DMCA notice. But that is simply not true for a conduit ISP, which is why Congress did not impose the notice and takedown regime on Service Providers like Frontier under subsection (a).

At bottom, the Claimants' effort to hold Frontier liable for a supposed failure to take what they deem to be appropriate action upon receiving notices threatens to rewrite § 512. Needless to say, the Court should apply the law as written. But, again, the Court should not and need not reach these § 512-specific issues because the Claimants' claims fail as a matter of law under threshold common law principles of secondary liability.

V. CONCLUSION

For the foregoing reasons, Frontier respectfully requests that the Court dismiss the Record Companies' and Movie Companies' claims in their entirety, with prejudice.

Dated: New York, New York
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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2023, I caused a true and accurate copy of the foregoing document to be served upon counsel the Record Companies and Movie Companies by filing the foregoing via the Court's ECF system.

/s/ John P. Campo _____

John P. Campo