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16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA**
WESTERN DIVISION

18 **ALS SCAN, INC.,**

19 *Plaintiff,*

20 v.

21 **CLOUDFLARE, INC., et al.,**

22 *Defendants.*

Case No. 2:16-cv-05051-GW-AFM

**Memorandum of Points and Authorities
in Opposition of Plaintiff ALS
Scan, Inc.'s Motion for Preliminary
Injunction Against Defendant Tiger
Media Inc.**

Date: October 3, 2016
Time: 8:30 a.m.
Place: Courtroom 10

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Introduction

1
2 Plaintiff ALS Scan, Inc. has filed this lawsuit and moved for a mandatory prelim-
3 inary injunction designed to force Defendant Tiger Media Inc. to endure a process
4 by which ALS may continuously dictate to Tiger how it must run its online advertis-
5 ing network. The proposed injunction would force Tiger to implement wide-ranging
6 content review protocols for all existing and potential publisher customers, in an on-
7 going effort to identify and “weed out” any potential infringement of ALS’s content
8 by third parties. This breathtaking request for Tiger to police the Internet is unwar-
9 ranted because ALS’s motion fails every criterion relating to imposition of a prelim-
10 inary injunction. ALS has not met its heavy burden of showing that the law and facts
11 clearly favor its position, let alone a likelihood of success on the merits. It cannot
12 show irreparable harm. The balance of hardships weighs against an injunction. Fi-
13 nally, the public interest disfavors an injunction that would hobble Tiger’s ad net-
14 work.

Statement of Facts

15
16 Tiger is an online advertising brokerage company. Van Ginneken Decl. ¶ 3. Tiger
17 acts as a middleman between “advertisers” who buy ad space, and “publishers” who
18 operate independent websites. *Id.* The model is similar to a real estate agent, who
19 does not own the property and simply connects a buyer with a seller. *Id.* Publishers
20 and advertisers use their own independent hosting, domains, software, and other in-
21 frastructure to operate their websites and distribute their content. *Id.*

22 In 2006, Tiger created the JuicyAds online ad platform, which automates the de-
23 livery of ads (referred to as an ad network). *Id.* at ¶ 4. Participating publishers and
24

1 advertisers use JuicyAds to buy and sell ad space and raw traffic. *Id.* The JuicyAds
2 service is widely available to businesses and individuals, who may sign up at Juicy-
3 Ads.com by completing the registration form and accepting the Terms of Service
4 (“TOS”) online. *Id.* Over 93,000 advertisers and publishers participate in the Juicy-
5 Ads ad network. *Id.*

6 JuicyAds is a self-serve platform, which gives advertisers the ability to place their
7 own ads on third-party publisher sites without the assistance of sales representatives.
8 *Id.* at ¶ 5. The JuicyAds platform provides a “marketplace” displaying the ad spots
9 available for purchase on participating publisher sites (only sites with volumes of over
10 1,000 visitors per day are included), similar to what Zillow.com does for real estate.
11 *Id.* Only registered JuicyAds users can access the information relating to publisher
12 sites listed in the JuicyAds “marketplace.” *Id.* at ¶ 6.

13 In the JuicyAds ad network, the publisher’s role is limited to signing up with Juicy-
14 Ads.com, adding its websites, adding ad zones (i.e., the location where the ad will be
15 displayed on the publisher’s site) for sale, and placing JuicyAds ad code (which calls
16 the ad) in the code for the publisher site. *Id.* at ¶ 9. The publisher site’s functionality,
17 content, and distribution are not affected by the addition or removal of the JuicyAds
18 ad code. *Id.* at ¶ 10. Publishers can add, move, modify, or completely remove ad spots
19 from their sites at any time, without notice to Tiger. *Id.* The ad code is fully inde-
20 pendent of the publisher site and even if the ad code is suspended (or removed), the
21 publisher’s site continues to operate unaffected by the suspension (or removal). *Id.*

22 In the TOS, Tiger prohibits participating publishers and advertisers from violat-
23 ing Tiger’s or any third party’s intellectual-property rights. *Id.* at ¶ 11 (citing TOS
24

1 ¶¶ IV(a)(vii), X(a). Under the TOS, each “[u]ser takes full responsibility for the
2 selection and use of the JuicyAds’ service.” *Id.* at ¶ 12 (quoting TOS ¶ III). In addi-
3 tion, “All [u]sers agree to use JuicyAds’ service for purposes that are lawful within
4 their jurisdiction, and agree not to use JuicyAds to distribute ... unlawful content.”
5 *Id.*

6 Under the TOS, JuicyAds users remain “solely responsible for the development,
7 operation[,] and maintenance of their website and all materials that appear on
8 [u]sers’ websites used in connection with the JuicyAds service.” *Id.* at ¶ 13 (quoting
9 TOS ¶ XIII). In addition, “JuicyAds expressly disclaims any ownership or control of
10 [u]sers’ sites or content.” *Id.* Further, each “[u]ser acknowledges full responsibility
11 for their websites and their activities in conjunction.” *Id.* And each “[u]ser shall be
12 responsible for ensuring materials made available through their websites do not vio-
13 late or infringe upon ... the rights of any third party.” *Id.* “JuicyAds reserves the
14 right ... to terminate its services to any [w]ebsite at any time, at its sole and exclusive
15 discretion.” *Id.* (quoting TOS ¶ IV).

16 Tiger does not create, operate, or control any of the third-party publisher sites
17 that participate in the JuicyAds ad network, including the third-party publisher sites
18 that ALS identified in the First Amended Complaint (“FAC”). *Id.* at ¶ 14. Tiger
19 does not advertise or otherwise promote to consumers any of the third-party pub-
20 lisher sites that participate in the JuicyAds ad network, including the third-party pub-
21 lisher sites that ALS identified in the FAC. *Id.* Tiger’s actions are limited to promot-
22 ing to advertisers the availability of ad space on participating publisher sites. *Id.*

23 Tiger does not host or operate the servers on which third-party publisher sites
24

1 reside, including the publisher sites that ALS identified in the FAC. *Id.* at ¶ 15. Tiger
2 does not provide JuicyAds customers (or anyone else) with tools to locate infringing
3 material; nor does any infringing material ever reside on or pass through any network
4 or computer Tiger owns or operates. *Id.* None of the alleged infringing materials
5 identified by ALS are stored, maintained, or available on systems or facilities oper-
6 ated by Tiger. *Id.* Nor does Tiger make software available that facilitates infringement
7 or the distribution or location of infringing material. *Id.* Finally, Tiger does not facil-
8 itate or control consumer access to third-party publisher sites, or offer a site or a ser-
9 vice through which consumers could search for or download infringing content. *Id.*

10 Tiger does not direct any activity within any third-party publisher site, preap-
11 prove any content on any third-party publisher site, or have the ability to affect or
12 control conduct by third-party publishers or any other third party. *Id.* at ¶ 16. Any
13 instructions or support Tiger gives regarding how to use the JuicyAds ad network are
14 focused on how to use the platform not on how publishers should operate their web-
15 sites. *Id.* Tiger does not control the layout, appearance, or content of third-party pub-
16 lisher sites. *Id.* Nor does Tiger have the right or ability to remove, disable, or block
17 access to infringing material located on third-party publisher sites, *id.*, let alone have
18 the right or ability to require third-party publishers to do the same. *Id.*

19 Tiger's only recourse for publisher misbehavior is to suspend or terminate the
20 publisher's account and discontinue payment of any ad revenues to the publisher.
21 *Id.* at ¶ 17. When Tiger suspends or terminates a publisher's account, JuicyAds stops
22 serving ads to the publisher's site. *Id.* But the ad zones and ad code remain on the
23 publisher's site because Tiger does not have the ability to remove ad zones or ad
24

1 code from third-party websites. *Id.*

2 Suspending or terminating a publisher from the JuicyAds ad network does not
3 stop that publisher from continuing to reproduce, display, and distribute infringing
4 material on its site. *Id.* at ¶ 18. Nor does it terminate that publisher’s ability to host
5 and serve any infringing content on its site. *Id.* The terminated or suspended pub-
6 lisher may still reproduce a third party’s copyrighted works (including ALS’s) and
7 post them on its site, all without Tiger’s aid, approval, or even knowledge. *Id.* Thus,
8 although it can terminate or suspend a publisher’s account, Tiger cannot stop the
9 publisher from continuing its infringing activity on its site. *Id.*

10 **Standard of Review**

11 “A preliminary injunction is an ‘extraordinary and drastic remedy’ ...; it is never
12 awarded as of right.” *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008). “A plaintiff
13 seeking a preliminary injunction must establish that he is likely to succeed on the
14 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,
15 that the balance of equities tips in his favor, and that an injunction is in the public
16 interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). “In each case,
17 courts ‘must balance the competing claims of injury and must consider the effect on
18 each party of the granting or withholding of the requested relief.’” *Id.* at 24 (cita-
19 tion omitted). “The policy against the imposition of judicial restraints prior to an
20 adjudication of the merits becomes more significant when there is reason to believe
21 that the decree will be burdensome[.]” 11A C. Wright, A. Miller, & M. Kane, *Federal*
22 *Practice and Procedure* § 2948.2 (2d ed. 1995).

23 “A preliminary injunction can take two forms. A prohibitory injunction prohibits
24

1 a party from taking action and ‘preserve[s] the status quo pending a determination
2 of the action on the merits.’” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH &*
3 *Co.*, 571 F.3d 873, 878 (9th Cir. 2009) (citation omitted). “A mandatory injunction
4 ‘orders a responsible party to “take action.”’” *Id.* at 879 (citations omitted). “A
5 mandatory injunction “goes well beyond simply maintaining the status quo
6 [p]endente lite [and] is particularly disfavored.”’” *Id.* (citations omitted). “In gen-
7 eral, mandatory injunctions ‘are not granted unless extreme or very serious damage
8 will result and are not issued in doubtful cases or where the injury complained of is
9 capable of compensation in damages.’” *Id.* (citations omitted).

10 Because ALS’s proposed injunction requires Tiger to take affirmative action,
11 ALS is seeking a mandatory injunction and “must establish that the law and facts
12 *clearly favor* [its] position, not simply that [it] is likely to succeed.” *Garcia v. Google,*
13 *Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (emphasis in original).

14 Argument

15 I. ALS cannot establish that the law and facts clearly favor its position on its 16 copyright and trademark infringement claims

17 “The first factor under *Winter* is the most important—likely success on the mer-
18 its.” *Id.* “Because it is a threshold inquiry, when ‘a plaintiff has failed to show the
19 likelihood of success on the merits, [the court] “need not consider the remaining
20 three [*Winter* elements].”’” *Id.* (citations omitted). But ALS’s “burden here is dou-
21 bly demanding: Because [ALS] seeks a mandatory injunction, [it] must establish that
22 the law and facts *clearly favor* [its] position, not simply that [it] is likely to succeed.”
23 *Id.* For the reasons stated below, ALS cannot do so.

1 **A. ALS cannot establish that the law and facts clearly favor its position on**
 2 **its contributory copyright infringement claim where Tiger has not**
 3 **materially contributed to any copyright infringement**

4 To prevail on its claim for contributory copyright infringement,¹ ALS must show
 5 that Tiger “(1) has knowledge of a third party’s infringing activity, and (2) ‘induces,
 6 causes, or materially contributes to the infringing conduct.’” *Perfect 10, Inc. v. Visa*
 7 *Int’l Serv. Ass’n*, 494 F.3d 788, 795 (9th Cir. 2007) (quoting *Ellison v. Robertson*, 357
 8 F.3d 1072, 1076 (9th Cir. 2004)). ALS cannot establish material contribution here.

9 ALS fails to show that Tiger materially contributed to any copyright infringement
 10 by any third-party publisher. “Material contribution” is more than passive partici-
 11 pation. *See Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996).
 12 And mere contribution to an infringer’s general business is insufficient; “‘the ...
 13 assistance must bear some direct relationship to the infringing acts.’” *Perfect 10, Inc.*
 14 *v. Visa*, 2004 WL 1773349, at *3 (C.D. Cal. Aug. 5, 2004) (citation omitted).

15 Material contribution may be found only when the defendant “engages in per-
 16 sonal conduct that *encourages* or *assists* the infringement.” *A&M Records, Inc. v.*

17 ¹ ALS also fails to establish direct copyright infringement because the FAC does not
 18 identify the works ALS claims the defendants allegedly infringed, let alone allege that
 19 a specific registration was infringed. Instead, ALS attaches a list of “the hundreds of
 20 copyright registrations submitted by ALS[.]” FAC ¶ 21. This is insufficient. *See Me-*
 21 *dia.net Advertising FZ-LLC v. NetSeer, Inc.*, 156 F. Supp. 3d 1052, 1068 (N.D. Cal.
 22 2016) (“Dismissal is thus warranted as Plaintiff fails to identify which sections it al-
 23 leges Defendant copyrighted.”). Nor does ALS adequately allege that the infringing
 24 acts occurred within the United States. Instead, ALS alleges that “[m]any of the sites
 listed above reside on servers and/or content delivery networks within the United
 States.” FAC ¶ 86. This is also insufficient. *See Kolbe v. Trudel*, 945 F. Supp. 1268,
 1270 (D. Ariz. 1996) (“plaintiff can only state a claim fully cognizable under the cop-
 yright laws by alleging an act of infringement within the United States.”).

1 *Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001) (emphasis added). Material con-
2 tribution has been found in limited circumstances where a defendant has provided
3 hosting services that are engaged in distribution of the infringing material. *See, e.g.*,
4 *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1375
5 (N.D. Cal. 1995) (hosting services engaged in distribution of infringing images); *see*
6 *also Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 943 (9th Cir.
7 2011) (providing direct infringers with server space satisfies the material contribu-
8 tion standard). But the defendant's "[p]articipation must be substantial." *Netcom*,
9 907 F. Supp. at 1375. Thus, "Material contribution turns on whether the activity in
10 question 'substantially assists' direct infringement."² *Louis Vuitton*, 658 F.3d at 943.

11 ALS argues that Tiger materially contributed to publishers' infringing conduct.
12 *See* Pl.'s Mem. Supp. Prelim. Inj. 16. ALS identifies (and mischaracterize) various
13 features of the JuicyAds platform that it claims "materially contribute to the infring-
14 ing conduct" of the publishers of the third-party sites ALS identifies in the FAC. But
15 the JuicyAds platform features that ALS identifies have nothing to do with a third-
16 party publisher's alleged infringing activity, let alone substantially assist a third-party
17 publisher's direct copyright infringement.

18 ² ALS argues that "[i]n contributory liability cases such as these, maintenance and
19 enforcement of a repeat infringer policy, or lack thereof, is important." Pl.'s Mem.
20 Supp. Prelim. Inj. 15. While a repeat infringer policy is required under the DMCA,
21 *see* 17 U.S.C. § 512(i)(1)(A), "Compliance with the DMCA is optional." 1 Ian C.
22 Ballon, *E-Commerce and Internet Law* § 4.12[1] (2015 update). Because Tiger is not
23 seeking DMCA safe harbor protection, the "maintenance and enforcement of a re-
24 peat infringer policy" is not relevant. *See* 17 U.S.C. § 512(l) ("The failure of a service
provider's conduct to qualify for limitation of liability under [the DMCA] 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.").

1 For example, ALS argues that “Tiger built and maintained a ‘network,’ a ‘mar-
2 ketplace,’ a ‘community’ and a ‘platform’ of Users, Publishers who sell traffic and
3 Advertisers who buy traffic from Publishers.” *Id.* But Tiger’s building and maintain-
4 ing an ad network does not substantially assist a publisher’s direct infringement. Nor
5 does “require[ing] potential users to apply for membership in [the JuicyAds ad] net-
6 work,” “provid[ing] customer service and detailed technical support for [JuicyAds]
7 Users,” “provid[ing] code that permits Publishers to put JuicyAds ads on their
8 sites,” “serv[ing] the ads on Publisher sites,”³ “redirect[ing] traffic to purchasing
9 Advertisers when a consumer clicks on the JuicyAds ad,” or “charg[ing] Advertisers
10 and pay[ing] Publishers for this traffic” substantially assist a publisher’s direct cop-
11 yright infringement.⁴ *Id.* These features do not relate to the alleged infringing acts.

12 _____
13 ³ Serving ads on the alleged infringing sites does not relate to infringement at all,
14 because the publishers of these sites could earn ad revenue regardless of the content
15 offered on their sites. *See Elsevier Ltd. v. Chitika, Inc.*, 826 F. Supp. 2d 398, 406 n.19
16 (D. Mass. 2011) (“Pharmatext earned advertising income when users clicked on ads
17 that lead them *away* from the Pharmatext site.’ Thus, there is not a clear link between
18 the advertising income and the furthering of Pharmatext’s ... infringing activities.”).

19 ⁴ A court in this District has already rejected the argument that revenue stream re-
20 ceived from ads constitutes “material contribution.” In *Perfect 10, Inc. v. Google, Inc.*,
21 Perfect 10 sought to hold Google contributorily liable on the theory that Google
22 “provid[es] a revenue stream to infringing websites ... [by] placing ... advertise-
23 ments ... on the[] ... websites ... [.]” 416 F. Supp. 2d 828, 856 (C.D. Cal. 2006),
24 *aff’d in part, rev’d in part sub nom. Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146
(9th Cir. 2007). The court rejected this theory because although Google’s AdSense
program provided some revenue to the infringing sites, “There is no evidence that
these sites rely on Google AdSense for their continued existence or that they were
created with the purpose of profiting from the display of AdSense advertisements.”
Id. Google’s AdSense ads thus did not materially contribute to the infringement by
others. *Id. Accord UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d
1006, 1032 (9th Cir. 2013) (“funding alone cannot satisfy the material assistance re-
quirement.”).

1 ALS also claims that “Tiger advertises, and provides valuable search tools and
2 data regarding, each of its Publishers.” *Id.* Assuming arguendo that this statement is
3 accurate, which it’s not, *see* Van Ginneken Decl. ¶¶ 6–7, 14, providing information
4 to advertisers about participating publishers and search tools to allow advertisers to
5 filter through available ad space does not substantially assist a publisher’s direct cop-
6 yright infringement. This is because consumers cannot use the data or the search
7 tools to search for or locate infringing content. *See id.* at ¶ 15.

8 Yet ALS claims that “Tiger’s search tools allowed ALS to find numerous addi-
9 tional cases of repeat infringement of ALS works by Publishers in the JuicyAds’ net-
10 work.” Pl.’s Mem. Supp. Prelim. Inj. 16. This statement is misleading. The JuicyAds
11 search filters narrow down the list of publisher sites and their associated ad zones by
12 metrics that have no relation to the individual images or content on those publisher
13 websites. Van Ginneken Decl. ¶ 7. The filter or “search tool” does not search the
14 actual content of a publisher’s site, as Tiger does not index each page or image of a
15 site like Google or another search engine would. *Id.* The “search tool” is limited to
16 the information regarding the site itself—the domain name, title, and metatags such
17 as keywords and descriptions in the site’s source code. *Id.* It is not possible to use the
18 “search tool” to scan or find infringing content on publisher sites in the JuicyAds.
19 *Id.* Thus, ALS could not have found “numerous additional cases of repeat infringe-
20 ment of ALS works by Publishers in the JuicyAds’ network,” Pl.’s Mem. Supp. Pre-
21 lim. Inj. 16, unless those sites used “ALS” in their domain name, title, or metatags.⁵

22
23 ⁵ To the extent that Mr. Penn claims he found “an infringing ALS video” using “the
24 JuicyAds search utility,” this is false. Exhibit 21 (Doc. 12-21) to his declaration shows
that Mr. Penn picked a publisher site from the list of “Featured Websites” and *then*

1 In short, ALS claims that Tiger provides support (by facilitating the sale of ad
2 space) for the businesses it challenges, but it does not show (and cannot show) that
3 Tiger substantially participates in the alleged *infringing activity*. This distinction is
4 critical. Copyright law does not demand a blockade of companies that are alleged to
5 engage in infringing activity by imposing contributory infringement liability on ven-
6 dors that do business with those companies. Copyright law merely forbids the sub-
7 stantial participation by others in infringing activity. *See, e.g., Metro-Goldwyn-Mayer*
8 *Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937–40 (2005); *Napster*, 239 F.3d at 1022;
9 *Fonovisa*, 76 F.3d 264.

10 The defendants in *Napster*, *Grokster*, and *Fonovisa* shared a common attribute
11 missing here—the infringing materials at issue were stored, maintained, and availa-
12 ble on or through systems or facilities *actually operated by the defendants*. *Grokster*
13 and *Napster* made and distributed software that was known and intended to be used
14 to store and share infringing music files. *Fonovisa* involved a lower-tech operation—
15 a swap meet where the sale of pirated music proliferated. *See Visa*, 494 F.3d at 800.

16 The Ninth Circuit soundly rejected ALS’s theory of contributory liability nearly
17 ten years ago in *Visa*. In that case, the owner of the copyrights in images of nude
18 models sought to impose contributory liability on Visa and other payment processors
19 for processing credit card payments for the proprietors of numerous sites that had
20 “stolen [Perfect 10’s] ... images, altered them, and illegally offered them for sale
21 online.” *Id.* at 793. Although the defendants’ payment systems “ma[d]e it easier for
22 _____
23 ran a search on that third-party site (pornve.com) for “alsscan” using that site’s
24 use “the JuicyAds search utility” to “find” the “infringing ALS video.”

1 ... infringement to be profitable, and ... therefore had the effect of increasing such
2 infringement,” *id.* at 799, the Ninth Circuit declined to find material contribution.

3 In doing so, the Ninth Circuit distinguished *Grokster*, *Napster*, and *Fonovisa*:

4 The actual display, location, and distribution of infringing images in this
5 case occurs on websites that organize, display, and transmit information
6 over the wires and wireless instruments that make up the Internet. The
7 *websites* are the “site” of the infringement, not Defendants’ payment
8 networks. Defendants do not create, operate, advertise, or otherwise
9 promote these websites. They do not operate the servers on which they
10 reside. ... Defendants merely provide a method of payment, not a
11 “site” or “facility” of infringement.

12 *Visa*, 494 F.3d at 799–800 (emphasis in original).

13 ALS advances the same arguments the Ninth Circuit rejected in *Visa*. As in *Visa*,
14 the actual display, location, and distribution of infringing images in this case occurs
15 on third-party publisher websites that organize, display, and transmit information
16 over the wires and wireless instruments that make up the Internet. *Id.* at 799. As in
17 *Visa*, the *websites* are the “site” of the infringement, not Tiger’s ad network. *Id.* As
18 in *Visa*, Tiger does not create, operate, advertise, or otherwise promote these web-
19 sites. Van Ginneken Decl. ¶ 14. As in *Visa*, Tiger does not operate the servers on
20 which these sites reside. *Id.* at ¶ 15. As in *Visa*, Tiger does not provide users the tools
21 to locate infringing material; nor does any infringing material ever reside on or pass
22 through any network or computer Tiger operates. *Id.* And as in *Visa*, Tiger merely
23 provides a method to buy and sell ad space not a “site” or “facility” of infringement.

1 See *Visa*, 494 F.3d at 800; see also *Elsevier*, 826 F. Supp. 2d at 405 (“while Chitika’s
2 advertising payments might make it easier for Saggi’s infringement to be profitable,
3 Chitika did not create, operate, advertise, or promote the infringing website, and its
4 advertisements were not the ‘site’ of the infringement”). Even without ads on pub-
5 lisher sites, the infringing activity could continue, and thus serving ads is not a ma-
6 terial contribution. See *Visa*, 494 F.3d at 798 (“because infringement ... can occur
7 without using Defendants’ payment system, we hold that payment processing by the
8 Defendants ... does not constitute a ‘material contribution’ ...”).

9 To avoid *Visa*, ALS argues that “Tiger maintained the online version of a flea
10 market and provided numerous services to Users, just as in *Fonovisa*.” Pl.’s Mem.
11 Supp. Prelim. Inj. 17. But users do not come to JuicyAds to buy, sell, or “swap”
12 infringing content; users come to JuicyAds to buy and sell ad space and raw traffic.
13 See Van Ginneken Decl. ¶ 4. No infringing materials are stored, maintained, or avail-
14 able on systems or facilities operated by Tiger, see *id.* at ¶ 14, as was the case in *Nap-*
15 *ster*, *Grokster*, and *Fonovisa*. Nor does Tiger make software available that facilitates
16 infringement or the distribution or location of infringing material, see *id.*, as was the
17 case in *Napster* and *Grokster*. And Tiger’s business model is not “premised on har-
18 nessing the competitive pressures between individual webmasters into a cooperative
19 system that benefits the webmasters by increasing the overall value to consumers,”
20 as was the case in *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1170
21 (C.D. Cal. 2002).

22 In sum, like the credit card companies in *Visa*, Tiger “cannot be said to materially
23 contribute to the infringement in this case because [it] ha[s] no direct connection to
24

1 that infringement.” 494 F.3d at 796. ALS offers no evidence that Tiger encouraged
2 or assisted infringement, let alone that any of the alleged assistance bore a direct re-
3 lationship to the infringing acts or substantially assisted direct infringers in obtaining
4 access to or distributing infringing content. Thus, ALS’s claim for contributory cop-
5 yright infringement fails as a matter of law. *See id.* (plaintiff failed to allege that “any
6 infringing material passes over Defendants’ payment network or through their pay-
7 ment processing systems”); *UMG Recordings*, 718 F.3d at 1032 (no contributory in-
8 fringement against investors in file-sharing company where complaint alleged they
9 helped fund infringement); *Demetriades v. Kaufman*, 690 F. Supp. 289, 294
10 (S.D.N.Y. 1988) (“that the Doernberg defendants brokered a real estate transaction
11 that ultimately was connected to a copyright infringement is not enough.”).⁶

12 **B. ALS cannot establish that the law and facts clearly favor its position on**
13 **inducement liability where no evidence exists that Tiger distributed**
14 **JuicyAds with the object of promoting its use to infringe copyright**

15 In *Grokster*, the Supreme Court held that “one who distributes a device with the
16 object of promoting its use to infringe copyright, as shown by clear expression or
17 other affirmative steps taken to foster infringement, is liable for the resulting acts of
18 infringement by third parties.” 545 U.S. at 936–37. Because ALS has demonstrated
19 no “affirmative steps taken to foster infringement” and proved no facts suggesting

20 ⁶ ALS claims that “Tiger admitted into its network a site that proclaimed it published
21 stolen content.” Pl.’s Mem. Supp. Prelim. Inj. 19. But as the Ninth Circuit has ex-
22 plained, “When a website traffics in pictures that are titillating by nature, describing
23 photographs as ‘illegal’ or ‘stolen’ may be an attempt to increase their salacious ap-
24 peal, rather than an admission that the photographs are actually illegal or stolen. We
do not place the burden of determining whether photographs are actually illegal on a
service provider.” *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007).

1 that Tiger promoted its ad network as a means to infringe, “its claim is premised on
2 a fundamental misreading of *Grokster* that would render the concept of ‘inducement’
3 virtually meaningless.” *Visa*, 494 F.3d at 800–01.

4 To establish inducement liability, ALS must show: (1) the distribution of a device
5 or product, (2) acts of infringement, (3) an object of promoting its use to infringe
6 copyright, and (4) causation.” *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020,
7 1032 (9th Cir. 2013). “The third, usually dispositive, requirement for inducement
8 liability is that the ‘device’ or service be distributed ‘with the object of promoting its
9 use to infringe copyright, as shown by clear expression or other affirmative steps
10 taken to foster infringement.’” *Id.* at 1034 (quoting *Grokster*, 545 U.S. at 936–37).

11 As the Supreme Court explained, “mere knowledge of infringing potential or ac-
12 tual infringing uses would not be enough ... to subject [a defendant] to liability.”
13 *Grokster*, 545 U.S. at 937. Instead, inducement “premises liability on purposeful, cul-
14 pable expression and conduct, and thus does nothing to compromise legitimate com-
15 merce or discourage innovation having a lawful promise.” *Id.* Further, “to establish
16 inducement liability, it is crucial to establish that the distributors ‘communicated an
17 inducing message to their ... users,’ the classic example of which is an ‘advertise-
18 ment or solicitation that broadcasts a message designed to stimulate others to com-
19 mit violations.” *Visa*, 494 F.3d at 801 (quoting *Grokster*, 545 U.S. at 937).

20 ALS fails to establish that any of these standards are met or that any of these con-
21 siderations are present here. Tiger does, of course, market JuicyAds as a means for
22 publishers to sell ad space. But it does not follow that Tiger affirmatively promotes
23 each publisher site that participates in JuicyAds. “The software systems in *Napster*
24

1 and *Grokster* were engineered, disseminated, and promoted explicitly for the purpose
2 of facilitating piracy of copyrighted music and reducing legitimate sales of such mu-
3 sic to that extent.” *Id.* In addition, “the Grokster operators explicitly targeted then-
4 current users of the Napster program by sending them ads for its OpenNap pro-
5 gram.” *Id.* Here, ALS does not (and cannot) show that Tiger created or promotes its
6 ad network as a means to break laws.

7 Yet ALS argues that this case is akin to *Grokster* and *Fung*, because “Tiger made
8 no effort to use ‘filtering tools or other mechanisms’ to detect infringing activity by
9 Publishers.” Pl.’s Mem. Supp. Prelim. Inj. 19. But this ignores the Supreme Court’s
10 “caution that ‘in the absence of other evidence of intent, a court would be unable to
11 find contributory infringement liability merely based on a failure to take affirmative
12 steps to prevent infringement.’” *Fung*, 710 F.3d at 1035 (quoting *Grokster*, 545 U.S.
13 at 939 n.12). ALS points to no “clear expression” or “affirmative acts” by Tiger
14 with any specific intent to foster infringement. Infringing material is not available
15 using JuicyAds. JuicyAds does not facilitate access to websites; infringers do not use
16 JuicyAds to copy, alter, distribute, or display infringing material; and consumers do
17 not use JuicyAds to locate, view, or download the infringing images. *See* Van
18 Ginneken Decl. ¶ 15. Rather, third-party publishers use JuicyAds merely to sell ad
19 space to third-party advertisers who want to buy it. *See id.* at ¶¶ 3-4.

20 ALS claims that “as in *Grokster* and *Fung*, Tiger ‘makes money by selling adver-
21 tising space’” and thus relies on “‘high-volume use.’” Pl.’s Mem. Supp. Prelim.
22 Inj. 20. First, Tiger does not sell ad space; publishers do. *See* Van Ginneken Decl.
23 ¶ 3. Tiger merely brokers the sale similar to a real estate agent. *See id.* Second, ALS
24

1 again ignores the Supreme Court’s caution that “[t]his evidence alone would not
2 justify an inference of unlawful intent.” *Grokster*, 545 U.S. at 940. While ALS argues
3 that “JuicyAds encouraged Publishers to join its network in droves,” Pl.’s Mem.
4 Supp. Prelim. Inj. 20, it offers *no evidence* that JuicyAds encouraged publishers to
5 join its network in droves to commit copyright infringement.

6 In sum, ALS has not offered any evidence that Tiger “provides a service that
7 could be used to infringe copyrights, with the manifested intent that the service ac-
8 tually be used in that matter.” *Fung*, 710 F.3d at 1037. Nor has ALS offered any evi-
9 dence that Tiger “acted with a purpose to cause copyright violations by use” of its
10 services, *Grokster*, 545 U.S. at 938, let alone that the JuicyAds service “was used to
11 infringe [ALS’s] copyrights.” *Fung*, 710 F.3d at 1037. While ALS points to the Juicy-
12 Ads “repeat infringer policy,” “Compliance with the DMCA is optional.” *Ballon*,
13 *supra*, at § 4.12[1]. Thus, Tiger’s alleged failure to comply with the DMCA cannot
14 be cited as evidence of infringement. *See* 17 U.S.C. § 512(l).

15 Because ALS offers no evidence showing Tiger had a “clear expression” of spe-
16 cific intent to foster infringement, ALS cannot establish inducement liability.

17 **C. ALS cannot establish that the law and facts clearly favor its position on**
18 **its vicarious copyright infringement claim where Tiger does not have the**
19 **requisite right and ability to supervise and control infringing activity**

20 Vicarious infringement “is a concept related to, but distinct from, contributory
21 infringement.” *Visa*, 494 F.3d at 802. Vicarious copyright infringement exists where
22 a “defendant has (1) the right and ability to supervise the infringing conduct and (2)
23 a direct financial interest in the infringing activity.” *Id.* ALS fails to establish that
24

1 Tiger has the right and ability to supervise publishers' infringing activity.⁷

2 "[A] defendant exercises control over a direct infringer when he has both a legal
3 right to stop or limit the directly infringing conduct, as well as the practical ability to
4 do so." *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1173 (9th Cir. 2007); *accord*
5 *Routt v. Amazon.com, Inc.*, 584 F. App'x 713, 715 (9th Cir. 2014) ("A defendant has
6 control ... when the defendant can directly put an end to that conduct."). "For vi-
7 carious liability to attach," Tiger "must have the right and ability to *supervise* and
8 *control* the infringement, not just affect it." *Visa*, 494 F.3d at 805 (emphasis in origi-
9 nal). Tiger does not have this right or ability.

10 Here, Tiger does not direct any infringing activity within the infringing sites, pre-
11 approve any infringing content, or have the ability to affect or control infringing con-
12 duct by third parties. Van Ginneken Decl. ¶ 16. The TOS bars publishers from vio-
13 lating third parties' intellectual-property rights. *Id.* at ¶ 11 (citing TOS ¶¶ IV(a)(vii),
14 X(a)). The TOS make publishers "solely responsible" for the content of their sites.
15 *Id.* at ¶ 13 (quoting TOS ¶ XIII). If Tiger discovers a publisher is infringing a third
16 party's rights, ***it can only suspend or terminate the publisher's account.*** *Id.* at ¶ 17.
17 Simply put, Tiger does not have any editorial or other control rights over the design,
18 hosting, or transmission of any graphical materials, or any ability to dictate content.

19 Yet ALS claims in a conclusory fashion that "Tiger had the right and ability to
20 supervise the infringing activity, in that, just as in *Napster* and *Cybernet*, it retained
21 the right and ability to terminate a Publisher from its network." Pl.'s Mem. Supp.

22 _____
23 ⁷ ALS also fails to show Tiger's direct financial interest in the infringing activity, but
24 space constraints prevent Tiger from addressing this further in light of ALS's failure
on the control prong of the test. *See Visa*, 494 F.3d at 806.

1 Prelim. Inj. 21. But the Ninth Circuit has specifically rejected this argument. For ex-
2 ample, Perfect 10 made this argument against Google, whose AdSense agreements
3 gave it “the right to monitor and terminate partnerships with entities that violate
4 others’ copyrights.” *Amazon.com*, 508 F.3d at 1173. The court rejected this argu-
5 ment. *See id.* Because “Google’s right to terminate an AdSense partnership [did] not
6 give Google the right to stop direct infringement by third-party websites,” and
7 Google could not “terminate those third-party websites or block their ability to host
8 and serve infringing [content] on the Internet,” Google lacked any ability to super-
9 vise and control the infringement, and thus could not be liable for vicarious infringe-
10 ment. *Id.* at 1173–74. *Accord Routt*, 584 F. App’x at 715.

11 The Ninth Circuit reached the same conclusion in *Visa*. In that case, Perfect 10
12 alleged that the defendant credit card companies had the right and ability to control
13 the allegedly infringing acts of websites by not processing payments on those sites.
14 494 F.3d at 802. But the court found these allegations insufficient. The “mere ability
15 to withdraw a financial ‘carrot,’” it found, “does not create the ‘stick’ of ‘right and
16 ability to control’ that vicarious infringement requires.” *Id.* at 803. Thus, Visa’s abil-
17 ity to stop processing payments and thereby reduce profitability of infringement did
18 not amount to an ability to control the infringement because the infringement “does
19 not turn on the payment; it turns on the reproduction ... and distribution of the im-
20 ages, which [credit card processors] do not do” *Id.* at 806.

21 ALS’s claims are indistinguishable from the claims asserted and rejected in *Am-*
22 *azon.com* and *Visa*. As in *Visa*, Tiger “cannot take away the tools the offending web-
23 sites use to produce, alter, and distribute the infringing images over the Internet.”
24

1 494 F.3d at 804. As in *Amazon.com*, while Tiger can terminate a publisher’s account,
2 it is powerless to stop the publisher from continuing its infringing activity. 508 F.3d
3 at 1173–74. The publisher may still copy ALS’s photos and post them on its site,
4 without Tiger’s aid, approval, or even knowledge. *See id.* at 1174. Thus, Tiger’s
5 “ability to exert financial pressure does not give [it] the right or ability to control the
6 actual infringing activity at issue.” *Visa*, 494 F.3d at 804.

7 This binding precedent forecloses ALS’s theory, and for good reason. The Inter-
8 net is not a swap meet. It is an open system not under Tiger’s control. Tiger has no
9 practical ability to police the Internet or its publishers, which independently operate
10 their own sites. *See Van Ginneken Decl.* ¶ 3. Moreover, to hold Tiger responsible
11 under the circumstances here would create absurd results. For example, if the TOS
12 creates vicarious liability because it prohibits publishers from infringing others’ in-
13 tellectual-property rights (as ALS contends), Tiger would be better off *not* to insist
14 that publishers refrain from illegal conduct. It would be similarly illogical to afford
15 protection to a site that promptly removes infringing content on notice by rights
16 holders, but *not* to provide protection when a site has no ability to remove the offend-
17 ing material on a third-party site. *See Visa*, 494 F.3d at 795 n.4.

18 ALS’s reliance on *Napster* and *Cybernet* is misplaced. In *Napster*, the Ninth Cir-
19 cuit found that a software operator could control its users’ transmission of pirated
20 music because it had the ability to block access to its software, thus ending the users’
21 ability to transmit the infringing files. 239 F.3d at 1023–24. Here, Tiger “cannot stop
22 any of the third-party websites from reproducing, displaying, and distributing unau-
23 thorized copies of [ALS’s] images because that infringing conduct takes place on the
24

1 third-party websites. [Tiger] cannot terminate those third-party websites or block
2 their ability to ‘host and serve infringing ... images’ on the Internet.” *Amazon.com*,
3 508 F.3d at 1174. Tiger has “no ability to actually remove infringing material from
4 the Internet or directly block its distribution.” *Visa*, 494 F.3d at 804 n.15. “Without
5 image-recognition technology, [Tiger] lacks the practical ability to police the infring-
6 ing activities of third-party websites.” *Amazon.com*, 508 F.3d at 1174.

7 In *Cybernet*, Cybernet had a “monitoring program in place,” under which “par-
8 ticipating sites receive detailed instructions regard[ing] issues of layout, appearance,
9 and content.” 213 F. Supp. 2d at 1173. In granting injunctive relief, the court found
10 significant that (1) “Cybernet ha[d] refused to allow sites to use its system until they
11 comply with its dictates;” (2) “it monitor[ed] images to make sure that celebrity
12 images do not oversaturate the content found within the sites that make up Adult
13 Check;” and (3) Cybernet “not only ha[d] the right to terminate webmasters at will,
14 it control[ed] consumer access, and promote[d] its services.” *Id.* at 1173–74. No such
15 evidence exists here—Tiger has no ability to control “consumer access” to pub-
16 lisher sites and does not control the layout, appearance, or content of publisher sites.
17 See Van Ginneken Decl. ¶¶ 15–16.

18 Because Tiger does not have the right or ability to supervise and control infringe-
19 ment, let alone the practical ability to do so, it cannot be vicariously liable. See *Ama-*
20 *zon.com*, 508 F.3d at 1173–74; *Visa*, 494 F.3d at 804; *Routt*, 584 F. App’x at 715–16.

1 **D. ALS cannot establish that the law and facts clearly favor its position on**
2 **its contributory trademark infringement claim where Tiger does not have**
3 **direct control and monitoring of the instrumentality used to infringe**

4 ALS's trademark claim fails for the same reasons as its copyright claims. Liability
5 for indirect infringers is even narrower under trademark law than under copyright
6 law. *See Visa*, 494 F.3d at 806. Because ALS fails to establish contributory copyright
7 infringement, it cannot establish secondary contributory trademark infringement.

8 To establish contributory infringement, ALS must show that Tiger (1) "inten-
9 tionally induced" another to infringe or (2) continued to supply an infringing prod-
10 uct to an infringer with knowledge of infringement. *Inwood Labs., Inc. v. Ives Labs.,*
11 *Inc.*, 456 U.S. 844, 855 (1982). When the direct infringer supplies a service rather
12 than a product, there must be "[d]irect control and monitoring of the instrumentality
13 used by a third party to infringe the plaintiff's mark." *Visa*, 494 F.3d at 807.

14 ALS only argues the second basis here. Under the second basis, ALS must show
15 that Tiger (1) "continued to supply its services to one who it knew or had reason to
16 know was engaging in trademark infringement," *Louis Vuitton*, 658 F.3d at 942, and
17 (2) "had '[d]irect control and monitoring of the instrumentality used by a third party
18 to infringe'" ALS's marks, *id.* (quoting *Lockheed Martin Corp. v. Network Sols., Inc.*,
19 194 F.3d 980, 984 (9th Cir. 1999)). ALS cannot establish the second prong.

20 Here, Tiger has no control over publishers' infringing actions. No Tiger product
21 or service is allegedly used in or as part of any infringing act, as required by *Inwood*
22 and *Lockheed Martin*. Unlike *Louis Vuitton*, where the web hosting businesses "had
23 direct control over the 'master switch' that kept the websites online and available,"
24

1 958 F.3d at 943, Tiger does not have “direct control,” let alone any control, “over
2 the ‘master switch’ that [keeps] the [publishers’] websites online and available.” *Id.*

3 Because ALS fails to show that Tiger has any control over the “instrumentality”
4 used by publishers to allegedly infringe ALS’s trademarks, its contributory trade-
5 mark claim fails as a matter of law.

6 **II. ALS fails to show it is likely to suffer irreparable harm**

7 ALS also fails to establish that it is likely to suffer irreparable harm in the absence
8 of preliminary relief. ALS’s brief discussion of harm offers a speculative conclusion
9 without evidence and should carry no weight. *See Goldie’s Bookstore, Inc. v. Superior*
10 *Ct.*, 739 F.2d 466, 472 (9th Cir. 1984). The pure economic losses ALS alleges typi-
11 cally do not form the basis for a finding of irreparable injury. *See Lydo Enters. v. City*
12 *of Las Vegas*, 745 F.2d 1211, 1214 (9th Cir. 1984).

13 Indeed, ALS’s own evidence undercuts its claims of irreparable harm. First, ALS
14 admits that since 2001, “receipts and profits have decreased.” Walsh Decl. ¶ 5. ALS
15 also admits that “[p]rofits declined 10–15% in 2002 and more than 30% in 2003.” *Id.*
16 at ¶ 7. All of this happened *before* JuicyAds came into existence in 2006.

17 Second, while ALS claims that it is “not aware of any factors for this decline in
18 profits other than the increasingly ubiquitous availability of infringing ALS content
19 on the Internet,” *id.*, ALS does not submit evidence “from even a single former sub-
20 scriber who ceased paying for [ALS’s] service because of the content freely available
21 via” third-party sites. *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 981 (9th Cir. 2011).
22 It could just as easily be true that around the time consumers graduated from slow
23 dial-up Internet access to dedicated higher speed Internet connections, consumers
24

1 moved on from recorded content ALS offers to newer forms of interactive content
2 such as live webcams.

3 Third, ALS “has not established that the requested injunction would forestall”
4 its “steady decline in revenues, profits and market share directly attributable to
5 chronic piracy on the Internet.” *Id.* In short, ALS “has not shown a sufficient causal
6 connection between irreparable harm to [ALS’s] business and [Tiger’s] operation of
7 its [ad network].” *Id.* at 982. Thus, this factor weighs against ALS.

8 **III. The balance of equities disfavors an injunction**

9 The balance of the equities tip in Tiger’s favor. The requested injunction would
10 impose a heavy and continuous, if not impossible, burden on Tiger. ALS’s proposed
11 injunction is not only unduly burdensome and drastically overbroad, it requires Tiger
12 to actively search for potentially infringing ALS content contrary to the DMCA and
13 binding Ninth Circuit precedent. *See* 17 U.S.C. § 512(m)(1); *CCBill*, 488 F.3d at
14 1113. The proposed injunction requires Tiger to manually review each month all pub-
15 lisher sites to determine the presence of “ALS Content” or “red flags of infringe-
16 ment.” This will put JuicyAds out of business. *See* Van Ginneken Decl. ¶¶ 25, 28.
17 But just as the Ninth Circuit has “decline[d] to shift [this] substantial burden [of
18 policing copyright infringement] from the copyright owner to the provider,” *CCBill*,
19 488 F.3d at 1113, this Court should decline ALS’s request to do the same. *See id.* at
20 1114; *see also UMG Recordings*, 718 F.3d at 1022. Further, ALS’s substantial delay in
21 filing its Complaint and seeking a preliminary injunction weighs against it when con-
22 sidering the propriety of the relief. *See Lydo*, 745 F.2d at 1213.

1 **IV. Public interest does not favor mandatory injunctions**

2 Finally, the public interest does not favor ALS. Initially, entry of a mandatory
3 injunction “is particularly disfavored.” *See Garcia*, 786 F.3d at 740. While ALS ar-
4 gues that it is in the public interest to protect constitutional rights, Pl.’s Mem. Supp.
5 Prelim. Inj. 24, it fails to identify a constitutional right that will be impacted in the
6 absence of injunctive relief. The public interest disfavors the proposed injunction.

7 **V. Court should order substantial bond**

8 Under Rule 65(c), “The court may issue a preliminary injunction ... only if the
9 movant gives security in an amount that the court considers proper to pay the costs
10 and damages sustained by any party found to have been wrongfully enjoined”
11 Fed. R. Civ. P. 65(c). ALS seeks entry of an order that requires Tiger to do what the
12 law does not require it to do, and more significantly, will threaten the survival of
13 Tiger’s business. *See Van Ginneken Decl.* ¶¶ 25, 28. Because ALS is unlikely to pre-
14 vail in a trial on the merits in light of binding Ninth Circuit authority, coupled with
15 the substantial losses Tiger will suffer by the proposed injunction, this Court should
16 require ALS to post a significant bond.

17 **Conclusion**

18 For all these reasons, the Court should deny ALS’s motion.

19 Respectfully submitted,

20 By: /s/Kevin S. Toll

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22 SILVERSTEIN LEGAL

23 Dated: September 12, 2016

24 *Attorneys for Defendant Tiger Media Inc.*