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

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)	
In re:)	Chapter 11
)	
FRONTIER COMMUNICATIONS)	Case No. 20-22476 (RDD)
CORPORATION, <i>et al.</i> ¹)	
)	(Jointly Administered)
)	
)	

**MEMORANDUM IN OPPOSITION TO DEBTORS’ MOTION FOR JUDGMENT AS A
MATTER OF LAW**

Movie Company Claimants² do not assert that Frontier is liable for aiding and abetting by knowingly providing substantial assistance to acts of international terrorism under 18 U.S.C.

¹ Due to the large number of debtor entities in these chapter 11 cases, for which joint administration has been granted, 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 Reorganized Debtors’ claims and noticing agent at <https://cases.primeclerk.com/ftt>. The location of the Reorganized Debtors’ service address for purposes of these chapter 11 cases is: 50 Main Street, Suite 1000, White Plains, New York 10606.

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

§2333(d)(2) as asserted by Plaintiffs in *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 143 S. Ct. 1206 (2023) (“*Twitter*”). Rather, Movie Company Claimants allege that Frontier is secondarily liable under material contribution and vicariously for its subscribers’ copyright infringements and violations of the integrity of copyright management information in their movies. The Court should reject Frontier’s misguided attempt to apply the aiding and abetting standard *Twitter* describes for acts of international terrorism to copyright infringement – a strict liability tort. As argued by Frontier while successfully convincing the District Court not to withdraw the bankruptcy reference in this case, “...secondary liability law [for copyright infringement] is well-settled, based on decades-old Supreme Court precedent, and not a matter of first impression.” *Voltage Holdings, LLC et al. v. Frontier Communications Parent, Inc.*, Civ. Case No. 1:21-cv-05708-AT, Doc. #11, ¶32. Thus, it is not plausible that the Supreme Court *Twitter* decision, which does not even include the word “copyright” a single time, upended well-settled decades-old precedent on secondary liability law for copyright infringement.

The Court should also reject Frontier’s improper attempt to go outside the pleadings and assert that its services are limited to merely that of a 17 U.S.C. §512(a) conduit. *See* Mot. at p.25. Movie Company Claimants filed a response to Frontier’s objection to the proofs of claims asserting that Frontier failed to qualify for the §512(a) safe harbor from copyright infringement monetary damages and that the §512 safe harbors do not even apply to §1202 violations of the integrity of copyright management information. *See* Doc. #1894, pp.15-17. On the other hand, Frontier cannot dispute that it does more than serving merely as a conduit because it provides the modems and the Internet Protocol (“IP”) addresses that are the information tools per 17 U.S.C. §512(d) used by its subscribers to share pirated copies of Movie Company Claimants’ Works.

I. Relevant Factual and Procedural Background

1. Movie Company Claimants include producers of movies currently available for sale online and in brick and mortar retail stores. Many of these critically acclaimed movies were released in theaters throughout the world and feature Oscar awarded and/or nominated actresses and actors. For example, *Rambo V: Last Blood* features legendary actor Sylvester Stallone (three Oscar nominations); *London Has Fallen* and *Angel Has Fallen* feature legendary actor Morgan Freeman (five Oscar nominations and one Oscar for Best Supporting Actor) and legendary actress Angela Basset (Oscar nomination for best actress); *Kill Chain* features legendary actor Nicolas Cage (two Oscar nominations and one Oscar for Best Actor); *Tesla* features Ethan Hawke (four Oscar nominations); and *Dallas Buyers Club* features Matthew McConaughey (one Oscar for Best Actor) among others.

2. To deal with massive piracy of their movies, Maverickeye UG (haftungsbeschränkt) (“MEU”) was engaged to monitor peer-to-peer/BitTorrent networks for acts of distribution of their motion pictures (“Works”) and generate Notices of infringements (“Notices”) styled per 17 U.S.C. §512(c)(3) notification of the Digital Millennium Copyright Act (“DMCA”) to be sent to Internet Service Providers (“ISPs”) of IP addresses where MEU confirmed infringement of copyright protected content.

3. Between April 2016 and Mar. 9, 2020, MEU generated over 190,000 Notices that were sent to Frontier concerning IP addresses associated with confirmed infringing activity. *See* Doc. #2235-1, p.15. Particularly, Frontier’s subscribers downloaded and shared pirated movies with file titles altered to include the names of notorious piracy websites. *See, e.g.*, Doc. #2235-2, p.11 (pirated copies of *Hellboy* shared under false and altered file title “Hellboy (2019) [WEBRip] [1080p] [YTS.LT]”). By sharing pirated copies with the false file titles, Frontier’s subscribers further drove traffic to notorious piracy websites such as YTS and RARBG where Movie Company

Claimants' movies were pirated. *See id.*, p.13, ¶22. Notably, the United States Trade Representative has listed YTS and RARBG as examples of Notorious Markets engaged in and facilitating substantial piracy. *See* Doc. #1894, pp. 9-10.

4. On March 10, 2020, Movie Company Claimants' counsel sent a letter to Frontier describing their concerns about Frontier's subscribers' widespread piracy of their movies and providing specific examples of egregious subscribers assigned IP addresses for each of which 362 to 573 Notices were sent. *See* Doc.#1894-4, ¶¶2-3.

5. Between June 8, 2020 and Sept. 28, 2020, Movie Claimants filed pre-petition claim shown in Doc. #1894-1 based upon secondary liability for copyright infringement. Pre-Petition Claim nos. 2853, 2858, 2865, 2901, 2856, 2862, and 3131 are further based upon secondary liability for violations of the integrity of the copyright management information ("CMI") conveyed with file titles of their movies per 17 U.S.C. §1202 ("DMCA violations").

6. Despite receiving the March 10, 2020 letter from Movie Company Claimants' Counsel and the above pre-petition claims, as of June 2021, the Movie Company Claimants' agent had sent an additional 25,000 Notices to Frontier, some of which concern the *same* IP addresses for which Notices were sent prior to the bankruptcy. *See* Doc. #1894-5, ¶¶4-6.

7. On May 17, 2021, Frontier filed an omnibus objection to pre-petition claims of the record company claimants. *See* Doc. #1818. Particularly, Frontier argued: (a) record company claimants could not establish any direct or actual copyright infringement of Frontier customers; (b) any direct infringement was *de minimus*; (c) Frontier had no obligation to act on notices or terminate customers; (d) 17 U.S.C. §512(a) provides it a safe harbor; (e) Frontier acted in good faith; and (f) the record company claimants suffered no damages. *See id.*, pp. 6-7. Frontier did not argue that Movie Company Claimants failed to plausibly plead secondary liability.

8. On May 25, 2021, Frontier filed a notice of revised order [Doc. #1842] that included the Movie Company Claimants' pre-petition claims but failed to set forth any arguments particularly addressing the claims of secondary liability for copyright infringement made by the Movie Company Claimants. Frontier did not even specifically object to Movie Company Claimants' claims for secondary liability based upon DMCA violations in pre-petition claim nos. 2853, 2858, 2865, 2901, 2856, 2862, and 3131.

9. Between May 28 and June 1, 2021, Movie Company Claimants filed administrative claim nos. 3806, 3807, 3803, 3808, 3804, 3819 and 3812 based upon secondary liability for copyright infringement and DMCA violations. *See* Doc. #1894-1.

10. On June 7, 2021, Movie Company Claimants filed a Response [Doc. #1894] to Frontier's objection disputing Frontier's assertions and particularly asserting that Frontier failed to qualify for the §512(a) safe harbor from copyright infringement monetary damages and that the §512 safe harbors do not apply to DMCA violations provided by §1202. *See* Doc. #1894 at pp.15-17.

11. On July 30, 2021, Frontier filed a notice of second revised order [Doc. #1951] that included the Movie Company Claimants and Record Company Claimants' administrative claims in a proposed order and merely stated as follows:

that the Reorganized Debtors object to the Disputed Administrative Claims, including on the grounds previewed in the Objection...which sets forth defenses that are equally applicable to the Disputed Administrative Claims as to the other Disputed Copyright Claims, and which defenses are incorporated as to the Disputed Administrative Claims by reference...in addition to disputing the underlying merits the Disputed Administrative Claims on the grounds set forth in the Objection and incorporated herein by reference, the Reorganized Debtors assert that such claims are not entitled to administrative expense status as they do not constitute "actual, necessary costs and expenses of preserving the estate.

Doc. #1951, p.5.

Again, Frontier failed to set forth any arguments particularly addressing the arguments of

secondary liability for copyright infringement made by the Movie Company Claimants or even specifically object to Movie Company Claimants' claims for secondary liability based upon DMCA violations in the administrative claims.

12. On Nov. 21, 2023, the Court issued a case management order on the Movie Company and Record company claims which states, "all part VII rules shall apply in these contested matters..." See Doc. #2229.

13. On Dec. 5, 2023, Frontier filed its motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). See Doc. #2235.

II. Legal Standard

14. When a creditor files proof of claim executed in accordance with Bankruptcy Rules, proof of claim constitutes *prima facie* evidence of validity and amount, unless debtor or other party in interest objects. See Fed. R. Bankr. P. 3001(f)

15. "Judgment on the pleadings is appropriate where material facts are undisputed and where a judgment on the merits is possible merely by considering the contents of the pleadings." *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 (2d Cir. 1988). In deciding a Rule 12(c) motion for judgment on the pleadings, courts apply the same standard applicable to a motion under Rule 12(b)(6).

16. To survive a motion to dismiss, the resisting party must "plausibly suggest an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 681, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). When considering a motion to dismiss under either Rule 12(b)(6) or Rule 12(c), the Court must accept the facts alleged in the Complaint as true and draw all reasonable inferences in favor of the non-moving party. *Koppel v. 4987 Corp.*, 167 F.3d 125, 133 (2d Cir. 1999).

17. "For the Court to rule in favor of the movant, there must be no disputed issues of

material fact.” *Entegra Power Grp. LLC v. Dewey & Leboeuf LLP (In re Dewey & Leboeuf LLP)*, 493 B.R. 421, 428 (Bankr. S.D.N.Y. 2013) (Court compared complaint and answer and conclude the issue was disputed).

18. “[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes the infringing conduct of another, may be held liable as a “contributory” infringer.” *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (CA2 1971)

19. “One...infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.” *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930, 125 S. Ct. 2764, 2776 (2005).

III. Argument

A. Twitter did not alter secondary liability for copyright infringement.

20. Frontier’s argument that the Supreme Court’s analysis in *Twitter* for secondary liability for international terrorism is applicable to secondary liability for copyright infringement is wrong. Particularly, Frontier asserts a claim that “Frontier knowingly caused and materially contributed to the unlawful reproduction and distribution of Claimants’ copyrighted works” is insufficient to state a claim that it “knowingly gave substantial assistance” to the wrongdoers’ acts. Mot. at p.21. However, this “substantial assistance” language of *Twitter* pertains to the specific aiding and abetting language of 18 U.S.C. §2333(d)(2): “any person who aids and abets, by knowingly providing substantial assistance...an act of international terrorism.” Neither the “substantial assistance” language nor the analysis in *Twitter* is applicable to common law secondary liability for contributory copyright infringement based upon material contribution, which requires a showing that the defendant: (1) had actual or constructive knowledge of the

infringing activity; and (2) encouraged or assisted others' infringement, or provided machinery or goods that facilitated infringement. *See Arista Records LLC v. Lime Grp. LLC*, 784 F. Supp. 2d 398, 432 (S.D.N.Y. 2011) (citing *Faulkner v. Nat'l Geographic Soc'y*, 211 F. Supp. 2d 450, 473-74 (S.D.N.Y. 2002)). Unlike liability for international terrorism, "Copyright infringement is a strict liability wrong in the sense that a plaintiff need not prove wrongful intent or culpability in order to prevail." *Faulkner v. Nat'l Geographic Soc'y*, 576 F. Supp. 2d 609, 613 (S.D.N.Y. 2008). In *Twitter*, the underlying tort – the act of terrorism – occurred in a Reina nightclub in Istanbul, Turkey, not on Twitter's platform. Here, the underlying tort of copyright infringement occurred not only on Frontier's platform by its subscribers, but also on Frontier's servers when it transmitted and routed copies of the material for its subscribers. Accordingly, Frontier's attempt to compare the claims to "seeking to hold Ma Bell liable in 1923 simply for providing communication service that She knows some have used to commit offenses", Mot. at p.22, is inapposite. Unlike the VCR sold in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), Frontier continued to provide Internet service to its customers for profit despite receiving hundreds of thousands of notices of these subscribers' use of the service for infringement.

21. If the Supreme Court's May 18, 2023 *Twitter* decision applied to general principles of secondary liability as asserted by Frontier and represented a shift from material contribution for secondary liability for copyright infringement, one would expect that Courts would have stated to this effect. However, just a few months ago (on Oct. 16, 2023), the Tenth Circuit restated that the three elements of copyright infringement are: "(1) direct infringement ("another's infringing activities"); (2) knowledge of direct infringement (the defendant "knows of the infringement"); and (3) contribution to direct infringement ("the defendant causes or materially contributes")." *Greer v. Moon*, 83 F.4th 1283, 1287 (10th Cir. 2023). Similarly, on Oct. 17, 2023 the Second

Circuit restated that contributory infringement requires showing of knowledge of the infringing activity, induced, caused or materially contributed to the infringing conduct of another. *See Bus. Casual Holdings, Ltd. Liab. Co. v. YouTube, Ltd. Liab. Co.*, No. 22-3007-cv, 2023 U.S. App. LEXIS 27511, at *4 (2d Cir. Oct. 17, 2023) (quoting *EMI Christian Music Grp. Inc. v. MP3 Tunes LLC*, 844 F.3d 79, 99-100 (2d Cir. 2016)). Finally, on Sept. 5, 2023, the Southern District of New York also stated, “To state a claim for contributory infringement, a plaintiff must allege facts that a defendant with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.” *Hartmann v. Popcornflix.com LLC*, No. 20-CV-4923 (VSB), 2023 U.S. Dist. LEXIS 156430, at *14-15 (S.D.N.Y. Sep. 5, 2023). Likewise, in the trademark context, on July 24, 2023 the Ninth Circuit stated that, “A party that...continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement...is...contributorially responsible for any harm done as a result of the deceit.” *Y.Y.G.M. SA v. Redbubble, Inc.*, 75 F.4th 995, 1000 (9th Cir. 2023) (quoting *Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc.*, 456 U.S. 844, 854, 102 S. Ct. 2182, 72 L. Ed. 2d 606 (1982)).

22. Accordingly, the analysis in *Twitter* should be limited to the aiding and abetting of terrorism language of 18 U.S.C. §2333(d)(2) just as cautioned by Judge Jackson in her concurrence. Thus, the “knowingly gave substantial assistance” to the wrongdoers’ acts requirement discussed in *Twitter* is not applicable to the present case. Rather, the material contribution standard applies. Therefore, Movie Company Claimants’ claims are viable.

B. Frontier does not argue that Twitter altered “vicarious” secondary liability.

23. Each of Movie Claimants’ proof of claims includes an allegation that Frontier is vicariously liable. *See, e.g.*, Doc. #2235-1, pp.11-12, ¶¶20-22. Vicarious liability “allows imposition of liability when the defendant profits directly from the infringement and has a right

and ability to supervise the direct infringer even if the defendant initially lacks knowledge of the infringement.” *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 n.9, 125 S. Ct. 2764, 2776 (2005). Unlike contributory infringement based upon material contribution, vicarious liability does not require knowledge. *Id.* Frontier asserts that a claim that “Frontier knowingly caused and materially contributed to the unlawful reproduction and distribution of Claimants’ copyrighted works” is insufficient to state a claim that it “knowingly gave substantial assistance” to the wrongdoers’ acts. Mot., p.12. Frontier also asserts that “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.” *Id.*, pp. 12-13. But Frontier fails to argue that *Twitter* altered the standard for vicarious liability. Rather, Frontier argues that *Twitter*’s aid and abetting standard “substantial assistance” should be applicable to or replace material contribution. At best, Frontier cites three cases prior to *Twitter* in its legal standard section pertaining to vicarious liability. *See* Mot., p.8. None are applicable here. The vicarious infringement claim in *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004) was decided on summary judgment rather than on the pleadings as here. And rather than making conclusory allegations such as in *Hartmann v. Amazon.com, Inc.*, No. 20 CIV. 4928 (PAE), 2021 WL 3683510, (S.D.N.Y. Aug. 19, 2021), Movie Company Claimants allege, for example, that Frontier “...could have taken simple measures to stop this widespread copyright infringement but purposely chose not to...” and “The unlimited ability to download and distribute copyright protected content through [Frontier’s] service has served as a draw for [Frontier] to attract, retain, and charge higher fees to subscribers.” Doc.#2235-1, pp.11-12.

24. Frontier states in passing:

...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.

Mot., pp. 14-15.

25. But Frontier did not make this argument in its objection. *See* Doc. #1818. Thus, the Court should reject Frontier's attempt to improperly argue based upon material outside the pleadings that it does not have the technological ability to monitor what its customers do on the Internet. Moreover, Frontier's argument that standard for right and ability to control for vicarious infringement requires Frontier be able to monitor what its subscribers do on the Internet is wrong. What Courts require is the ability to terminate subscribers' service or the right to block access to infringing material. *See Sony Music Entm't v. Cox Communs.*, 464 F. Supp. 3d 795, 813 (E.D. Va. 2020); *Bodyguard Prods. v. RCN Telecom Servs., LLC*, Civ. A. 3:21-cv-15310 (GC) (TJB), 2022 U.S. Dist. LEXIS 185965, at *26-27 (D.N.J. Oct. 11, 2022). Without question, Frontier can terminate subscribers' service or block access to piracy websites.

26. Frontier's argument that it does not have the right or ability to control its customers piracy is contradicted by evidence Frontier submitted in this very bankruptcy case in the contested patent infringement proceeding over the technical capability of Frontier's Adtran digital subscriber line access multiplexer (DSLAM) equipment. *See* Doc. #2162 at ¶¶30, 38 (Frontier counsel concedes that Frontier uses Adtran DSLAM that contain DSL chipsets corresponding to working ports that serve individual customers). Particularly, the expert report of Frontier's own expert Thomas Star states that DSLAM equipment include DSL modems (Modem-C) that communicate with modems (Modem-R) at customer premise and that these modems include functions such as "Modem support of protocol and control for remote management" and "Control of flow rate of user data". Doc. #2165-1, ¶¶25-26, 33. Mr. Star describes the patents as adding a feature for adjusting the downstream or uplink bandwidth for a customer premise modem depending upon

noise characteristics used by Frontier. *See id.*, ¶168. Accordingly, Frontier’s own expert Thomas Star establishes that Frontier has a right or ability to supervise and control its customers’ activities on the Internet by at least utilizing the remote management features to control these modems.³

27. Accordingly, the Court should deny Frontier’s motion for judgment on the pleadings because Movie Claimants’ claims for copyright infringement and DMCA violations based upon vicarious infringement are viable and, in all events, unaffected by *Twitter*.

C. Movie Company Claimants allege that Frontier engaged in affirmative culpable conduct.

28. Frontier argues that because it provides an internet service “whose primary purpose is legitimate and which most people use lawfully”, its service cannot amount to material contribution. Mot. at p.22. Here, Frontier is asserting the repeatedly rejected argument that a service provider with knowledge of ongoing infringement by its subscribers can escape liability by merely asserting that its service has substantial non-infringing uses under *Sony*. The Fourth Circuit called this argument “meritless” when pointing out that the Supreme Court clarified in *Grokster* that “*Sony* 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...the fact that a product is “capable of substantial lawful use” does not mean the “producer can never be held contributorily liable.” *BMG Rights Mgmt. (US) LLC v. Cox Communs., Inc.*, 881 F.3d 293, 306 (4th Cir. 2018). To be clear, Movie Company Claimants are not alleging that Frontier is liable under the intentional inducement of infringement standard introduced by *Grokster*. The discussion of statements or action of

³ Frontier’s argument that it cannot monitor its customers’ activities is also contradicted by documents it filed with the Securities Exchange Commission where it boasts of having implemented Deep Packet Inspection Technology. <https://www.sec.gov/Archives/edgar/data/20520/000095015709000309/form425.htm>, p.7

purposeful conduct in *Grokster* are only applicable to intentional inducement claims. But to the extent *Grokster* requires intent or purposeful culpable conduct for material contribution, Frontier's act of continuing to provide Internet services to subscribers despite receiving nearly 200,000 notices just from agents of Movie Company Claimants and a letter from opposing counsel informing of its subscribers' widespread piracy is affirmative conduct. In *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1171 (9th Cir. 2007), the Ninth Circuit looked to the Restatement of Torts for common law principles and stated that "If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result," when concluding that Google could be held contributorily liable if it had knowledge that infringing images were available using its search engine, could take simple measures to prevent further damage to copyrighted works, and failed to take such steps. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965)). Likewise, in *BMG Rights Mgmt. (US) LLC v. Cox Communs., Inc.*, 881 F.3d 293, 307 (4th Cir. 2018) the Fourth Circuit relied on the Restatement of Torts and came to the same conclusion.

29. Just like the ISP Grande in *Umg Recordings, Inc. v. Grande Communs. Networks, LLC*, 384 F. Supp. 3d 743, 767 (W.D. Tex. 2019), Frontier did not just refuse to act. Rather, Frontier "acted affirmatively by continuing to sell internet services and continuing to provide internet access to infringing customers." *Id.* Movie Company Claimants more than sufficiently allege that Frontier engaged in affirmative culpable conduct.

D. The 17 U.S.C. §512 safe harbors do not permit Frontier to ignore notices of its subscribers' infringement.

30. Frontier argues that the nearly two hundred thousand notices it received "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.” Mot. at p.25. Particularly, Frontier argues that because it is not a service provider per §512(b)-(d) but rather merely a conduit per §512(a), it does not have to respond to DMCA notices. See *id.* at p.26. This argument is a red herring. Assuming *arguendo* that Frontier is merely a conduit, it can still be held vicariously or contributorily liable if it has knowledge that its subscribers use its service for copyright infringement but continues to provision internet service to these subscribers. Whether or not the notices comply with §512(b)-(d) is irrelevant since Frontier has not asserted a safe harbor under any of these sections. The notices informed Frontier of its customers’ flagrant activity. Moreover, Movie Company Claimants’ counsel also sent Frontier a letter on March 10, 2020 giving specific examples of rather egregious subscribers assigned IP addresses for each of which 362 to 573 Notices were sent. See Doc.#1894-4, ¶¶2-3. Accordingly, Frontier has knowledge of its customers’ ongoing infringement.

31. Frontier cites *Millennium Funding, Inc. v. 1701 Mgmt. LLC*, 576 F. Supp. 3d 1192, 1213 (S.D. Fla. 2021) (“*Millennium Funding*”) in support of its argument that the hundreds of thousands of notices did not impart knowledge of infringement or impart a duty to act. *Millennium Funding* does not support Frontier’s argument. In *Millennium Funding*, the Court concluded that because the customers of Defendant QuadraNet (a data center service provider that leased servers) were Virtual Private Network (“VPN”) service providers who in turn had their own customers (“end users”) whose infringing online activity was encrypted by the VPN service providers, the Defendant QuadraNet could not obtain specific knowledge of end users’ encrypted infringing activity to impute culpable intent. See *Millennium Funding, Inc.*, 576 F. Supp. 3d at 1213 (S.D. Fla. 2021). Notably, the same *Millennium Funding* court later awarded a default judgment against QuadraNet’s VPN service provider customer LiquidVPN based upon *inter alia* material

contribution contributory copyright infringement from the thousands of notices that were sent to the VPN service provider. *Millennium Funding, Inc. v. 1701 Mgmt. Ltd. Liab. Co.*, No. 21-cv-20862-BLOOM/Otazo-Reyes, 2022 U.S. Dist. LEXIS 55799, at *17 (S.D. Fla. Mar. 25, 2022) (...LiquidVPN Defendants also have knowledge that their end users are using their Popcorn Time VPN to pirate Plaintiffs' Works from the thousands of notices that Plaintiffs' agent sent to QuadraNet and Choopa that were forwarded onto LiquidVPN Defendants.) Thus, Frontier is akin to the LiquidVPN Defendants against whom the *Millennium Funding* court ordered to \$9,900,000.00 for secondary liability for copyright infringement and \$4,950,000.00 for secondary liability as to DMCA violations. *See id.* *22 (S.D. Fla. Mar. 25, 2022).

32. Frontier also cites the Ninth Circuit's unpublished decision of *ALS Scan, Inc. v. Steadfast Networks, Ltd. Liab. Co.*, 819 F. App'x 522 (9th Cir. 2020) in support of this misguided argument that notices do not impute knowledge. However, *ALS* is not applicable. In *ALS*, it was undisputed that defendant Steadfast forwarded the notices to the subscriber that owned the website where the infringing images were stored *and the owner took them down*. *See id.* at 523 ("a data-center service provider has taken adequate 'simple measures' to avoid contributory copyright infringement if it forwarded notices of such infringement to the hosting website — and every alleged infringed material was taken down"). Moreover, the Defendant in *ALS* was a data center service provider like QuadraNet. In contrast, Frontier is a residential service provider with a direct relationship with the subscribers. Frontier did not allege in its Objection that it took any simple steps in response to the notice. Rather, Frontier argues that it does not have to do anything in response to the notices.

33. Frontier improperly reaches outside the pleadings to argue that it is only a conduit provider per 17 U.S.C. §512(a). Movie Company Claimants filed a Response [Doc. #1894] on

June 7, 2021 disputing that Frontier qualifies for the §512(a) safe harbor from copyright infringement monetary damages and asserting that the §512 safe harbors do not even apply to violations of the integrity of copyright management information per §1202. *See* Doc. #1894, pp.15-17. Because this point is disputed, it is not suitable for judgment on the pleadings.

34. Assuming *arguendo* that Frontier is merely a §512(a) conduit provider, the text of 17 U.S.C. §512(i) that is applicable to all service providers contradicts its argument that it has no obligation to act on notices. Particularly, §512(i) conditions eligibility on all service providers to adopt, reasonably implement and inform subscribers of “a policy that provides for the termination in appropriate circumstances of subscribers...who are repeat infringers.” The notices informed Frontier that its subscribers are repeat infringers. Accordingly, Frontier was obligated to act on the notices if it wished to maintain its §512(a) safe harbor.

35. Frontier’s argument is also contradicted by the injunctive relief provided for in §512(j) which explicitly applies to §512(a) conduit providers. Particularly, §512(j) provides that the Court may grant “(i)An order restraining the service provider from providing access to a subscriber or account holder of the service provider’s system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.” The notice of infringement informed Frontier that its subscribers were “engaging in infringing activity” as described in §512(j). Accordingly, Congress was cognizant that subscribers of §512(a) conduit providers can also engage in infringing activity.

36. Frontier’s (improper) argument that it is merely a §512(a) conduit provider is contradicted by the pleadings (Movie Company Claimants’ proofs of claims, Frontier’s objection and Movie Company Claimants’ response). Frontier cannot dispute that it does more than serving

merely as a conduit because it provides the IP addresses that Movie Company Claimants allege Frontier’s subscribers use to share pirated copies of Movie Claimants’ Works. These IP addresses are “[t]he unique 32-bit address that specifies the location of each device or workstation on the Internet.” *HB Prods., Inc. v. Faizan*, 603 F. Supp. 3d 910, 917 n.2 (D. Haw. 2022). The IP addresses Frontier assigns to its subscribers are information location tool as provided in 17 U.S.C. §512(d):

“...for infringement of copyright by reason of the provider *referring or linking* users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link...”
(emphasis added)

37. Just like an “index, reference, pointer, or hypertext link”, *Id.*, the IP address assigned to the subscriber by Frontier is the information location tool that linked other BitTorrent users to the online location containing infringing material or infringing activity. Essentially, IP addresses function just like hypertext links explicitly referred to in §512(d). For an example of the exact similarity between a hypertext link and IP address, this Court’s website <https://www.nysb.uscourts.gov/> is located at IP address 199.107.17.176. By entering the information location tool 199.107.17.176 in a website browser, a user can visit this Court’s website and locate this Court’s website information as shown in following screenshot:



38. Subsection (3) of 17 U.S.C. §512(d) explicitly states that a condition for the limitation of liability is:

upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, **the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.**

(emphasis added)

39. The notifications sent on behalf of Movie Company Claimants satisfy all requirements of §512(d)(3). Movie Company Claimants refer to the exemplary notice [Doc. #1894-2] included with their response to Frontier's objection to the proofs of claims. The notice provided the identification of the reference or link (IP address 50.35.177.133; Port 45701), the material claimed to be infringing (The.Hitmans.Bodyguard.2017.HDRip.XviD.AC3-EVO), the activity claimed to be infringing (sharing via BitTorrent) and information reasonably sufficient to

permit the service provider to locate that reference or link (IP address 50.35.177.133; Port 45701). Contrary to the Frontier's argument that it can do nothing, Frontier can disable access to the infringing material by, for example, null routing⁴ the assigned IP address. Thus, Frontier's argument that the notices did not confer knowledge of direct infringement is incorrect.

E. Frontier did not dispute that it is secondarily liability for DMCA violations in its pleadings.

40. A motion for judgment on the pleadings requires that there be no disputed issues. However, Frontier did not object to the Movie Company Claimants' claims based upon secondary liability for DMCA violations under 17 U.S.C. §1202 in pre-petition claim nos. 2853, 2858, 2865, 2901, 2856, 2862, and 3131 and administrative claim nos. 3806, 3807, 3803, 3808, 3804, 3819 and 3812. These claims constitute *prima facie* evidence of validity and amount due to Frontier's failure to specifically object per Fed. R. Bankr. P. 3001(f). Frontier cannot move for judgment on the pleadings in its favor for claims it did not even dispute. Nonetheless, as Movie Company Claimants pointed out in their Response to Frontier's Objection, the 17 U.S.C. § 512(a) safe harbor (or any of the safe harbors of § 512) do not apply to secondary liability for DMCA violations of §1202. Rather, §1202 has *its own safe harbor* at §1202(e)(2)(A)(i) *that explicitly recognizes secondary liability* which Frontier has not asserted. *See* 17 U.S.C. §1202(e)(2)(A)(i) (providing a limitation of liability for digital transmissions if "...the placement of such information by someone *other than such person...*").

IV. Conclusion

⁴ Null routing, which is also called black hole routing, is a network route that goes nowhere. *See* RFC 3882 "Configuring BGP to Block Denial-of-Service Attacks", Sept. 2004, <https://datatracker.ietf.org/doc/html/rfc3882> [last accessed on Sept. 7, 2023]; *see also* Ax Sharma, "VPN provider bans BitTorrent after getting sued by film studios", Mar. 12, 2022, <https://www.bleepingcomputer.com/news/security/vpn-provider-bans-bittorrent-after-getting-sued-by-film-studios/> [last accessed on Sept. 7, 2023] ("It is a common practice in the hosting industry for a provider to "null route" a subscriber's IP address, effectively terminating a network connection, where it has received multiple notices of copyright infringement associated with an IP address.")

41. For the foregoing reasons, the Court should dismiss Frontier's Rule 12(c) motion on the pleadings and award Movie Company Claimants any relief justice dictates.

DATED: Kailua-Kona, HI, Jan. 5, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on Jan. 5, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all ECF recipients in the above-captioned matter.

Pursuant to the Case Management Order #1 [Doc. #2229] applying Part VII rules including Fed. R. Bankr. P.7005 to this contested matter – Movie Company Claimants have complied with their service obligations by serving counsel for all Parties in this contested matter pursuant to Fed. R. Civ. Pro 5(b)(2)(E) for service by the above ECF submission.

Dated: Kailua-Kona, HI Jan. 5, 2024

/s/ Kerry S. Culpepper
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