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17 **UNITED STATES DISTRICT COURT**  
18 **CENTRAL DISTRICT COURT OF CALIFORNIA**  
19 **WESTERN DIVISION**

20 ALS SCAN, INC.,  
21 a Maryland Corporation,

22 Plaintiff,

23 v.

24 CLOUDFLARE, INC.  
25 a Delaware corporation,  
26 et al.

27 Defendants  
28

Civil Action No: 2:16-cv-05051-GW-AFM

**STEADFAST NETWORKS LLC'S  
MEMORANDUM IN SUPPORT OF  
ITS MOTION TO DISMISS SECOND  
AMENDED COMPLAINT PURSUANT  
TO RULE 12(B)(6)**

Hearing Date: February 9, 2017

Hearing Time: 8:30

Place: Courtroom 10

Judge: Hon. George H. Wu

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1 “Difficult and controversial questions of copyright liability in the online  
 2 world prompted Congress to enact Title II of the [“DMCA”], the Online  
 3 Copyright Infringement Liability Limitation Act (OCILLA). 17 U.S.C. §  
 4 512 (2003).” *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004).  
 5 While recognizing that “‘in the ordinary course of their operations service  
 6 providers must engage in all kinds of acts that expose them to potential  
 7 copyright infringement liability[,]” **Congress was nonetheless “loath to**  
 8 **permit the specter of liability to chill innovation that could also serve**  
 9 **substantial socially beneficial functions.”** *UMG Recordings, Inc. v.*  
 10 *Shelter Capital Partners LLC*, 718 F.3d 1006, 2013 WL 1092793, at \*5  
 11 (9th Cir. 2013) (quoting S. Rep. No. 105-190, at 8 (1998) (alteration  
 12 omitted)). In an effort to balance these competing concerns, Congress  
 13 designed the OCILLA to “facilitate cooperation among Internet service  
 14 providers and copyright owners ‘to detect and deal with copyright  
 15 infringements that take place in the digital networked environment.’”  
 16 *Ellison*, 357 F.3d at 1076 (quoting S. Rep. 105-190, at 20 (1998); H.R. Rep.  
 17 105-551, pt. 2, at 49 (1998)).

18  
 19 *Ventura Content, Ltd. v. Motherless, Inc.*, No. 2:11-cv-5912-SVW-FMO, 2013  
 20 U.S. Dist. LEXIS 189948, at \*10-11 (C.D. Cal. Jul. 3, 2013) (emphasis added).

21 In *Ventura Content*, the plaintiff sued a website similar to Imagebam which  
 22 allowed users to upload pictures and videos. Defendants sought safe harbor  
 23 protection under Section 512 of the DMCA (17 U.S.C. § 512(c)), claiming its users  
 24 were the infringers, not the defendants themselves. Judge Wilson agreed with the  
 25 defendants’ position, holding:

26 A service provider does *not* have the “right and ability to control”  
 27 infringing activity merely because it has the technological capacity to  
 28 remove or block access to materials posted on its website or on its system;

1 “something more” is required. Specifically, “in order to have the ‘right and  
2 ability to control,’ the service provider must exert substantial influence on  
3 the activities of users.”

4 *Ventura Content*, No. 2:11-cv-5912-SVW-FMO, 2013 U.S. Dist. LEXIS 189948 at  
5 \*38-39 (emphasis in original) (internal citations omitted).

6 If Imagebam were added to this lawsuit it could claim safe harbor under the  
7 Section 512(c) of the DMCA, and Imagebam’s safe harbor protection would inure  
8 to Steadfast. Given this legal impediment, ALS Scan, Inc. (“Plaintiff”) is  
9 attempting to leapfrog both Imagebam and the individual users of the Imagebam  
10 hosting service to sue Steadfast for copyright and trademark infringement. The  
11 actions of Plaintiff are exactly why the safe harbor provisions of the DMCA were  
12 created by the United States Congress. Plaintiff should not be allowed to use the  
13 DMCA as a sword against Steadfast when its purpose was to shield businesses  
14 such as Steadfast.  
15

16 Steadfast should be dismissed from this case because it has safe harbor  
17 protection under Section 512(c) of the DMCA. Further, even if Steadfast did not  
18 have safe harbor protection, Plaintiff’s claims for vicarious and contributory  
19 copyright and trademark infringement are meritless and should be dismissed.  
20 Steadfast should not have to carry the financial and time burden involved in  
21 defending itself in a lawsuit it should not be a party to in the first place.

## 22 **I. BACKGROUND**

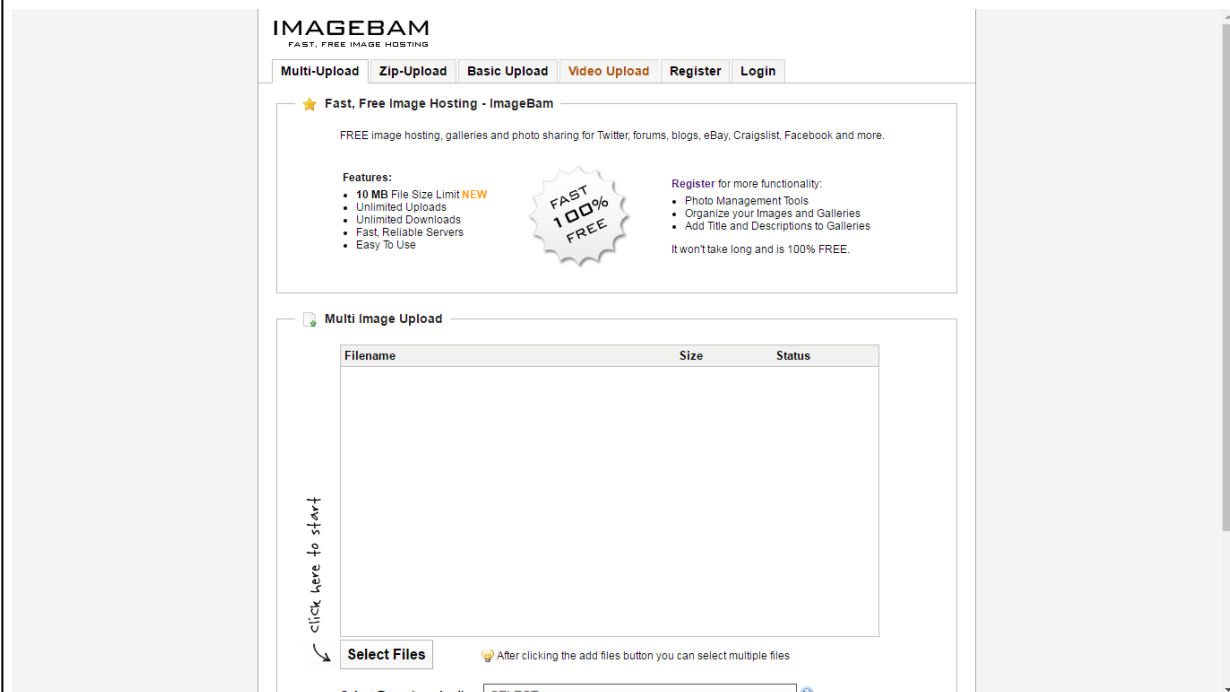
23 In its Second Amended Complaint (“SAC”), Plaintiff claims to own a library  
24 of copyrighted and trademarked works of adult entertainment. SAC ¶ 3. Plaintiff  
25 alleges that its works are repeatedly infringed by pirate internet sites, which display  
26 Plaintiff’s works without Plaintiff’s permission. *See id.* ¶¶24-26. These “pirate”  
27 sites are allegedly supported by third-party service providers that continue doing  
28 business with the sites even after receiving actual notice of infringement from



1 Plaintiff. *Id.* ¶25. Plaintiff asserts that Steadfast hosts pirate sites, including  
 2 Imagebam. *Id.* ¶¶ 15, 49. Plaintiff also asserts it has sent numerous notifications  
 3 to Steadfast of infringing content on the Imagebam website and that Steadfast  
 4 failed to implement or enforce a repeat infringer policy by removing Imagebam  
 5 from its servers. *Id.* ¶ 49. Plaintiff made no other specific factual assertions  
 6 against Steadfast in the SAC.

7 In the SAC, Plaintiff sets forth three causes of action against Steadfast: (1)  
 8 contributory copyright infringement; (2) vicarious copyright infringement; and (3)  
 9 contributory trademark infringement. *See id.* ¶¶ 64-70, 77-79.

10 It is clear that Plaintiff did not conduct any real investigation of Imagebam.  
 11 A cursory review of the Imagebam website indicates there are no images actually  
 12 displayed on the Imagebam website; rather the website claims to offer “image  
 13 hosting, galleries and photo sharing for Twitter, forums, blogs, eBay, Craigslist,  
 14 Facebook and more.” *See* IMAGEBAM, <http://www.imagebam.com> (last visited  
 15 Jan. 4, 2017). Below is a screenshot of the Imagebam website homepage:  
 16



In order to use the services provided by Imagebam on its website, individual users must register and create an account with Imagebam (see “Register,” IMAGEBAM, <http://www.imagebam.com/register> (last visited Jan. 4, 2017)):

As set forth directly on the Imagebam website, the Terms of Service sets forth a clear copyright policy and DMCA procedure to allow for the removal of any images which infringe copyrights, specifically:

***Compliance with Laws***

*Member assumes all knowledge of applicable law and is responsible for compliance with any such laws. Member may not use the Service in any way that violates applicable state, federal, or international laws, regulations or other government requirements. Member further agrees not to transmit any illegal material that encourages conduct that could constitute a criminal offense, give rise to civil liability or otherwise violate any applicable local, state, national, or international law or regulation.*

*Imagebam.com has a zero-tolerance policy regarding spam, child pornography, child modeling, copyright infringement and abuse.*

***Notification of Claimed Copyright Infringement***

*It is our policy to respond to notices of alleged infringement that comply with the Digital Millennium Copyright Act. If you are the owner of the copyright or intellectual property that violates copyright infringement.*

*Under the DMCA, a claim must be sent to the service providers Designated*

1 Agent.

2 **Copyright and Intellectual Property Statement**

3 **Notifying ImageBam of Violations:**

4 *If you believe that copyright infringement or intellectual property rights*  
 5 *have been violated, please provide ImageBam with the following*  
 6 *information:*

- 7 • *an electronic or physical signature of the person authorized to act on*  
 8 *behalf of the owner of the copyright or other intellectual property*  
 9 *interest;*
- 10 • *a description of the copyrighted work or other intellectual property that*  
 11 *you claim has been infringed;*
- 12 • *a description or url on ImageBam where the material that you claim is*  
 13 *infringing is located on the ImageBam site;*
- 14 • *your current contact information, including telephone number, and/or*  
 15 *email address;*
- 16 • *Your statement and good faith belief that the disputed use is not*  
 17 *authorized by the copyright or intellectual property owner, its agent, or*  
 18 *the law;*
- 19 • *Your statement made under penalty of perjury, that the above*  
 20 *information in your Notice is accurate and that you are the copyright or*  
 21 *intellectual property owner or authorized to act on the copyright or*  
 22 *intellectual property owner's behalf.*

23 *Notice of claims of copyright or intellectual property infringement can be*  
 24 *directed to Imagebam.com's Designated Agent via*  
 25 ***dmca@imagebam.com.***

26 *Please do not send any other notices or communications to the*  
 27 *Designated Agent, who is appointed solely for the purposes of receiving*  
 28 *notices of copyright claims under the DMCA*

“Terms of Service,” IMAGEBAM, <http://www.imagebam.com/terms-of-service>  
 (last visited Jan. 4, 2017).

Imagebam is not an unknown “pirate” website as Plaintiff claims (*see* SAC ¶ 49); rather, it is a website operated by Flixya Entertainment, LLC (“Flixya”), a California Limited Liability Company, with an address at 471 Nelo Street, Suite G, Santa Clara, California 95054. Flixya is also the DMCA agent for Imagebam.

“Flixya Entertainment, LLC” Directory of DMCA Agents,  
[https://www.copyright.gov/onlinesp/agents/f/flixya\\_entertain.pdf](https://www.copyright.gov/onlinesp/agents/f/flixya_entertain.pdf) (last visited Jan.

4, 2017). Certainly, Imagebam should be a defendant in this lawsuit.

If Plaintiff visited the Imagebam website, they would know the appropriate enforcement step to take was to contact Flixya directly to request the content be taken down. However, Plaintiff sent the notices to Steadfast, who in turn forwarded them to the proper party, Flixya, who then removed the images in question. Plaintiff skipped the pursuit of the actual infringers and instead seeks to drag Steadfast into this dispute.

## **II. LEGAL STANDARD FOR DISMISSAL UNDER FED. R. CIV. P. 12(b)(6)**

A complaint is subject to dismissal if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). While the court must assume all facts alleged in Plaintiff’s First Amended Complaint to be true for the purposes of this Rule 12(b)(6) Motion, Plaintiff’s “[f]actual allegations must be enough to raise a right to relieve above the speculative level” such that there is a “reasonable expectation that discovery will reveal evidence of [the claim].” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement of relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

In determining whether a motion to dismiss should be granted, the court may consider not only the contents of the complaint but also any “materials incorporated into the complaint by reference, and matters of judicial notice.”

*In re Rigel Pharm, Inc. Secs. Litig.*, 697 F.3d 869, 875-76 (9th Cir. 2012); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). The materials incorporated by reference need not be physically attached to the complaint, nor is the rule limited to “paper” documents – it applies equally to digital or electronic “materials” such as websites. *Kniesel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (affirming dismissal of defamation claim under Rule 12(b)(6) and taking

1 judicial notice of web pages on ESPN website containing allegedly defamatory  
2 content because “[t]he rationale of the ‘incorporation by reference’ doctrine applies  
3 with equal force to internet pages as it does to printed material”). Because Plaintiff  
4 specifically mentioned Imagebam and Steadfast it is appropriate to review the  
5 websites of these parties when deciding this Motion to Dismiss.

### 6 **III. ARGUMENT**

7 Steadfast has safe harbor protection under Section 512(c) of the DMCA for  
8 the claims brought against it by Plaintiff. Further, even if Steadfast did not have  
9 safe harbor protection, the assertion that Plaintiff sent DMCA Notices to Steadfast  
10 regarding the actions of individual users of the Imagebam service is not enough to  
11 establish a right to relief for copyright and trademark infringement by Steadfast  
12 above the speculative level.

13 Steadfast only provides computer storage. It does not operate the Imagebam  
14 website or service, nor does it manage any functions of Imagebam. Steadfast does  
15 not have access to the individual users’ content or accounts on Imagebam; it does  
16 not provide the software that runs the Imagebam website and service for the users  
17 to upload content; it does not enter into contracts with the Imagebam users; it does  
18 not register Imagebam users; it does not handle Imagebam user complaints; nor  
19 does it interact with the Imagebam users in any way. Accordingly, Plaintiff has  
20 failed to state a claim against Steadfast upon which relief can be granted.

21 If one follows Plaintiff’s theory of the claims against Steadfast to its logical  
22 conclusion, then Plaintiff would be entitled to demand the shutting down of  
23 virtually every major website on the Internet that contains user-generated content  
24 including, *inter alia*, Amazon, YouTube and Facebook, all of which have their  
25 own DMCA agents. Plaintiff’s theory would allow it to supersede the protection  
26 put in place by the DMCA by attacking the storage providers for any website on  
27 the Internet. Relying of Plaintiff’s theory, any website that hosts content uploaded  
28

1 by individual users would need to be shut down based on the misdeeds of  
 2 individual users. This would mean Dropbox, Walgreen's Photo, Collage.com,  
 3 Pinterest and others could be shut down. While Plaintiff's theory may be creative,  
 4 the Court should not allow it to overcome the protections put in place by the  
 5 United States Congress which was "**loath to permit the specter of liability to**  
 6 **chill innovation that could also serve substantial socially beneficial functions.**"  
 7 *Ventura Content*, Case No. 2:11-cv-5912-SVW-FMO, 2013 U.S. Dist. LEXIS  
 8 189948, at \*10-11 (emphasis added).

9  
 10 **A. STEADFAST IS IMMUNE FROM LIABILITY UNDER THE**  
**DMCA SAFE HARBOR**

11 Plaintiff has failed to state a claim because Steadfast is immune from  
 12 liability under the DMCA's Section 512(c) safe harbor. Section 512(c) of the  
 13 DMCA "protect[s] eligible service providers from all monetary . . . relief that may  
 14 arise from copyright liability." *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d  
 15 1090, 1098-99 (W.D. Wash. 2004). Under this safe harbor, an entity is protected  
 16 from liability for copyright infringement if it satisfies the following elements:

- 17 1. the entity is a "service provider" as the term is defined in 17 U.S.C. §  
 18 512(k)(1)(B);
- 19 2. the service provider has (a) adopted, (b) reasonably implemented, and (c)  
 20 informed subscribers and account holders of the service provider's  
 21 system or network of a policy that provides for the termination in  
 22 appropriate circumstances of subscribers and account holders of the  
 23 service provider's system or network who are repeat infringers;
- 24 3. the service provider does not interfere with standard technical measures;
- 25 4. prior to the filing of the suit, the service provider has neither actual  
 26 knowledge of infringing material on its systems or network, nor an  
 27 awareness of facts of circumstance from which infringement is apparent;  
 28

1 5. the service provider acted expeditiously to remove or disable access to  
 2 infringing material upon obtaining knowledge or awareness of infringing  
 3 material on its system or network; and

4 6. the service provider lacks the ability to control infringing activity.

5 *See* 17 U.S.C. § 512. As set forth below, Steadfast satisfies each of the elements.

6 1. *Steadfast Is a Service Provider Under 17 U.S.C. §512(k)(1)(B).*

7 Under the DMCA, “the term ‘service provider’ means a provider of online  
 8 services or network access, or the operator of facilities therefor.” 17 U.S.C. §  
 9 512(k)(1)(B). Because Steadfast provides storage services it qualifies as a “service  
 10 provider.”

11 2. *Steadfast Has Adopted and Reasonably Implemented a Policy That*  
 12 *Provides for Termination in Appropriate Circumstances.*

13 Steadfast satisfies the eligibility requirement set forth in 17 U.S.C. §  
 14 512(i)(1)(A) because it: (1) has adopted a policy for terminating access to its  
 15 hosting storage services for repeat copyright infringers; (2) informs its users of the  
 16 this policy; and (3) implements this policy in a reasonable manner.

17 ***First***, Steadfast has adopted a policy in its terms and conditions that provides  
 18 for the termination of its services against customers who violate copyright law:

19 All services provided by Steadfast may be used for lawful purposes only.

20 Transmission, storage, or presentation of any information, data or  
 21 material in violation of any American law is prohibited. This includes,  
 22 but is not limited to: copyrighted material, trademark, intellectual  
 23 property, material that promotes any illegal activity, or material protected  
 24 by trade secret and other statutes without proper authorization. Steadfast  
 25 will comply with all requirements of all Federal and State laws and  
 26 regulations and will comply with orders of any court of competent  
 27 jurisdiction or regulatory agency with authority over Steadfast or its  
 28



business. The subscriber agrees to indemnify and hold harmless Steadfast from any claims resulting from such compliance or the use of the service which damages the subscriber or any other party

Any illegal activity may result in your site being suspended immediately, without notification.

“Acceptable Use Policy/Terms of Service,” STEADFAST, <http://steadfast.net/legal-information> (last visited Jan. 4, 2017).

**Second**, Steadfast only has to inform users it has a termination policy. A service provider “need only inform users that, in appropriate circumstances, it may terminate the user’s accounts for repeated copyright infringement.” *Corbis*, 351 F. Supp. 2d at 1102 (citing *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634 (N.D. Ill. 2002)). Steadfast is not required “to reveal its decision-making criteria” to its customers. *Corbis*, 351 F. Supp. 2d at 1102. As noted above, Steadfast informs all of its customers that access to its servers may be denied if they violate Steadfast’s terms and conditions.

**Third**, Steadfast has registered as a DMCA Agent with the United States Copyright Office which provides copyright owners the ability to contact Steadfast in order to take down any infringing images. *See* “Steadfast Networks, LLC” Directory of DMCA Agents, [https://www.copyright.gov/onlinesp/agents/s/steadfast\\_networks\\_llc.pdf](https://www.copyright.gov/onlinesp/agents/s/steadfast_networks_llc.pdf) (last visited Jan. 4, 2017).

### 3. *Steadfast Does Not Interfere with Standard Technical Measures.*

Steadfast satisfies the DMCA eligibility requirement set forth in 17 U.S.C. § 512(i)(1)(B) as it does not interfere with standard technical measures used to identify and protect copyrighted works. Here, Plaintiff has not identified with particularity any standard technical measure used to identify or protect its copyrights, nor has Plaintiff asserted that Steadfast somehow interfered with such



1 measures.

2 4. Steadfast Did Not Have Actual or Apparent Knowledge of the  
 3 Alleged Copyright Infringement Prior to the Filing of This  
 4 Lawsuit.

5 Under the DMCA, Steadfast satisfies the requirement set forth in 17 U.S.C.  
 6 § 512(c)(1)(A) because it lacked actual or apparent knowledge of the alleged  
 7 infringing activity. Plaintiff will assert that it sent numerous notices to Steadfast,  
 8 which prove that Steadfast had actual or apparent knowledge of alleged copyright  
 9 infringement. This argument fails on two grounds. **First**, the DMCA notices sent  
 10 to Steadfast were in reference to individual users of the Imagebam website, not  
 11 Imagebam itself. **Second**, Imagebam has its own DMCA agent and Steadfast  
 12 forwarded Plaintiff's notices to Imagebam, who apparently expeditiously removed  
 13 the complained-of images because Plaintiff never followed up regarding the  
 14 notices.

15 5. Steadfast Acted Expeditiously Once It Received the Notices from  
 16 Plaintiff.

17 Upon receiving the notices from the Plaintiff, Steadfast immediately  
 18 forwarded the notices to Imagebam, who removed the complained-of images, as  
 19 Plaintiff never sent follow up correspondence to Steadfast. Under 17 U.S.C. §§  
 20 512(c)(1)(A) and (C), a service provider satisfies the safe harbor requirement if it  
 21 acts expeditiously to remove (or disable access to) allegedly infringing material  
 22 upon notice or actual knowledge of the claimed or actual infringement. Steadfast's  
 23 actions satisfy this requirement.

24 6. Steadfast Lacks the Ability to Control Allegedly Infringing Activity.

25 Steadfast does not have the practical ability to control the allegedly  
 26 infringing conduct by individual users of the Imagebam website. A service  
 27 provider satisfies 17 U.S.C. § 512(c)(1)(B) of the DMCA if it lacks either the right  
 28 or the ability to control infringing activity. An accused infringer does not have the

ability to control a direct infringer by merely having “the ability . . . to remove or block access to materials posted on its website or stored in its system.” *Perfect 10, Inc. v. Google, Inc.*, 416 F. Supp. 2d 828, 858 (C.D. Cal. 2006) (citing *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1093-94 (C.D. Cal. 2001)). Here, Steadfast must have the “practical ability” “to stop or limit the directly infringing conduct.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1173 (9th Cir. 2007). In the SAC, Plaintiff provides only conclusory allegations about Steadfast’s control over the users of the Imagebam website and does not explain these allegations with particularity. *See* SAC ¶¶ 64-70. Steadfast simply provides storage services to Imagebam who in turn offers services to individual users.

In short, even if the Court took Plaintiff’s conclusory and overbroad allegations as true, Steadfast is protected from liability by the DMCA safe harbor with regard to Plaintiff’s copyright claims. Thus, no relief can be granted and Steadfast should be dismissed from this lawsuit.<sup>1</sup>

**B. PLAINTIFF FAILS TO STATE A CLAIM FOR CONTRIBUTORY INFRINGEMENT AGAINST STEADFAST**

*1. Steadfast Did Not Substantially Contribute to the Copyright Infringement by the Imagebam Users.*

Plaintiff has failed to state a claim that Steadfast is liable for contributory copyright infringement. Contributory copyright infringement “may be imposed for intentionally encouraging infringement through specific acts.” *Amazon.com*, 508 F.3d at 1170; *see also Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930, 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005). In the SAC, Plaintiff does not allege that Steadfast had knowledge of the infringing activity of the individual users of the Imagebam website. This omission is fatal to Plaintiff’s

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<sup>1</sup> In the SAC, Plaintiff makes no assertion that the images are still available.

1 claim and grounds for dismissal. The mere receipt of a DMCA notice and then the  
 2 removal of an image does not constitute proof that the images were in fact  
 3 infringing. In no way does Steadfast encourage or promote any illegal conduct,  
 4 including the alleged infringements.

5 Steadfast can only be liable for materially contributing to infringement  
 6 where its participation in the infringing conduct of the primary infringer is  
 7 “substantial.” *See Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*,  
 8 907 F. Supp. 1361, 1375 (9th Cir. 1995) (citing *Gershwin Publ. Corp. v. Columbia*  
 9 *Artists Mgmt.*, 443 F.3d 1159 (2d Cir. 1971); *Apple Computer, Inc. v. Microsoft*  
 10 *Corp.*, 821 F. Supp. 616, 625 (N.D. Cal. 1993); *Demetriades v. Kaufmann*, 690 F.  
 11 Supp. 289, 294 (S.D.N.Y. 1988)).

12 In *Amazon.com*, the Ninth Circuit held that “a computer system operator can  
 13 be held contributorily liable if it “‘has *actual* knowledge that *specific* infringing  
 14 material is available using its system,’ and can ‘take simple measures to prevent  
 15 further damage’ to copyrighted works, yet continues to provide access to infringing  
 16 works.” 508 F.3d at 1172 (internal citations omitted) (quoting *A&M Records, Inc.*  
 17 *v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001); *Netcom*, 907 F. Supp. at  
 18 1375) (emphasis in original).

19 In this case, Plaintiff can only show that Steadfast gained knowledge of the  
 20 allegedly infringing material uploaded by Imagebam’s individual users, upon  
 21 Steadfast’s receipt of the DMCA Notices. Once Steadfast received the DMCA  
 22 Notices from Plaintiff, it immediately forwarded the Notices to Imagebam who  
 23 removed the material.<sup>2</sup> This is exactly how the procedures established by the  
 24 DMCA are supposed to work. Unlike in *Amazon.com*, 508 F.3d at 1170, as soon  
 25  
 26  
 27

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28 <sup>2</sup> Nowhere in the SAC does Plaintiff assert that the images in the DMCA Notices  
 are still accessible.

1 as Steadfast was made aware of the allegedly infringing material it took action to  
 2 prevent the further damage to Plaintiff's copyrighted materials. There was no  
 3 failure on Steadfast's part to take the requisite actions.

4 Plaintiff relies on the assumption that numerous DMCA Notices sent to  
 5 Steadfast regarding the possible copyright infringement by Imagebam users  
 6 constitutes a general awareness on Steadfast's part regarding the copyright  
 7 infringement. However, this theory has been rejected by prior courts in the Ninth  
 8 Circuit. *See UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099,  
 9 1111 (C.D. Cal. 2009) ("UMG nevertheless argues that Veoh is ineligible for the  
 10 safe harbor because its founders, employees, and investors knew that widespread  
 11 infringement was occurring on the Veoh system."), *aff'd sub nom. UMG*  
 12 *Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013).  
 13 In *UMG Recordings*, the Court rejected the plaintiff's argument, stating:  
 14

15 No doubt it is common knowledge that most websites that allow users to  
 16 contribute material contain infringing items. If such general awareness were  
 17 enough to raise a "red flag," the DMCA safe harbor would not serve its  
 18 purpose of "facilitat[ing] the robust development and world-wide expansion  
 19 of electronic commerce, communications, research, development, and  
 20 education in the digital age," and "balanc[ing] the interests of content  
 21 owners, on-line and other services providers, and information users in a way  
 22 that will foster the continued development of electronic commerce and  
 23 growth of the Internet.

24 *UMG Recordings*, 665 F. Supp. 2d at 1111 (quoting S. Rep. 105-190, at 1-2  
 25 (1998); H.R. Rep. 105-551(II), at 21).

26 The mere issuance of DMCA Notices by Plaintiff does not establish that the  
 27 entire Imagebam website was created to intentionally encourage infringement  
 28 through specific acts. In *Ventura Content* the Court wrote:

1 Section 512(c)'s safe harbor . . . requires only that Defendants demonstrate  
 2 the absence of a genuine issue of material fact as to whether they had actual  
 3 or red flag knowledge of *specific instances of infringement* . . . . To demand  
 4 more would require Defendants to demonstrate that material on their website  
 5 was *not* copyright-infringing, effectively undermining Congress'  
 6 "considered policy determination" of placing the "burden of policing  
 7 copyright infringement . . . squarely on the owners of the copyright." . . .  
 8 "[I]f merely hosting material that falls within a category of content capable  
 9 of copyright protection, with the general knowledge that one's services  
 10 could be used to share unauthorized copies of copyrighted material, was  
 11 sufficient to impute knowledge to service providers, the §512(c) safe harbor  
 12 would be rendered a dead letter[.]"

13  
 14 *Ventura Content*, No. 2:11-cv-5912-SVW-FMO, 2013 U.S. Dist. LEXIS 189948 at  
 15 \*25-26 (internal citations omitted).

16 Given the Ninth Circuit precedent and that Plaintiff does not allege Steadfast  
 17 had knowledge of or intentionally encouraged infringement through specific acts,  
 18 Plaintiff fails to state a claim for contributory copyright infringement claim against  
 19 Steadfast fails.

20 2. *Steadfast Did Not Induce Copyright Infringement By Imagebam's*  
 21 *Users.*

22 Plaintiff has also failed to state a claim that Steadfast is liable for  
 23 contributory copyright infringement through inducement. Plaintiff, without  
 24 asserting any facts, included a claim for contributory copyright infringement  
 25 through inducement which requires proof that a defendant "intentionally  
 26 induced[ed] or encourage[ed] direct infringement" by a third party. *See MGM*  
 27 *Studios*, 545 U.S. at 930, 937 (2005) ("The classic instance of inducement is by  
 28 advertisement or solicitation that broadcasts a message designed to stimulate others

1 to commit violations.”). Inducement “is a legal determination, and dismissal may  
2 not be avoided by characterizing a legal determination as a factual one.” *Perfect*  
3 *10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 802 (9th Cir. 2007).

4 Plaintiff has not pled any facts that Steadfast induced registered users of  
5 Imagebam to engage in copyright infringement. Unlike the *MGM Studios* case,  
6 Plaintiff has not pled any facts that would indicate Steadfast solicited, advertised,  
7 promoted or rewarded acts of direct infringement by others, or that Steadfast’s  
8 storage services were created for the purpose of facilitating mass copyright  
9 infringement.<sup>3</sup> *See MGM Studios*, 545 U.S. at 939.

10 Plaintiff’s allegation of inducement is made without factual allegations and,  
11 therefore, is not a viable claim under *Iqbal*, 556 U.S. at 678, and should be  
12 dismissed.

### 13 **C. PLAINTIFF FAILS TO STATE A CLAIM FOR VICARIOUS** 14 **COPYRIGHT INFRINGEMENT**

15 Plaintiff alleges no facts to support either element for vicarious copyright  
16 infringement as required under *Iqbal*, and thus this cause of action should be  
17 dismissed. “To state a claim for vicarious copyright infringement, Plaintiff must  
18 allege that defendant has (1) the right and ability to supervise the infringing  
19 conduct and (2) a direct financial interest in the infringing activity.” *See Visa*, 494  
20 F.3d. at 802. In the SAC, Plaintiff fails to adequately state a claim for vicarious  
21 liability because Steadfast does not have the requisite right and ability to supervise  
22 and control the infringing conduct. *See SAC* ¶¶ 68-70.

23 In no way does Steadfast encourage any conduct whatsoever, including  
24 especially the alleged infringements. Steadfast offers passive storage services to  
25 Imagebam. Steadfast has nothing to do with Imagebam’s users and does not have  
26  
27

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28 <sup>3</sup> In the SAC Plaintiff only specifically mentions Steadfast in Paragraph 49.

1 the ability to supervise or control what the independent Imagebam users can  
 2 upload onto the Imagebam website. Steadfast's situation is analogous to the  
 3 services offered by credit card processors like in the *Visa* case, 494 F.3d 788.  
 4 Plaintiff's theory appears to rest on the fact that "numerous" DMCA Notices were  
 5 sent to Steadfast regarding the actions of individual users of the Imagebam website  
 6 which allegedly gives Steadfast the right to control the infringing conduct.

7 However, as stated previously, this theory was rejected in *Ventura Content*:

8 A service provider does *not* have the "right and ability to control" infringing  
 9 activity merely because it has the technological capacity to remove or block  
 10 access to materials posted on its website or on its system; "something more"  
 11 is required. Specifically, "in order to have the 'right and ability to control,'  
 12 the service provider must exert substantial influence on the activities of  
 13 users."  
 14

15 *Ventura Content*, No. 2:11-cv-5912-SVW-FMO, 2013 U.S. Dist. LEXIS 189948 at  
 16 \*38-39 (emphasis in original) (internal citations omitted)

17 The SAC is devoid of any allegation that Steadfast engaged in any  
 18 affirmative acts to encourage or invite users to infringe. Therefore, Plaintiff's  
 19 vicarious liability cause of action against Steadfast must be dismissed.

#### 20 **D. PLAINTIFF FAILS TO STATE A CLAIM FOR** 21 **CONTRIBUTORY TRADEMARK INFRINGEMENT**

22 Plaintiff has failed to state a claim for contributory trademark infringement  
 23 against Steadfast. "To be liable for contributory trademark infringement,  
 24 [Steadfast] must have (1) 'intentionally induced' the primary infringer to infringe,  
 25 or (2) continued to supply an infringing product to an infringer with knowledge  
 26 that the infringer is mislabeling the particular product supplied. *See Visa*, 494 F.3d  
 27 at 807 (citing *Inwood Labs, Inc. v. Ives Labs, Inc.*, 456 U.S. 844, 102 S. Ct. 2182,  
 28 72 L. Ed. 2d 606 (1982)). "The tests for secondary trademark infringement are



1 even more difficult to satisfy that those required to find secondary copyright  
2 infringement.” *Visa*, 494 F.3d at 806 (citing *Sony Corp. v. Universal City Studios*,  
3 464 U.S. 417, 439 n.19, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984)). “For liability to  
4 attach, there must be ‘[d]irect control and monitoring of the instrumentality used  
5 by a third party to infringe the plaintiff’s mark.’” *Visa*, 494 F.3d at 807 (citing  
6 *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 984 (9th Cir.  
7 1999)).

8 In the SAC, Plaintiff has not alleged any facts that would support a claim  
9 that Steadfast induced any user of the Imagebam website to use and infringe the  
10 Plaintiff’s trademarks. Further, the SAC does not allege any facts establishing  
11 what the purported trademark infringement by the Imagebam users entailed.  
12

13 The SAC contains no factual allegations which could establish that Steadfast  
14 somehow controls or monitors any instrumentality used by the Imagebam users to  
15 engage in trademark infringement. Steadfast should not be burdened with the costs  
16 of defending such a claim that has no basis in fact or in law. For these reasons,  
17 Plaintiff’s Contributory Trademark Infringement cause of action should be  
18 dismissed.  
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1 **IV. CONCLUSION**

2 Therefore, Steadfast respectfully requests this Court grant Steadfast  
3 Networks, LLC's Motion to Dismiss all the Counts against it in the Second  
4 Amended Complaint.

5 JOHN L. AMBROGI  
6 COLIN T.J. O'BRIEN  
7 PARTRIDGE PARTNERS, P.C.  
8

9 PAUL D. SUPNIK  
10

11 Dated: January 5, 2017

12 By: s/Colin T.J. O'Brien  
13 COLIN T.J. O'BRIEN  
14 Attorneys for Steadfast Networks, LLC  
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**PROOF OF SERVICE**

I, COLIN T.J. O'BRIEN, certify that I am an attorney at law, licensed to practice in the State of Illinois and I am admitted to appear before the United States District Court for the Central District of California, and that on January 5, 2017, true copies of the following document was served via the Court's ECF:

**STEADFAST NETWORKS LLC'S MEMORANDUM IN SUPPORT  
OF ITS MOTION TO DISMISS SECOND AMENDED COMPLAINT  
PURSUANT TO RULE 12(B)(6)**

to the following parties in this action via their counsel:

ALS Scan, Inc.

Hivelocity Ventures Corp.

Cloudflare, Inc.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: January 5, 2017

s/Colin T.J. O'Brien

Colin T.J. O'Brien

Attorney for Defendant

Steadfast Networks LLC