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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION**

PINK LOTUS ENTERTAINMENT, LLC,

Plaintiff(s),

vs.

JOHN DOE AND STEVE POLAN,

Defendant(s).

Case No. 2:11-cv-3073 WBS-KJN

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT POLAN'S RULE 12(b)(6)
MOTION TO DISMISS FOR FAILURE TO
STATE A CLAIM, OR IN THE
ALTERNATIVE, RULE 12(c) MOTION
FOR JUDGMENT ON THE PLEADINGS**

**DATE: 01/28/2013
TIME: 2:00 P.M
COURTROOM: 5, 14th Floor**

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I. INTRODUCTION

1
2 The website for the Northern District of California (www.cand.uscourts.gov/wifi) states
3 that the district “is pleased to announce that free wireless public internet access is now
4 available to persons doing business with the court in all Northern District court
5 locations...Wi-Fi makes it possible for users to connect to the public internet using the
6 wireless technology used in most laptops. If users are able to connect to a typical home or
7 business Wi-Fi system, they can connect to the court Wi-Fi.”

8 Providing free WiFi access to the Internet was undoubtedly welcomed by judges,
9 attorneys, clerks, and court users of all types. According to the Plaintiff’s negligence claim
10 against Mr. Polan, however, the Northern District now has a duty extending to the producers
11 of adult entertainment and Plaintiff herein, to monitor and secure the Northern District’s WiFi
12 connection in such a way that no one can connect to the network to commit a copyright
13 infringement. Plaintiff’s position imposes a substantial burden on the Northern District,
14 especially since the Northern District obviously has intentionally offered unsecured Wi-Fi
15 access that can be used by anyone, including those who wish to commit copyright
16 infringement.

17 While the Terms of Use for the Northern District WiFi connection prohibit infringing
18 use, the fact is that the connection is available to the public and has no mechanism to
19 prevent infringing use. Luckily for the Northern District (and millions of Americans), Plaintiff’s
20 theory lacks any legal precedent, is wholly unsupported by existing law and, as one judge
21 has noted, “flies in the face of common sense.”¹

22 Plaintiff’s negligence theory is, instead, the latest incarnation of the copyright trolling
23 phenomenon that has swept through district courts across the country. Certain features
24 have become hallmarks of this brand of litigation. First, Plaintiff files a single suit seeking
25 the identities of scores or hundreds of unrelated individuals based on a generalized

26
27 ¹ *In Re BitTorrent Litigation*, No. 2:11-cv-03999(E.D.N.Y. May 1, 2012)(Doc. 39 at pg. 5)(“While Plaintiffs claim
28 that they can amend their complaints to allege negligence against the owner of a WiFi router who failed to
password-protect the device which was then used by an intruder to infringe its copyright, this assertion flies in
the face of common sense.”)

1 allegation that each has “shared” one of the plaintiff’s copyrighted works – usually a
2 pornographic film with an obviously pornographic title. In the instant matter, Plaintiff filed its
3 complaint in *Pink Lotus Entertainment, LLC v. Does 1 – 46*, case number C-11-02263 HRL
4 (hereinafter *Pink Lotus #1*) in the Northern District, San Jose Division, on May 6, 2011. (*Pink*
5 *Lotus #1*, Doc. #2).

6 Next, the plaintiff seeks from the court an *ex parte* order for “early” or “limited
7 expedited discovery”, seeking the names, addresses, telephone numbers, etc. of each ISP
8 subscriber associated with particular IP addresses. This is typically accomplished by
9 assuring the court in the original action that: (a) the joinder of scores or hundreds of
10 individuals as Doe defendants is proper and Plaintiff intends to amend the complaint to
11 include each; and, (b) that the requested expedited discovery will be sufficient to “fully
12 identify” the defendants and serve each with process.

13 Plaintiff in the present matter adhered to this model. In *Pink Lotus #1*, the original
14 matter where Plaintiff obtained Defendant’s identity, Plaintiff represented to the court that
15 “Through the information they gather from the ISPs via these subpoenas, the plaintiffs are
16 able to fully “identify”...each P2P network user suspected of violating Plaintiff’s copyright.”
17 (*Pink Lotus #1*, Doc. #6, pg. 3, lines 9 – 12.)

18 In *Pink Lotus #1* an Order granting leave to take expedited discovery issued on June
19 11, 2011 (*Pink Lotus #1*, Doc. #8). Plaintiff then issued a subpoenas on Mr. Polan’s ISP
20 through the United States District Court for the Northern District of Illinois; requiring any
21 effort to quash the subpoena to be brought in Illinois. Similar subpoenas were issued to the
22 ISP’s for the other Doe defendants.

23 After obtaining the identity of each subscriber via the subpoenas, the Plaintiff then
24 sends letters to each account holder demanding thousands of dollars to settle its claims,
25 and threatening to sue the subscriber for \$150,000 if the subscriber fails to pay the
26 settlement demand. As Plaintiff well knows, a subscriber’s decision to settle is often wholly
27 unrelated to whether or not the subscriber infringed a copyright; rather, the decision is
28 based on a desire to avoid the legal expense and embarrassment of trying to establish one

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1 is innocent of downloading pornography.

2 The final phase in these mass copyright actions is, typically, a slow death. Here,
3 Plaintiff never amended its complaint in *Pink Lotus #1* to name any Doe defendant. One
4 Doe defendant, appeared anonymously as “Yolanda P.” and moved to quash the subpoena
5 to her ISP on August 4, 2011. (*Pink Lotus #1*, Doc. #12) The motion hearing was twice
6 continued. On October 5, 2011The Perkins Coie law firm filed an appearance on behalf of
7 Yolanda P. (*Pink Lotus #1*, Doc. #26.) Eight days later Plaintiff filed its Notice of Voluntary
8 Dismissal without prejudice of the entire action. (*Pink Lotus #1*, Doc. #27)

9 That dismissal is consistent with the fact that Plaintiffs rarely take these matters to
10 trial. The district courts have started to refuse requests for expedited discovery to Internet
11 Service Providers except on an individual basis. Indeed, Judge Otis D. Wright II of the
12 Central District of California, in an Order on June 27, 2012 refusing to permit one subpoena
13 for the ten Doe defendants, stated: “The federal courts are not cogs in a plaintiff’s copyright-
14 enforcement business model. The Court will not idly watch *what is essentially an extortion*
15 *scheme*, for a case that plaintiff has no intention of bringing to trial.” (*Malibu Media, LLC v.*
16 *John Does 1 through 10*, Case No. 2:12-cv-3623 – ODW, Doc. #7, pg.6, lines 18-20).
17 (Emphasis added.)

18 II. FACTUAL BACKGROUND

19 In early August 2011, Plaintiff obtained Mr. Polan’s name and contact information by
20 subpoena on his ISP. On August 16, 2011, Plaintiff’s counsel sent Mr. Polan a letter
21 demanding \$3400 to settle its claims and enclosed a settlement package that included a
22 two-page document titled “Frequently Asked Questions,” a payment authorization form, and
23 a sample “release.” Plaintiff’s counsel called Mr. Polan on October 21, 2011, and left voice
24 mails on October 27, 2011 and November 8, 2011seeking settlement of Plaintiff’s claims.

25 The instant action was initiated on November 21, 2011 with the filing of a complaint
26 naming only “John Doe” (Docket Doc. #2). The first paragraph of that complaint identifies
27 Mr. Polan as the ISP account holder.

28 Plaintiff’s counsel sent Mr. Polan a letter dated December 5, 2011 requesting

1 “informal discovery pursuant to the Northern District of California Local Rules” (sic) and
2 stating that Plaintiff had “commenced our informal discovery efforts in relation to the above-
3 referenced case.” The letter identified the suit naming John Doe as the only defendant.
4 Plaintiff continued to contact Mr. Polan directly, seeking settlement, including at least three
5 phone calls after Mr. Polan filed his Answer on July 13, 2012. Mr. Polan received calls on
6 June 21, 22, 25, and July 11, 16, 17 and 18, 2012. At least two were made by individuals;
7 the rest were calls from an automated system urging contact with Plaintiff’s counsel.

8 Although Mr. Polan had not been named as a party, and thus had not yet appeared
9 in this case, the Court entered a Scheduling Order on the March 19, 2012 (Docket Doc.
10 #11). That Order provides, in relevant part:

11 I. SERVICE OF PROCESS

12 This action was filed against a John Doe defendant and plaintiff has
13 thus far failed to identify or serve a named defendant. *Plaintiff shall*
14 *have until May 18, 2012, to identify and effect service upon a named*
15 *defendant. Except as so provided, no further service is permitted*
16 *without leave of court, good cause having been shown under Federal*
17 *Rule of Civil Procedure 16(b).*

18 II. JOINDER OF PARTIES/AMENDMENTS

19 No further joinder of parties *or amendments to pleadings* will be
20 permitted except with leave of court, good cause having been shown
21 under Federal Rule of Civil Procedure 16(b). See Johnson v.
22 Mammoth Recreations, Inc., 975 F.2d 604 (9th Cir. 1992). [Emphasis
23 added.]

24 On May 31, 2012, *without* seeking leave of court, Plaintiff filed its First Amended
25 Complaint (“FAC”) naming Mr. Polan in a single count. He was not served until more than
26 two months after the Scheduling Order cut-off date. *The docket contains no Order granting*
27 *Plaintiff leave to amend or serve any party after May 18, 2012.*

28 The FAC names a single Doe defendant in the first three causes of action for
Copyright Infringement and Contributory Infringement. Only the Fourth Cause of Action, for
Negligence, is directed to Defendant.

///

1 The pleadings in this matter establish that Plaintiff has no evidence that a particular
2 subscriber actually committed copyright infringement. Plaintiff's counsel filed a declaration
3 on January 30, 2012 in support of his application for leave to depose Mr. Polan before he
4 was named in this action (Docket Doc. #9-1). In paragraph 11 of his declaration counsel
5 states: "At this time, the actual infringer in this case is unknown to Plaintiff." This puts
6 plaintiff in a very awkward position, because actually suing people for infringement in this
7 situation would violate Rule 11, as well as expose the Plaintiff to liability for costs and
8 attorney fees under Copyright Act §505 when the defendant ultimately prevails.

9 Plaintiff's solution? File the First Amended Complaint which accuses the account-
10 holder of negligence – despite the fact that copyright negligence doesn't exist. It is not
11 important to Plaintiff that the negligence claim utterly lacks merit. It will serve the purpose of
12 appearing to comply with the "Service of Process" portion of the Scheduling Order by
13 naming a defendant. More importantly, it perpetuates the suit and increases settlement
14 pressure. Defendant has been publically shamed, forced to retain counsel and incur
15 significant costs to defend himself. These are potent weapons for a Plaintiff seeking cost-of-
16 defense settlements and threatening embarrassment to achieve that end.

17 For the reasons outlined more fully below, Defendant respectfully requests that this
18 court dismiss Plaintiff's groundless negligence cause of action with prejudice because the
19 defects in it cannot be cured by amendment. Mr. Polan also asks that the Court prohibit
20 further amendments naming Mr. Polan, and that the Court consider, in the context of Rule
21 11(c)(3), Plaintiff's failure to comply with the provisions of the Scheduling Order, as well as
22 the absence of even colorable merit underlying the negligence claim.

23 **III. STATEMENT OF ISSUES TO BE DECIDED**

- 24 1. Is Plaintiff's Negligence action against Defendant Polan preempted by Copyright
25 Act §301 or the doctrines of conflict preemption or field preemption?
26 2. Is Defendant Polan entitled to immunity from suit under CDA §230 based on the
27 allegations that he provided internet access to an unidentified individual who
28 subsequently harmed Plaintiff?

1 3. Has Plaintiff alleged a sufficient factual basis regarding the existence of a duty to
2 state a cause of action for negligence and survive dismissal under Fed. R. Civ. P.
3 12(b)(6)?

4 **IV. LEGAL ARGUMENT**

5 **A. PLAINTIFF'S FIRST AMENDED COMPLAINT FAILS TO STATE A CLAIM UPON**
6 **WHICH RELIEF MAY BE GRANTED**

7 A complaint may be dismissed under Rule 12(b)(6) if it appears beyond doubt that
8 the plaintiff can prove no set of facts in support of the claim that would entitle him to relief.
9 *Hishion v. King & Spalding*, 467 U.S. 69 (1984) at 73. A dismissal under this rule may be
10 based on the failure to allege a cognizable legal theory, or by the failure to allege sufficient
11 facts under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d
12 530 (9th Cir. 1984) at 533-34.

13 Allegations of fact in the complaint must be taken as true and construed in the light
14 most favorable to the Plaintiff. *See Livid Holdings, Ltd. v. Salomon Smith Barney, Inc.*, 416
15 F.3d 940 (9th Cir. 2005) at 946. Notably, however, "the tenet that a court must accept as
16 true all of the allegations contained in a complaint is inapplicable to legal conclusions," and
17 courts are not "bound to accept as true a legal conclusion couched as a factual allegation."
18 *Ashcroft v. Iqbal*, (2009) 556 U.S. 662 at 678 (internal quotation marks and citations
19 omitted). *See also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988)
20 ("[C]onclusory allegations without more are insufficient to defeat a motion to dismiss for
21 failure to state a claim.").

22 As such, "bare assertions amounting to nothing more than a formulaic recitation of
23 the elements" of a claim are not entitled to a presumption of truth." *Moss v. U.S. Secret*
24 *Service*, 572 F.3d 962 (9th Cir. 2009) at 969. When a complaint fails to adequately state a
25 claim, this fact should be "exposed at the point of minimum expenditure of time and money
26 by the parties and the court." *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) at 556 As
27 discussed below, Plaintiff's First Amended Complaint fails to state a claim upon which relief
28 may be granted because it's negligence claim is preempted by § 301 of the Copyright Act,

1 because Defendant is immune from the alleged liability under §230 of the Communications
2 Decency Act, and because the FAC is substantively insufficient to state a negligence claim
3 under California law. Accordingly the complaint against Mr. Polan should be dismissed with
4 prejudice under Rule 12(b)(6).

5 **1. PLAINTIFF'S NEGLIGENCE CLAIM IS PREEMPTED BY THE COPYRIGHT ACT.**

6 § 301 of the Copyright Act provides:

7 On and after January 1, 1978, ***all legal or equitable rights that are***
8 ***equivalent to any of the exclusive rights within the general scope of***
9 ***copyright as specified by section 106*** in works of authorship that are fixed
10 in a tangible medium of expression and come within the subject matter of
11 copyright as specified by sections 102 and 103, whether created before or
12 after that date and whether published or unpublished, ***are governed***
exclusively by this title. Thereafter, no person is entitled to any such
right or equivalent right in any such work under the common law or
statutes of any State.

13 17 U.S.C. 301(a).(Emphasis added.) Copyright Act preemption is extremely broad.

14 The Northern District of California stated:

15 While the language of section 301 is quite clear, Congress also
16 reinforced its desire to sweep broadly in a report accompanying the legislation:
17 'The declaration ... in section 301 is intended to be stated in the clearest and
18 most unequivocal language possible, so as to foreclose any conceivable
19 misinterpretation of its unqualified intention that Congress shall act
20 preemptively, and to avoid the development of any vague borderline areas
between State and Federal protection.' H.R.Rep. No. 1476, 94th Cong., 2d
Sess. 130 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5746 (quoted in
Rosciszewski v. Arete Associates, 1 F.3d 225, 232 (4th Cir. 1993).

21 Thus, Congress has clearly indicated that state-law claims which come
22 within ***the subject matter of copyright law and which protect rights***
23 ***equivalent to any of the exclusive rights within the scope of federal***
copyright law ... should be litigated only as federal copyright claims. *Id.*

24
25 *Firoozye v. Earthlink Network*, 153 F.Supp.2d 1151(N.D. Cal. 2001) at 1121-22 (Emphasis
26 added.)

27 The House Committee report goes on to note that "preemption of rights under State
28 law is complete with respect to any work coming within the scope of the bill, even though the

1 scope of exclusive rights given the work under the bill is narrower than the scope of
2 common law rights in the work might have been. H.R.Rep. No. 1476, 94th Cong., 2d Sess.
3 130 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5746. The message is unmistakable:
4 the rights granted by the Copyright Act must be vindicated within the confines of the
5 Copyright Act and its jurisprudence.

6 The test for copyright preemption asks two essential questions. First, do the claims
7 fall “within the subject matter of copyright law?” *Firoozye*, 153 F.Supp. 2d at 1121-22.
8 Second, do the claims seek to “protect rights equivalent to any of the exclusive rights within
9 the scope of federal copyright law?” *Id.* If the answer to these questions is yes, then
10 Plaintiff’s claims “should be litigated only as federal copyright claims.” *Id.* In the instant
11 case, the answer to each question is obviously affirmative, and Plaintiff’s negligence cause
12 of action against Steve Polan is therefore preempted by §301.

13 **A. Plaintiff’s Claim is Within the Subject Matter of Copyright**

14 The first prong of the copyright preemption test asks whether the Plaintiff’s claim is
15 within the subject matter of copyright. There can be no doubt that Plaintiff’s claim herein,
16 which is based on the unauthorized reproduction and distribution of Plaintiff’s allegedly
17 copyrighted work, is within the subject matter of copyright. The Copyright Act describes the
18 “Subject matter of copyright” as follows. “Copyright protection subsists, in accordance with
19 this title, in original works of authorship fixed in a tangible medium of expression...Works of
20 authorship include the following categories... (6) motion pictures and other audiovisual
21 work.” 17 U.S.C. §102.

22 As the House Committee report notes:

23 “As long as a work fits within one of the general subject matter categories of
24 sections 102 and 103 [sections 102 and 103 of this title], the bill prevents the
25 States from protecting it even if it fails to achieve Federal statutory copyright
because it is too minimal or lacking in originality to qualify, or because it has
fallen into the public domain.”

26 H.R.Rep. No. 1476, 94th Cong., 2d Sess. 130 (1976), reprinted in 1976 U.S.C.C.A.N. 5659,
27 5748.

28 ///

1 Thus, the first test for copyright preemption is satisfied whether or not the individual
2 work at issue is deemed copyrightable, and is satisfied solely by virtue of the fact that the
3 work is a motion picture, falling within the subject matter of copyright. The work that forms
4 the basis of Plaintiff's claim in the instant case qualifies as a motion picture, and thus is
5 within the subject matter of copyright. The first prong of the preemption test is satisfied.

6 **B. Plaintiff Seeks to Protect Rights Identical to the §106 Exclusive Rights**

7 There can also be no doubt that Plaintiff's negligence claim against Steve Polan
8 seeks to protect rights that are equivalent to the section 106 rights of reproduction,
9 distribution, etc. Plaintiff's complaint makes it abundantly clear the negligence claim against
10 Defendant seeks to protect Plaintiff's copyrighted work from unauthorized copying and
11 sharing. This is precisely the role of copyright law.

12 Indeed, Plaintiff cannot formulate any statement of its right to relief without reference
13 to its "exclusive rights" under the copyright act (See, e.g., First Amended Complaint, Pars.
14 63, 64, 67), or the violation of those rights by "copying and sharing" (e.g., Pars. 63, 64, 65,
15 67), or "interfered with Plaintiff's exclusive rights in the copyrighted video" (e.g., Pars. 63,
16 64, 67). One can only conclude, based on the allegations of the First Amended Complaint,
17 that Plaintiff seeks redress for alleged violation of its exclusive rights under the Copyright
18 Act in the subject video.

19 Plaintiff's own focus on its "exclusive rights" is particularly telling. 17 U.S.C. §106 is
20 entitled "Exclusive Rights in Copyrighted Works," and lays out the familiar exclusive rights,
21 including the right to distribute and the right to reproduce. These are *precisely* the rights
22 that Plaintiff claims were violated as a result of Mr. Polan's alleged negligence. Plaintiff is
23 unable to formulate any version of the claim without reference to its "exclusive rights."
24 Moreover, the over-arching act that triggers liability to Plaintiff (under Plaintiff's theory), is
25 the unauthorized copying and sharing of Plaintiff's work by a third party. This is exactly the
26 situation that the twin doctrines of vicarious and contributory copyright liability have been
27 developed to address.

28 ///

1 The Ninth Circuit has adopted the “extra element” test to help determine whether the
 2 state law claim “seeks to protect rights which are qualitatively different from copyright rights.
 3 The state claim must have an ‘extra element’ which changes the nature of the action” in
 4 order to survive preemption *Del Madera Properties v. Rhodes and Gardner, Inc.*, 820 F.2d
 5 973 (9th Cir. 1987) at 977. Many courts have addressed this issue and determined that
 6 negligence claims do not add the required “extra element” that qualitatively changes the
 7 nature of the action, and thus are preempted. As the Central District of California stated:

8 Because the essential allegation is still that Defendants unlawfully
 9 copied Plaintiff’s ideas, it is still a copyright infringement claim. **Moreover,**
 10 **recharacterization of the claim as one of ‘negligence’ does not add a**
 11 **legally cognizable additional element because a general claim for**
 12 **copyright infringement is fundamentally one founded on strict**
 13 **liability. The alteration of the required mental state does not add an**
 14 **‘additional element’... Plaintiff’s negligence claim is preempted by**
 15 **federal copyright law.**

16 *Dielsi v. Falk*, 916 F.Supp. 985 (C.D. Cal. 1996) at 992-993. (Emphasis added; internal
 17 citations omitted). The court in *Dielsi* recognized that simply rephrasing a claim does not
 18 change the essential elements of the claim. In the present case, the gravamen of Plaintiff’s
 19 claim is that Defendant Polan’s liable for the copyright infringement of John Doe – this is
 20 precisely the type of claim that is evaluated under the Copyright Act rubrics of contributory
 21 and/or vicarious liability.

22 In addition to the court in *Dielsi* , a number of other courts have found that negligence
 23 causes of action are preempted by copyright law and that the alteration of the required
 24 mental state does not add a legally cognizable extra element. See, e.g. *Felix the Cat*
 25 *Productions v. New Line Cinema*, 2000 WL 770481 (C.D. Cal. April 28, 2000)
 26 (“Recharacterizing Plaintiff’s copyright claim as one for negligence does not add an
 27 additional element”); *Watermark Publishers v. High Tech. Sys.*, 1997 U.S. Dist. LEXIS
 28 22512 at fn. 15 (S.D. Cal. Jun 18, 1997) (preempting Plaintiff’s negligence claim, and noting
 “The only possible basis for a duty to protect another from copyright infringement – if such a
 duty can exist – is in copyright law; thus the alleged existence of a duty is not an ‘extra
 element’”); *Gary Friedrich Enterprises, LLC v. Marvel Enterprises, Inc.*, 713 F.Supp.2d 215

1 (S.D.N.Y. 2010) (negligence claim under either New York or Illinois law was properly
2 preempted by Copyright Act §301); *Bridgeport Music, Inc. v. 11C Music, et. al.*, 154
3 F.Supp.2d 1330 (M.D. Tenn., 2001) (negligence claim preempted by Copyright Act despite
4 elements of “duty” and “breach.”); *Marvullo v. Gruner + Jahr AG & Co.*, 2001 WL 40772, at
5 fn. 7 (S.D.N.Y. Jan. 17, 2001) (photographer’s negligence claim simply restates copyright
6 infringement claim); *Drum Major Music v. Young Money Entertainment*, 2002 WL 423350
7 (S.D.N.Y. Feb. 7, 2012) (negligence claim preempted by Copyright Act).

8 Further, Plaintiff’s Prayer for Relief seeks in paragraphs 5 and 6 to hold Mr. Polan
9 jointly liable with the Doe defendant for violation of Plaintiff’s copyright and for attorney’s
10 fees, litigation expenses and costs. The only apparent basis for an award of fees and costs
11 would be the Copyright Act. To hold Mr. Polan jointly liable with the Doe infringer effectively
12 imposes infringement liability on Mr. Polan without any infringement claim against him, and
13 without liability under the Copyright Act.

14 Based on the foregoing, Plaintiff’s negligence claim against Defendant is
15 unquestionably preempted by Copyright Act §301. The work at issue is a motion picture –
16 certainly within the subject matter of copyright as defined by §102. In addition, Plaintiff
17 seeks to protect rights that are identical to the rights protected by Copyright Law as
18 demonstrated by Plaintiff’s inability to assert any right to relief without reference to these
19 exclusive rights. Because Plaintiff’s sole claim against Defendant is preempted, the FAC
20 should be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) for failing to posit a
21 cognizable legal theory entitling Plaintiff to relief.

22 **C. Preemption Under Conflict and Field Preemption Doctrines**

23 In addition to the obvious statutory preemption via §301, Plaintiff’s claims are also
24 subject to preemption under the non-statutory doctrines of federal preemption. A state law
25 cause of action is preempted not only by specific statute, like §301, but also when the
26 Constitution or other federal legislation evidences an intent to fully occupy the field in
27 question, or when there is a fundamental incompatibility between federal and state law.
28 Thus, when the state law “stands as an obstacle to the accomplishment and execution of

1 the full purposes and objectives of Congress”, it is preempted. See, *Capital Cities Cable,*
2 *Inc. v. Crisp*, 467 U.S. 691 (1984).

3 Here, the FAC seeks to impose liability on an ISP subscriber for providing internet
4 access to someone who subsequently used that connection to infringe Plaintiff’s copyright.
5 However, holding an information conduit liable for the content of the information transmitted
6 represents a fundamental conflict between Plaintiff’s state law claim and the existing federal
7 legislation, including the Digital Millennium Copyright Act (“DMCA”), the Copyright Act, and
8 the Communications Decency Act (“CDA”).

9 The Copyright Act, DMCA, and CDA all include carefully drawn liability limitations for
10 mere intermediaries in the information transmission process, such as Defendant here.
11 There is a substantial body of Copyright Act case law discussing the requirements for
12 imposing secondary liability on a third-party that has not directly infringed a copyright. This
13 regime does not authorize the imposition of liability for “negligent infringement.”

14 Also, as set out below, the CDA has broad immunity provisions designed to prevent
15 the imposition of tort liability based on the communications of a third party. Likewise, the
16 DMCA includes several statutory “safe harbors,” that are designed to shield third party
17 intermediaries from copyright liability resulting from merely transmitting information. Taken
18 together, these legislative acts demonstrate Congress’ desire to occupy the field with regard
19 to third party liability for the electronic communications of another – communications that
20 routinely cross state lines and defy state regulations. As such, state regulation over this
21 field is prohibited.

22 Further, Plaintiff’s negligence cause of action directly conflicts with the copyright
23 principles of secondary liability and the broad policies of an open internet underlying both
24 the CDA and the DMCA. Thus, Plaintiff’s cause of action for negligence is also preempted
25 under the doctrines of conflict preemption and field preemption.

26 **2. PLAINTIFF’S NEGLIGENCE CLAIM IS BARRED BY CDA §230 IMMUNITY.**

27 Assuming, arguendo, that Plaintiff’s cause of action for negligence could survive
28 preemption, Plaintiff’s claims are nonetheless barred by Communications Decency Act

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1 immunity under 47 U.S.C. §230. Specifically, §230(c)(1) provides that “No provider or user
2 of an interactive computer service shall be treated as the publisher or speaker of any
3 information provided by another information content provider.” 47 U.S.C. 230(c)(1). The
4 CDA goes on to state: “No cause of action may be brought and no liability may be imposed
5 under any State or local law that is inconsistent with this section.” 47 U.S.C. 230 (e)(3).

6 A fundamental policy underlying §230 immunity is “to promote the continued
7 development of the Internet and other interactive computer services and other interactive
8 media,” and to preserve the vibrant and competitive free market that presently exists for the
9 Internet and other interactive computer services, unfettered by Federal or State regulation.”
10 47 U.S.C. §230(b)(1 & 2). As the 4th Circuit recognized, the CDA was designed to “avoid
11 the chilling effect upon Internet free speech that would be occasioned by the imposition of
12 tort liability upon companies that do not create potentially harmful messages but are simply
13 intermediaries for their delivery. *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997)
14 at 330-331.

15 Although CDA immunity does not provide immunity from liability under *intellectual*
16 *property laws*, Plaintiff’s negligence claim *must not* be a claim under intellectual property
17 laws if it is to survive preemption. Courts have construed “immunity broadly, in the spirit of
18 the CDA’s stated purpose of promoting rather than impeding technology and Internet use.”
19 *Smith v. Intercosmos Media Group, Inc.*, 2002 WL 31844907 at fn. 3 (E.D. La. Dec. 17,
20 2002).

21 Courts must undertake a three-part inquiry to determine whether a defendant is
22 eligible for CDA immunity. The three parts are “(1) the defendant [is] a provider or user of
23 an interactive computer service; (2) the cause of action treat[s] the defendant as a publisher
24 or speaker of information; and (3) the information at issue [is] provided by another
25 information content provider.” *Delfino v. Agilent Technologies, Inc.*, 52 Cal.3d 376 (6th Dist.
26 2007) at 389, quoting *Gentry v. eBay, Inc*, 99 Cal. App. 4th 816, (4th Dist. 2002) at 830.

27 As noted above, courts must first determine whether the defendant qualifies as a
28 “provider...of an interactive computer service.” Although this phrasing conjures images of

1 traditional internet service providers, (i.e. Comcast or Time Warner), the CDA defines the
2 term in a way that leaves no doubt that it would apply to the allegations against Mr. Polan.
3 Specifically, §230(f)(2) defines an interactive computer service as “any information service,
4 system, or access software provider that provides or enables computer access by multiple
5 users to a computer server, **including specifically a service or system that provides**
6 **access to the Internet...**” 47 U.S.C. 230(f)(2)(emphasis added).

7 Plaintiff accuses Mr. Polan of providing internet access to an individual who ultimately
8 pirated Plaintiff’s film. This act, according to Plaintiff, is the sole basis of Defendant’s
9 liability. The act of providing internet access to a third party, however, is **exactly** the type of
10 activity that qualifies for CDA immunity as the provider of an interactive computer service
11 because it is specifically included in the definition cited above.

12 Indeed, the California Court of Appeals examined almost precisely the same issue in
13 *Delfino v. Agilent Technologies, Inc., supra*. The Plaintiff in *Delfino* sought to impose liability
14 on Agilent Technologies based on Agilent’s provision of internet access to a particular
15 employee, who used that access to send allegedly threatening and defamatory emails.
16 Plaintiff sought to impose liability on Agilent based on a theory of negligent infliction of
17 emotional distress, based on allegations very similar to those made by Plaintiff in the
18 present case. Specifically, Plaintiff claimed that Agilent “was informed and knew that [the
19 employee] was using its computer system” to commit torts against the Plaintiff. Agilent
20 claimed immunity under the CDA and the trial court confirmed. On appeal, the 6th District
21 Court of Appeal confirmed the grant of immunity and noted that “Agilent clearly meets the
22 definition of that term under section 230(f)(2), in that it “provides or enables computer
23 access by multiple users.” *Id.* at 806. Another California case, *Kathleen R. v. City of*
24 *Livermore*, 87 Cal.App.4th 684 (1st Dist. 2001) held that public libraries providing computers
25 and internet access qualified them for CDA protection as the provider of an interactive
26 computer service.

27 The conduct here that purportedly gives rise to liability is virtually identical to the
28 conduct of the defendants in *Delfino* and *Kathleen R.*, providing internet access to a third

1 party. As the courts in *Delfino and Kathleen R.* concluded, and as the language of §230
2 makes clear, a defendant whose liability is premised upon his ownership or control of “a
3 **service or system that provides access to the Internet,**” qualifies as the provider of an
4 interactive computer service, and satisfies the first requirement for CDA immunity.

5 The second requirement for CDA immunity is that the “the cause of action treat[s] the
6 defendant as a publisher or speaker of information.” *Id.* at 805. The California Supreme
7 Court has held that the CDA makes no attempt to exclude pre-CDA “distributors” of
8 information, and one who was characterized as a passive distributor is likewise entitled to
9 immunity. *Barrett v. Rosenthal*, 40 Cal.4th 33 (2006).

10 Moreover, although this element is couched in terms that are familiar to defamation
11 suits, immunity under section 230 is not so limited. *Kathleen R.*, *supra*, pp. 696 – 698.
12 Numerous courts have applied CDA immunity to defendants accused of a variety of torts
13 beyond defamation, including nuisance, premises liability, misappropriation of right of
14 publicity, and, relevantly, negligent failure to control a third party’s online conduct. See, e.g.
15 *Kathleen R.*, *supra*; *Carafano v. Metrosplash.Com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); and
16 *Doe v. America Online, Inc.*, 783 So.2d 1010 (Fla. 2001). Indeed, several courts have
17 specifically held that CDA immunity bars a Plaintiff’s claim for negligence, like the one
18 alleged herein. See, e.g., *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) (defendant
19 immune from negligence liability); *Carafano v. Metrosplash*, *supra*, (same); *Barnes v.*
20 *Yahoo! Inc.*, 2005 WL 30055602 at fn. 4 (D. Or. Nov. 8, 2005) (same); *Ben Ezra, Weinstein,*
21 *& Co, v. America On Line*, 206 F.3d 980(10th Cir. 2000) at 986 (CDA bars claims for
22 negligence and defamation); *Doe II v. MySpace, Inc.*, 175 Cal.App.4th 561(2nd Dist. 2009)
23 (negligence, gross negligence and strict product liability barred by CDA); *Zeran v. America*
24 *Online, Inc.*, *supra*, (CDA bars defamation liability).

25 The case of *Kathleen R.* is instructive. In that case, Plaintiff attempted to hold the
26 City of Livermore liable for allowing a twelve-year-old to access and download sexually
27 explicit images from an internet connection in the public library onto a floppy disk that he
28 brought with him. The minor then allegedly took the floppy disk to another location where

1 he printed the pictures. The California District Court of Appeals had no trouble determining
2 that Plaintiff was attempting to hold the library responsible as the speaker or publisher of the
3 explicit materials by virtue of the library's role as a conduit for internet service. The court
4 held that §230 immunizes "interactive computer service providers from liability for mere
5 failure to 'restrict access to offensive material disseminated through their medium.'" *Id.*, at
6 692, quoting *Blumenthal v. Drudge*, 992 F.Supp. 44 (D.D.C.1998) at 49.

7 The allegations against Mr. Polan are practically identical to those in *Kathleen R.*
8 The plaintiffs attempt to impose liability on the basis of the defendant's providing internet
9 access to a third party or third parties. In each, the Defendant is accused only of being a
10 conduit for objectionable material that was downloaded from a connection offered by the
11 Defendant. In each case, the defendant's liability is premised on a third party's use of the
12 defendant's internet access to copy pornographic materials to a storage device for later use.
13 Accordingly, like the City of Livermore in *Kathleen R.*, Mr. Polan is entitled to CDA immunity.

14 The final prong of the test for CDA immunity asks whether "the information at issue
15 [is] provided by another information content provider." *Delfino, supra* at 805. The CDA
16 defines an information content provider as the "person or entity that is responsible, in whole
17 or in part, for the creation or development of information provided through the internet..." 47
18 USC §203(f)(3). In this case, it is clear that Mr. Polan is not the creator or entity responsible
19 for the creation or development of the film at issue. The First Amended Complaint does not
20 allege that Mr. Polan is the creator or developer of the information at issue – Plaintiff's
21 copyrighted work. As such, Mr. Polan easily satisfies the third prong of the preemption test.

22 Plaintiff expressly seeks to impose liability on Mr. Polan based on his allegedly
23 providing internet access to an unidentified individual who infringed the Plaintiff's copyright.
24 Providing internet access to a third party, however, makes Mr. Polan the provider of an
25 interactive computer service and entitles him to immunity under the CDA. This immunity
26 extends to all attempts to hold him liable for the allegedly tortious transmission of
27 information from a third-party. Thus, in addition to being substantively insufficient to state a
28 negligence cause of action, and preempted under §301 of the Copyright Act, Plaintiff's

1 negligence claim against Mr. Polan is barred by his CDA §230 immunity.

2 **3. PLAINTIFF CANNOT ESTABLISH THE DUTY ELEMENT OF A NEGLIGENCE**
3 **CAUSE OF ACTION**

4 The elements of a cause of action for negligence in California (as elsewhere) include
5 duty, breach, proximate cause, and damages. See, e.g., *Artiglio v. Corning Inc.*, 18 Cal.4th
6 604 (1998) at 614. “The threshold element of the existence of duty is a question of law to
7 be resolved by the court.” *Id.*

8 Plaintiff’s alleges that Mr. Polan owed Plaintiff a duty to secure his internet
9 connection to prevent infringement of Plaintiff’s copyrights. Plaintiff’s entire negligence
10 claim arises from Defendant’s alleged failure to take particular steps – allegations of
11 nonfeasance as opposed to misfeasance. See, e.g., First Amended Complaint paragraph
12 59 (“... Polan breached that duty by failing to secure his Internet connection.”); paragraph
13 60 (“... Polan’s failure to secure his Internet access account, ..., constitutes a breach of
14 ordinary care”); paragraph 61 (“... declined to monitor ... use of his ...connection”).

15 The California Supreme Court has recognized a critical distinction between one who
16 is accused of nonfeasance, rather than active misfeasance. As it explained in *Weirum v.*
17 *RKO General, Inc.*, 15 Cal.3d 40 (1975) at 49: “...misfeasance exists when the defendant is
18 responsible for making the plaintiff’s position worse, i.e. defendant has created the risk.
19 Conversely, nonfeasance is found when the defendant has failed to aid plaintiff through
20 beneficial intervention.” A defendant has no duty in situations of “nonfeasance” *unless* a
21 “special relationship” exists which would give rise to such a duty.

22 As recognized by California courts and the Restatement (Second) of Torts, “The fact
23 that the actor realizes or should realize that action on his part is necessary for another’s aid
24 or protection does not of itself impose upon him a duty to take such action.” Restatement
25 (Second) of Torts §314 (1965). A defendant only has a duty to take actions to protect a
26 third party when some “special relationship” exists between the Defendant and the injured
27 party. §314(a) discusses these special relationships, which include common carriers,
28 innkeepers, possessors of land in certain circumstances, and one who takes the custody of

1 another under circumstances that deprive the other of his normal opportunities for
2 protection. Restatement (Second) of Torts, §314(a). Clearly, none of these relationships
3 are alleged, or could even remotely apply to the present claims.

4 In *Davidson v. City of Westminster*, 32 Cal.3d 197(1982) the California Supreme
5 Court endorsed this position in a case involving a police officer's duty, noting that "absence
6 of duty is a particularly useful and conceptually more satisfactory rationale [for dismissal of
7 the action] where, absent any special relationship between the officers and the plaintiff, the
8 alleged tort consists merely in police nonfeasance." The *Davidson* Court went on to state
9 that:

10 As a general rule, one owes no duty to control the conduct of another,
11 nor to warn those endangered by such conduct. Such a duty may arise,
12 however, if (a) a special relationship exists between the actor and the third

13 person which imposes a duty upon the actor to control the third person's
14 conduct, or (b) a special relationship exists between the actor and the other
15 which gives the other a right to protection. *Id.* at 203 (Citations omitted.).

16 It is interesting to compare the actual duties owed by *police officers* to take
17 affirmative action to protect unrelated third parties with the duties that Plaintiff claims are
18 owed by Steve Polan, an ordinary citizen with an internet connection, to protect plaintiff from
19 copyright infringement by a third party. *Minch v. California Highway Patrol*, 140 Cal.App.4th
20 895 (3rd Dist. 2006) likewise examined the duty of police officers to protect unrelated third
21 parties and the distinction between nonfeasance and misfeasance. In *Minch*, the court
22 observed:

23 Plaintiff asserts that his law suit is based upon the CHP's misfeasance,
24 not nonfeasance. However, he has not identified specific conduct by which
25 the officers created a risk of peril. Rather, plaintiff's action is based on the
26 generic claim that the officers did not adequately protect him from the risk of
27 harm. This claim is, in all significant respects, identical to the claim in
28 *Mikialian*, where the court recognized the claim was one of nonfeasance and
upheld a judgment of nonsuit for lack of any duty in tort. *Minch, supra* at 909
(Citations omitted.)

The First Amended Complaint is based on generic claims that Mr. Polan failed to
protect the Plaintiff from harm by unknown third parties, clearly an allegation of
nonfeasance. Because Plaintiff's claim is not based on malfeasance, Plaintiff must plead a

1 special relationship giving rise to a duty to protect Plaintiff from harm. Plaintiff has not
2 alleged any special relationship that would give rise to such a duty. Given what is alleged in
3 against Mr. Polan in the First Amended Complaint, it is apparent that Plaintiff cannot plead
4 the existence of a “special relationship.” Accordingly, the only Count against Mr. Polan in
5 the First Amended Complaint Plaintiff fails to allege facts sufficient to demonstrate a duty to
6 protect Plaintiff’s interests or property, and cannot survive dismissal under Rule 12(b)(6).

7 **4. PLAINTIFF’S DUTY ASSERTIONS FAIL UNDER *IQBAL* & *TWOMBLEY***

8 Finally, Plaintiff’s negligence claim against Mr. Polan is devoid of factual support and
9 does not satisfy the federal courts’ heightened pleading standards in the wake of *Bell*
10 *Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
11 Plaintiff’s negligence cause of action amounts to little more than a formulaic recitation of the
12 elements of a negligence claim, along with general “defendant-unlawfully-harmed me”
13 accusations like those rejected in *Iqbal* & *Twombly*.

14 The clearest example of the First Amended Complaint’s deficiencies arises with
15 regard to the alleged duty owed by Defendant. “[T]o state a negligence cause of action, the
16 defendant must owe a duty of due care to the person injured, or to a class of persons of
17 which the plaintiff is a member.” *Valdez v. J. D. Diffenbaugh Co.*, 51 Cal. App. 3d 494 (4th
18 Dist. 1975). Paragraph 59 of the First Amended Complaint is the only paragraph that
19 alleges a legal duty owed by Mr. Polan to Plaintiff; to wit: “: “Defendant Polan had a duty to
20 secure his internet connection.” (Docket No.13, par. 59)

21 This is *precisely* the “[t]hreadbare recital of the elements of a cause of action,
22 supported by mere conclusory statements” that “do not suffice.” *Iqbal, supra, at 663, citing*
23 *Twombly, supra, at 555*. This court is not “bound to accept as true a legal conclusion
24 couched as a factual allegation.” *Iqbal, supra at 678*.

25 Plaintiff offers no factual or legal support for the (literally) unprecedented proposition
26 that an ISP subscriber (ergo, *all ISP subscribers*) owe a duty to Plaintiff (and all other
27 owners of intellectual property rights) to secure their internet connection to prevent copyright
28 infringement. The allegation that “Defendant Polan had a duty to secure his internet

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1 connection” is the epitome of a legal conclusion couched as a factual statement, and is the
2 only support for the proposition embodied within it.

3 This year the District Court for the District of Hawaii considered a negligence claim in
4 the BitTorrent context and concluded:

5 [A]llegations in the FAC are not sufficient to state a claim of negligence
6 for a couple reasons. First, nowhere in the FAC does Plaintiff assert any
7 specified legal duty in connection with its negligence claim. Further, Plaintiff
8 has not cited, nor has this Court found, any case law with analogous facts
from which the Court could conclude that the Defendants owed Plaintiff a
general duty to secure their internet connections.”

9 *Liberty Media Holdings v. Swarm*, No. 11-00262-DAE-RLP (Docket NO. 66 - Order
10 Granting in Part and Denying in Part Defendant Hatcher’s Motion to Dismiss...) (D. Haw.
11 January 30, 2012). See also, *Liberty Media Holdings v. Swarm...and Does 1-62*, (Docket #
12 3 & 4, Order on Ex Parte Application) (C.D. Cal. May 12, 2011). (On motion for expedited
13 discovery, Court determined Plaintiff’s negligence cause of action could not withstand a
14 motion to dismiss.).

15 The First Amended Complaint offers nothing more than a threadbare assertion that
16 Mr. Polan had a duty to secure his internet connection. It is entirely devoid of facts
17 supporting that assertion. Thus, assuming, *arguendo*, that negligence is not preempted *and*
18 that Defendant does not qualify for CDA immunity, Plaintiff’s negligence cause of action
19 must be dismissed as lacking sufficient factual basis to state a cause of action. Because
20 these defects cannot be cured by amendment, dismissal should be with prejudice.

21 **5. OTHER DISTRICT COURTS REJECT PLAINTIFF’S NEGLIGENCE THEORY**

22 Mr. Polan files with this motion his Request for Judicial notice of the Orders of other
23 District Courts that have considered the issues raised by this motion. Copies of the Orders
24 are attached as exhibits to the Request for Judicial Notice.

25 In *Liberty Media Holdings, LLC v Cary Tabora*, Case No. 12 Civ. 2234 (LAK) the
26 Southern District of New York considered Tabora’s motion to dismiss the same negligence
27 claim. In a July 9, 2012 Order (attached to Mr. Polan’s Request for Judicial Notice; available
28 on WestLaw: 2012 WL 2711381; also available through PACER, S.D.N.Y. Case No. Civ.

1 2234 Docket # 33) Judge Lewis A. Kaplan granted the motion, noting “The negligence claim
2 suffers from at least two problems, each independently fatal to its survival. It is necessary,
3 however, to discuss only the first.” Judge Kaplan then dismissed the negligence claim as
4 preempted by Copyright Act §301.

5 More recently, in two actions brought in the Northern District of California by the
6 same firm representing Plaintiff in this action, the negligence cause of action, which
7 consisted of virtually the same allegations, verbatim, as Plaintiff’s negligence cause of action
8 against Mr. Polan, was dismissed with prejudice.

9 In *AF Holdings, LLC v. John Doe and Josh Hatfield*, Case No. C 12-2049 PJH, Judge
10 Phyllis J. Hamilton, in an Order dated September 4, 2012, dismissed the negligence cause
11 of action with prejudice because: (1) it failed to state a nonfeasance negligence claim; and
12 (2) Copyright Act §301 preempts such liability.

13 In *AF Holdings, LLC v. John Doe and John Boston*, case number 5:12-CV-02048-
14 EJD Judge Edward J. Davila, in an Order dated October 3, 2012 dismissed the negligence
15 cause of action because: (1) Copyright Act §301 preempts such liability; (2) Mr. Boston was
16 immune from liability under CDA §230; and, (3) the complaint failed to state a nonfeasance
17 negligence claim. Both Judge Hamilton and Judge Davila dismissed the negligence cause
18 of action with prejudice because the defects in it could not be cured by amendment.

19 While these decisions are not binding on this Court, the reasoning of these courts on
20 precisely the issues presented by Mr. Polan’s motion bears consideration, as do the
21 authorities relied upon by those courts in their Orders.

22 **IV. CONCLUSION**

23 Plaintiff’s negligence cause of action fails to state a claim upon which relief can be
24 granted. Not only is it factually insufficient under *Iqbal* and *Twombly*, but also its allegations
25 demonstrate that the cause of action is preempted under both the Copyright Act’s §301 and
26 federal preemption doctrine. Further, Mr. Polan is immune from the alleged negligence
27 liability by operation of CDA §230.

28 Most fundamentally, however, the FAC alleges Mr. Polan’s nonfeasance as the basis

1 for his claimed negligence liability, but fails to allege facts demonstrating the existence of a
2 “special relationship” between Plaintiff and Mr. Polan that would give rise to the alleged
3 duty. The FAC demonstrates Plaintiff and Mr. Polan are strangers with no pre-existing
4 relationship. Absent a “special relationship,” no duty arises in nonfeasance cases,
5 precluding negligence liability as a matter of law.

6 Accordingly, the negligence cause of action fails to state a claim upon which relief
7 can be granted. Given the nature of the defects, the FAC should be dismissed with
8 prejudice as to Mr. Polan because these defects cannot be cured by amendment. Mr. Polan
9 seeks an Order prohibiting Plaintiff from naming him again as a defendant in this matter.

10 Despite the decisions in *Tabora* and, particularly, *Hatfield* and *Boston* which involve
11 the same law firm representing Plaintiff in this action, Plaintiff has persisted in pursuing its
12 unfounded negligence claim. In direct contravention of the Court’s Scheduling Order,
13 Plaintiff filed and served the FAC without leave of Court. Given the lack of merit in the
14 negligence cause of action, Mr. Polan seeks dismissal with prejudice and an Order
15 precluding Plaintiff from naming him again in this action. Further, in light of Plaintiff’s
16 disregard of the Court’s Scheduling Order requirements, Mr. Polan respectfully invites the
17 Court to consider directing an Order to Show Cause to Plaintiff pursuant to Rule 11(c)(3).

18
19 DATED: November 14, 2012

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20
21 By: /s/ J. Douglas Durham
22 Mark A. Campbell
23 J. Douglas Durham
24 Attorney for Defendant STEVE POLAN
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