

1 DURIE TANGRI LLP  
 RAGESH K. TANGRI (SBN 159477)  
 2 rtangri@durietangri.com  
 JOSEPH C. GRATZ (SBN 240676)  
 3 jgratz@durietangri.com  
 ANNIE A. LEE (SBN 328802)  
 4 alee@durietangri.com  
 217 Leidesdorff Street  
 5 San Francisco, CA 94111  
 Telephone: 415-362-6666  
 6 Facsimile: 415-236-6300

7 DURIE TANGRI LLP  
 ALLYSON R. BENNETT (SBN 302090)  
 8 abennett@durietangri.com  
 953 East 3rd Street  
 9 Los Angeles, CA 90013  
 Telephone: 213-992-4499  
 10 Facsimile: 415-236-6300

11 Attorneys for Defendant  
 INSTAGRAM, LLC

12  
 13 IN THE UNITED STATES DISTRICT COURT  
 14 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 15 SAN FRANCISCO DIVISION

16 ALEXIS HUNLEY, et al.,

17 Plaintiffs,

18 v.

19 INSTAGRAM, LLC,

20 Defendant.

Case No. 3:21-cv-03778-CRB

**DEFENDANT INSTAGRAM, LLC'S NOTICE  
 OF MOTION AND MOTION TO DISMISS  
 PLAINTIFFS' AMENDED COMPLAINT;  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT THEREOF**

Date: January 28, 2022

Time: 10:00 a.m.

Ctrlm: 6

Judge: Honorable Charles R. Breyer

1                           **NOTICE OF MOTION AND MOTION TO DISMISS**

2           PLEASE TAKE NOTICE THAT on January 28, 2022, in Courtroom 6 on the 17th floor of the  
3 above court, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant Instagram, LLC  
4 (“Instagram”), by and through its attorneys of record, will and hereby does move the Court pursuant to  
5 Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the First Amended Complaint for failure  
6 to state a claim upon which relief can be granted. This motion is based on the pleadings and papers on  
7 file in this action, the following memorandum of points and authorities, and any further papers, evidence  
8 or argument as may be submitted in connection with this motion.

9  
10 Dated: November 19, 2021

DURIE TANGRI LLP

11  
12 By:                           /s/ Joseph C. Gratz  
                                  JOSEPH C. GRATZ

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14                           Attorneys for Defendant  
                                  INSTAGRAM, LLC  
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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

This Court previously dismissed all of Plaintiffs' claims as barred by the Ninth Circuit's Server Test as articulated in *Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146 (9th Cir. 2007). *See* Order Granting Motion to Dismiss ("MTD Order"), ECF No. 27 at 2-3. This Court held that Plaintiffs failed to allege direct infringement for their secondary liability claims against Instagram because Plaintiffs had affirmatively alleged that third-party website embedders like BuzzFeed and Time do not store the copyrighted works on their own servers. *Id.* Plaintiffs' First Amended Complaint ("FAC"), ECF No. 28, does not contain *any* new factual allegations to change either that analysis or the result. Instead, Plaintiffs' new allegations consist of a slew of improper legal argument contrary to Ninth Circuit law, and new characterizations of the *exact same* technical embedding process alleged in the dismissed complaint.

If Plaintiffs want to challenge the wisdom of the Server Test, they can raise it with the Ninth Circuit. But Plaintiffs should not be permitted to waste the Court's limited resources by filing serial amended complaints that are subject to dismissal for the exact same reasons. Plaintiffs' FAC should be dismissed without leave to amend.

### II. BACKGROUND

On May 19, 2021, Plaintiffs brought this action alleging secondary copyright liability against Instagram for Instagram posts that were embedded on third-party websites like BuzzFeed and Time. In their original complaint, Plaintiffs alleged that in an embedded post, it is Instagram's servers that host and transmit the allegedly infringing content, without the copyrighted works ever being saved on the servers of the third-party websites. *See* Compl. ¶ 34, ECF No. 1, ("'[E]mbedding' is a technical process by which a copyrighted work can be made visible and displayed *without the copyrighted work being saved on the server of the third-party website.*") (emphasis added); *id.* at. ¶ 35 ("Put another way, 'embedding' a photograph or video on a webpage is the act of a technical web coder adding a specific 'embed' code to the HTML instructions that incorporates a photograph or video, *hosted in this case on Instagram's server*, to be displayed on a third-party webpage that the third-party controls with regard to the other text, photos or videos around the embedded work.") (emphasis added). On September 17,

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