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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ART OF LIVING FOUNDATION, a
California corporation,

Plaintiff,

vs.

DOES 1-10, inclusive,

Defendants.

Case No. 10-cv-5022-LHK-HRL

**PLAINTIFF ART OF LIVING
FOUNDATION'S OPPOSITION TO
DEFENDANT SKYWALKER'S
MOTION FOR RELIEF FROM
NONDISPOSITIVE PRETRIAL
ORDER OF MAGISTRATE JUDGE
RE: MOTION TO QUASH**

Date: October 27, 2011
Time: 1:30 PM
Judge: The Honorable Lucy H. Koh
Ctrm: Courtroom 4, 5th Floor

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1 Plaintiff Art of Living Foundation (“Plaintiff”), by and through its counsel of record,
2 respectfully submits the following memorandum of points and authorities in opposition to
3 the Motion for Relief from Nondispositive Pretrial Order of Magistrate Judge Re: Motion
4 to Quash filed by Defendant Doe/Skywalker.

5 INTRODUCTION

6 Since the outset of this litigation, pseudonymous Defendant Skywalker has fought
7 the disclosure of his identity, while Plaintiff has maintained that Skywalker’s identity is
8 necessary to litigate this action. In an effort to prevent disclosure, Defendant moved to
9 quash Plaintiff’s subpoena to web service provider Automattic. Judge Lloyd—the United
10 States magistrate judge assigned to this case—denied Defendant’s motion in a well-
11 reasoned opinion. Specifically, Judge Lloyd found that the test in *Sony Music*
12 *Entertainment Inc. v. Does*, 326 F. Supp. 2d 556, 564-65 (S.D.N.Y. 2004) applied to this
13 case, and that under the *Sony* test, Plaintiff’s subpoena was proper.

14 With his current motion, Defendant challenges Judge Lloyd’s order. In particular,
15 Defendant challenges Judge Lloyd’s use of the *Sony* test. Instead, Defendant argues
16 that the Court should have applied the test from *Highfields Capital Management L.P. v.*
17 *Doe*, 385 F. Supp. 2d 969, 975-76 (N.D. Cal. 2005). While Defendant provides little
18 explanation as to why the *Highfields* test—and not the *Sony* test—applies to this action,
19 this question is inconsequential because Plaintiff prevails under either test.

20 Plaintiff prevails under the *Sony* test where it has alleged prima facie claims for
21 trade secret misappropriation and copyright infringement, and where Plaintiff’s subpoena
22 is narrowly tailored to seek information necessary to prosecute this action. Similarly,
23 Plaintiff prevails under the *Highfields* test, because Plaintiff has already submitted
24 competent evidence supporting both of its claims, and where Plaintiff would be deprived
25 of its fundamental rights to meaningful court access and judicial relief if Defendant
26 remains pseudonymous.

27 Plaintiff is ready to move forward with this case, including by taking discovery and
28 proceeding to trial. As a first step, Plaintiff needs to learn the identity of Defendant

1 Skywalker. Defendant's argument that this action can proceed while Defendant remains
2 pseudonymous simply doesn't make sense. Thus, the Court should affirm Judge Lloyd's
3 order denying Defendant's motion to quash the subpoena seeking identifying information
4 for Skywalker.

5 **BACKGROUND**

6 Plaintiff, the Art of Living Foundation, is a non-denominational educational and
7 humanitarian organization dedicated to the teachings of His Holiness Sri Sri Ravi
8 Shankar ("Shankar"). (Declaration of Ashwani Dhall [D.E. 40] ("Dhall Decl.") ¶13.)
9 Plaintiff offers courses on breathing, meditation, and yoga. (*Id.* ¶14.) At the core of
10 Plaintiff's teachings is Sudarshan Kriya, a rhythmic breathing exercise. (*Id.* ¶15.)
11 Explanations of the teaching processes for Plaintiff's exercises are contained in several
12 written manuals and a set of teaching principles. (*Id.* ¶¶23-32 & Exs. A-D.) Plaintiff
13 considers these manuals and principles to be trade secrets and keeps them
14 confidential. (*Id.* ¶¶29-36.)

15 In addition to the manuals and teaching principles, Plaintiff has authored and
16 published an informational booklet entitled the Breath Water Sound Manual. (Dhall Decl.
17 ¶¶37-38 & Ex. E.) Plaintiff registered the Breath Water Sound Manuals with the United
18 States Copyright Office, Registration No. TX0007240203. (*Id.*) The Breath Water Sound
19 Manual is used by Plaintiff in connection with its Breath Water Sound course, which is
20 typically offered by Plaintiff at no charge. (*Id.* ¶39.) The Breath Water Sound course
21 explains some basic teachings of Plaintiff, including some basic breathing exercises,
22 sound relaxation methods, meditation techniques, tools for healthy living, and effective
23 processes to work together as a community. (*Id.* ¶40.) Many students who take the
24 Breath Water Sound course subsequently enroll in one of Plaintiff's fee-based courses.
25 (*Id.* ¶41; Declaration of Natalie Kaharick [D.E. No. 43] ("Kaharick Decl.") *passim.*)

26 On or before May 2010, Defendant Skywalker (possibly in coordination with other
27 anonymous Defendants) started the blog entitled Beyond the Art of Living and located
28 at <aolfree.wordpress.com> (the "Wordpress Blog"). (Dhall Decl. ¶44; Declaration of

1 Doe/Skywalker [D.E. No. 15] (“Skywalker Decl.”) ¶3.) Since the Wordpress Blog’s
2 inception, Defendant Skywalker has contributed to the blog pseudonymously. In the
3 summer of 2010, and without any consent from Plaintiff, Defendant Skywalker posted
4 Plaintiff’s trade secret manuals and teaching principles, and Plaintiff’s Breath Water
5 Sound Manual, on the Wordpress Blog. (Skywalker Decl. ¶9 & Exs. B-D.)

6 On November 5, 2010, Plaintiff filed its initial complaint against several Doe
7 Defendants who operate and contribute to the Wordpress Blog [D.E. No. 1.] The initial
8 complaint asserted claims for copyright infringement, misappropriation of trade secrets,
9 defamation, and trade libel. [D.E. No. 1.] On November 9, 2010, Plaintiff filed a motion
10 for administrative relief to take expedited discovery pursuant to Federal Rule of Civil
11 Procedure 26(d). [D.E. No. 5.] On December 17, 2010 the Court granted Plaintiff’s
12 motion and permitted Plaintiff to conduct discovery to identify the several
13 pseudonymous Defendants. [D.E. No. 10.] Pursuant to the Court’s December 17 order,
14 Plaintiff served subpoenas on Google, Inc. and Automattic, Inc. seeking information
15 sufficient to identify Defendants.

16 This action was subsequently assigned to the Honorable Lucy Koh. On January
17 31, 2011—before Google or Automattic had responded to the subpoenas—
18 pseudonymous Defendants Klim and Skywalker filed a motion to dismiss, a motion to
19 strike under Code of Civil Procedure 425.16, and a motion to quash the subpoenas to
20 Google and Auttomatic. [D.E. Nos. 11-13.] Judge Koh referred Defendants’ motion to
21 quash the subpoenas to Magistrate Judge Lloyd.

22 On June 15, 2011 Judge Koh entered an order granting in part and denying in
23 part Defendants’ motion to dismiss and denying Defendants’ motion to strike [D.E. No.
24 83.] The Court dismissed Plaintiff’s defamation and trade libel claims, but denied the
25 motion to strike as to Plaintiff’s misappropriation of trade secrets claim. Because
26 Defendants had not attacked Plaintiff’s copyright infringement claim in either their
27 motion to dismiss or motion to strike, that claim remained alive as well. On July 14,
28 2011, Plaintiff filed its First Amended Complaint (“FAC”), which asserted claims for

1 copyright infringement and misappropriation of trade secrets against Defendant
2 Skywalker and unknown Defendants that materially assisted Skywalker in his
3 misconduct. [D.E. No. 85.]

4 On August 10, 2011 Judge Lloyd entered an Order Granting in Part and Denying
5 in Part Defendants Klim and Skywalker's Motion to Quash (the "Order"). [D.E. No. 90.]
6 In the Order, Judge Lloyd found that in the context of copyright infringement claims,
7 courts generally apply the standard adopted in *Sony Music Entertainment Inc. v. Does*,
8 326 F. Supp. 2d 556, 564-65 (S.D.N.Y. 2004) to determine whether an anonymous
9 defendant's identity should be revealed. Applying the *Sony* test, Judge Lloyd found that
10 Plaintiff was entitled to discover Defendant Skywalker's identity through its subpoena to
11 Automattic, and thus denied Defendant's motion to quash.

12 On August 24, 2011, Defendant Skywalker filed the instant Motion for Relief from
13 Nondispositive Pretrial Order of Magistrate Judge Re: Motion to Quash. [D.E. No. 92.]
14 In his motion, Skywalker challenges the legal bases for the Order, arguing that Judge
15 Lloyd applied the incorrect test for evaluating whether an anonymous defendant's
16 identity should be revealed—*i.e.* Defendant argues that Judge Lloyd should have
17 applied the test set forth in *Highfields Capital Management L.P. v. Doe*, 385 F. Supp. 2d
18 969, 975-76 (N.D. Cal. 2005) instead of the *Sony* test. Defendant's motion is now
19 before the Court.

20 **AMICI'S INAPPOSITE BRIEF**

21 On August 31, 2011 three public interest groups—*i.e.* Public Citizen, the
22 Electronic Frontier Foundation, and the American Civil Liberties Union (collectively,
23 "Amici")—sought to appear as amici curiae and to file a brief in support of Defendant's
24 motion. [D.E. No. 96.]. The Court granted Amici leave to file their brief, and Amici filed
25 a 22-page brief in support of Defendant's motion. [D.E. No. 106.]

26 Despite the length of Amici's brief, it is an obvious "cut-and-paste" job taken from
27 Amici's filings in unrelated cases, namely lawsuits brought by recording companies to
28 identify large numbers of persons who downloaded copyrighted music and videos. Very

1 little of Amici's brief addresses the facts and evidence in this case. And in the few
2 instances that Amici try to address the facts of this case, they do so without evidentiary
3 citations and often with incorrect statements (e.g. Amici state that Plaintiff "has not
4 produced admissible evidence supporting it (sic) claim"). More often, Amici use their
5 brief as an opportunity to malign Plaintiff, Plaintiff's teachings, and Plaintiff's claims,
6 again making these accusations without evidence or authority (e.g. Amici state that
7 Plaintiff's suit is a "bogus intellectual property claim" designed to "hence out a critic, who
8 can then be subjected to extra-judicial self-help in a jurisdiction with no First
9 Amendment and, indeed no tradition of the rule of law.")

10 In summary, Amici's brief offers the Court with no new authority and no new
11 application of the relevant authority to the facts of this case.

12 **ARGUMENT**

13 The Ninth Circuit has recognized conflicting standards for deciding whether an
14 anonymous defendant's identity should be revealed. See *In re Anonymous Online*
15 *Speakers*, -- F.3d -- No. 09-71265, 2011 WL 61635, *5-6 (9th Cir. Jan. 7, 2011). Some
16 courts have declined to adopt a new standard to accommodate anonymous speech,
17 adhering to a conventional motion to dismiss standard. *Id.* at *5. Other courts have
18 required the plaintiff to make a prima facie showing of the claim for which the plaintiff
19 seeks the disclosure of the anonymous defendant's identity. *Id.* And other courts have
20 relied on a standard that falls between the motion to dismiss standard and the prima
21 facie evidence standard. *Id.*

22 While the Ninth Circuit has recognized these conflicting standards, it has not yet
23 identified a general standard to use in deciding whether an anonymous defendant's
24 identity should be revealed. Judge Lloyd recognized the existence of these various
25 standards and adopted the standard in *Sony Music Entertainment Inc. v. Does*, 326 F.
26 Supp. 2d 556, 564-65 (S.D.N.Y. 2004) as the appropriate one. Applying the *Sony* test,
27 Judge Lloyd found that Plaintiff's subpoena seeking identifying information for Defendant
28 Skywalker was proper.

1 Defendant does not appear to argue that Judge Lloyd misapplied the *Sony* test,
2 but rather that the *Sony* test is the wrong test. Thus, Defendant urges the Court to use
3 the test in *Highfields Capital Management L.P. v. Doe*, 385 F. Supp. 2d 969, 975-76
4 (N.D. Cal. 2005) instead of the *Sony* test. While Defendant provides little explanation as
5 to why the *Highfields* test—and not the *Sony* test—applies to this action, this question is
6 inconsequential because Plaintiff prevails under either test.

7 **A. Judge Lloyd properly applied the *Sony* test and found that Plaintiff’s subpoena**
8 **to identify Defendant was proper.**

9 Judge Lloyd found that in the context of copyright infringement claims, courts
10 generally apply the *Sony* test to determine whether an anonymous defendant’s identity
11 should be revealed. [D.E. No. 90 at 5:1-2.] *Sony* sets forth five principal factors to
12 examine in determining whether a subpoena should be quashed:

13 (1) [the] concrete[ness of the plaintiff’s] showing of a prima facie claim of
14 actionable harm, . . . (2) [the] specificity of the discovery request, . . . (3)
15 the absence of alternative means to obtain the subpoenaed information, . .
16 . (4) [the] need for the subpoenaed information to advance the claim, . . .
17 and (5) the [objecting] party’s expectation of privacy. *Arista Records, LLC*
18 *v. Doe* 3, 604 F.3d 110, 119 (2d Cir. 2010) (quoting *Sony Music*, 326 F.
19 Supp. 2d at 564-65).

20 Judge Lloyd found that the *Sony* test was well-reasoned and applied it to the facts of this
21 case. [D.E. No. 90 at 5:2-10.] Importantly, and contrary to the arguments of Defendant
22 and Amici, Judge Lloyd specifically considered the *Highfields* test in his Order, and found
23 that the *Highfields* requirements were generally included within the *Sony* test. [D.E. No.
24 90 at 5:1 n.3.] Judge Lloyd’s application of the *Sony* test is supported by the record.

25 First, Plaintiff has made a concrete showing of prima facie claims for both
26 copyright infringement and misappropriation of trade secrets. To establish a prima facie
27 claim for copyright infringement, a plaintiff must allege 1) ownership of a valid copyright
28 and 2) violation by the alleged infringer of at least one of the exclusive rights granted to
copyright owners by the Copyright Act. *UMG Recordings, Inc. v. Augusto*, 628 F.3d
1175, 1178 (9th Cir. 2011). To establish a prima facie claim for misappropriation of trade

1 secrets under California law, a plaintiff must allege 1) the existence of a trade secret, and
2 2) misappropriation of the trade secret. See *DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F.
3 Supp. 2d 1119, 1145 (N.D. Cal. 2010). The FAC contains specific allegations supporting
4 all of these elements, including the ownership of the materials at issue, the efforts
5 Plaintiff uses to keep its trade secrets confidential, the economic value that Plaintiff
6 derives from both its copyrights and trade secrets, and Defendant's unlawful posting of
7 these materials on the Wordpress Blog. [D.E. No. 85 at *passim*.] In fact, as discussed
8 below, *Infra* Part B, Plaintiff has previously submitted competent evidence supporting all
9 of these allegations.

10 Second, Plaintiff's subpoena is narrowly tailored to seek only identifying
11 information about Defendant. Third, Plaintiff is without any alternative means to discover
12 Defendant's identity; Defendant has refused to identify himself in his disclosures or
13 otherwise. Fourth, Plaintiff needs to learn Defendant's identity in order to prosecute this
14 action. Specifically, Plaintiff needs to know Defendant's identity to conduct discovery
15 about Defendant and his motives (including by taking a deposition of Defendant), to learn
16 about the extent of Defendant's misconduct, to enforce any judgment Plaintiff obtains
17 against Defendant, and to police Defendant's future conduct. Finally, as Judge Lloyd,
18 the *Sony* court, and this Court in *Xcentric Ventures, LLC v. Arden*, No. 09-80309-MISC-
19 JW-PVT, 2010 WL 424444, *4 (N.D. Cal. Jan. 27, 2010) have all found, while the First
20 Amendment may provide a right to privacy and free speech, the "First Amendment does
21 not protect copyright infringement."

22 Because Plaintiff has satisfied all of the elements of the *Sony* test, the Court
23 should affirm Judge Lloyd's order.

24 **B. Plaintiff has satisfied the *Highfields* test where it has submitted competent
25 evidence of actionable harm and where Defendant has not established any
26 significant competing harm.**

26 Even if this Court applies the *Highfields* test instead of the *Sony* test, Plaintiff
27 prevails. The *Highfields* standard contains two prongs. Under the first prong, Plaintiff
28 must persuade the Court that there is an evidentiary basis that entitles Plaintiff to prevail

1 on at least one of its claims. *Highfields*, 385 F. Supp. 2d at 975. If Plaintiff makes this
2 required evidentiary showing, *Highfields* requires the Court to assess and compare the
3 magnitude of the harms that would be caused to the competing interests by a ruling in
4 favor of Plaintiff and by a ruling in favor of Defendant. *Id.* at 976.

5 As this Court has already found, Plaintiff has submitted competent evidence
6 supporting its claims for copyright infringement and misappropriation of trade secrets.
7 Thus, the only open issue is whether the harm to Defendant by enforcing the subpoena
8 so outweighs Plaintiff's rights to obtain relief for Defendant's misconduct, that the First
9 Amendment will not allow the subpoena to be enforced. Where Defendant has
10 admittedly engaged in conduct proscribed by both state and federal statute, Defendant
11 must demonstrate a significant showing of harm. Defendant has failed to make any such
12 showing. Thus, the Court should affirm Judge Lloyd's decision denying Defendant's
13 motion to quash.

14 **1. Plaintiff has satisfied the first prong of the *Highfields* test by submitting**
15 **competent evidence supporting its claims.**

16 Under the first prong of the *Highfields* test, Plaintiff must submit evidence that
17 would entitle it to prevail under at least one of its claims. *Highfields*, 385 F. Supp. 2d at
18 975. It's unclear whether Defendant contends that Plaintiff has not submitted such
19 evidence. To the extent that Defendant makes this argument, the Court has already
20 rejected it.

21 **a. Plaintiff has submitted evidence supporting its copyright**
22 **infringement claim.**

23 As discussed above, to establish a prima facie claim for copyright infringement, a
24 plaintiff must show 1) ownership of a valid copyright and 2) violation by the alleged
25 infringer of at least one of the exclusive rights granted to copyright owners by the
26 Copyright Act. *UMG Recordings*, 628 F.3d at 1178. Plaintiff has submitted evidence
27 supporting both of these elements.

28 //

1 First, Plaintiff has shown that it owns the copyright in its Breath Water Sound
2 Manual. (Dhall Decl. ¶¶37-38 & Ex. D.) Second, Plaintiff has shown that Defendant
3 infringed on its copyright by posting the Breath Water Sound Manual on the Wordpress
4 Blog. (Skywalker Decl. ¶9 & Ex. E.) Defendant does not challenge this evidence. Thus,
5 Plaintiff has satisfied the first prong of the *Highfields* test.

6 Despite the foregoing, Defendant argues that Plaintiff has not submitted evidence
7 of damages caused by Defendant's infringement. Defendant's argument fails for multiple
8 reasons. First, provable damages is not an element of a claim for copyright infringement.
9 See *UMG Recordings*, 628 F.3d at 1178. Rather, the Copyright Act specifically permits
10 judicial relief even when damages are not readily quantifiable. See 18 U.S.C. §502; see
11 also *Wall Data Inc. v. Los Angeles County Sheriff's Dept.*, 447 F.3d 769, 786 (9th Cir.
12 2006) (jury may consider hypothetical lost license fee to determine actual damages).

13 More significantly, Plaintiff is prepared to establish the actual damages caused by
14 Defendant's infringement. As Plaintiff has disclosed, Plaintiff provides the Breath Water
15 Sound Manual to students of its free Breath Water Sound course. (Dhall Decl. ¶¶39-40.)
16 A percentage of students of Plaintiff's free Breath Water Sound course later enroll in
17 Plaintiff's fee-based courses—this percentage is referred to as a “conversion rate.”
18 (Dhall Decl. ¶41; Kaharick Decl. *passim*.) Plaintiff seeks damages in the amount equal to
19 the conversion rate multiplied by the number people to whom Defendant improperly
20 showed the Breath Water Sound Manual. Because the latter data is in Defendant's
21 exclusive possession, Plaintiff cannot yet perform this calculation. However, Defendant's
22 exclusive control of relevant information cannot be used to quash a subpoena.

23 Because Plaintiff has submitted evidence supporting each element of a claim for
24 copyright infringement, Plaintiff has satisfied the first prong of the *Highfields* test.

25 **b. Plaintiff has submitted evidence supporting its misappropriation**
26 **of trade secrets claim.**

27 As discussed above, to establish a prima facie claim for misappropriation of trade
28 secrets under California law, a plaintiff must show 1) the existence of a trade secret, and

1 2) misappropriation of the trade secret. See *DocMagic*, 745 F. Supp. 2d at 1145. The
2 Court has already found that Plaintiff has submitted competent evidence supporting both
3 of these elements in its order denying Defendant's special motion to strike. [D.E. No. 83.]

4 Specifically, the Court previously found that "Plaintiff has submitted credible
5 evidence that it derives independent economic value from the secret teaching manuals
6 and has established reasonable efforts to keep the manuals confidential." [D.E. No. 83
7 at 17:23-25.] The Court also found that "[w]ith respect to maintaining secrecy, Plaintiff
8 has submitted evidence that it keeps its manuals and lessons on password-protected
9 computers, limits access to the electronic files, requires teachers to agree not to disclose
10 the manuals and lessons, and requires teachers to agree to not use the manuals and
11 lessons for any other purpose than teaching Plaintiff's courses." [D.E. No. 83 at 18:4-7.]
12 Finally, the Court found that Defendant had admitted to posting Plaintiff's trade secrets
13 on the Word Press Blog. [D.E. No. 83 at 17:12-13.]

14 Again, Defendant argues that Plaintiff has not submitted evidence of damages
15 caused by Defendant's misappropriation. As with copyright infringement, damages is not
16 an element of a prima facie claim for misappropriation of trade secrets. See *DocMagic*,
17 745 F. Supp. 2d at 1145. Rather, the California law specifically permits judicial relief
18 even when damages are not readily quantifiable. See Civil C. §3426.3.

19 More significantly, Plaintiff is prepared to establish recoverable damages caused
20 by Defendant's misappropriation. Civil Code section 3426.3 provides several measures
21 of damages upon proof of misappropriation of trade secrets: a) damages for the actual
22 loss caused by misappropriation, b) the unjust enrichment caused by misappropriation,
23 and c) if neither damages nor unjust enrichment caused by misappropriation are
24 provable, the court may order payment of a reasonable royalty. See *Unilogic, Inc. v.*
25 *Burroughs Corp.*, 10 Cal. App. 4th 612, 626 (1992). A reasonable royalty is a court-
26 determined fee imposed upon a defendant for his or her use of a misappropriated trade
27 secret. See *Ajaxo Inc. v. E*Trade Fin. Corp.*, 187 Cal. App. 4th 1295, 1308 (2010). As
28 previously disclosed, Plaintiff seeks damages for Defendant's misappropriation in the

1 amount of a reasonable royalty multiplied by the number of viewers of the
2 misappropriated trade secrets. Plaintiff will also seek any wrongful profits obtained by
3 Defendant from his misappropriation. Because relevant data is in Defendant's exclusive
4 possession, Plaintiff cannot yet perform this calculation. However, Defendant's exclusive
5 control of relevant information cannot be used to quash a subpoena.

6 Because Plaintiff has submitted evidence supporting each element of its claim for
7 misappropriation of trade secrets, Plaintiff has satisfied the first prong of the *Highfields*
8 test for this claim as well.

9 **2. Plaintiff prevails on the second prong of the *Highfields* test where it has**
10 **established violations of its rights protected by state and federal law.**

11 Under the second prong of the *Highfields* test, the Court must assess and
12 compare the magnitude of the harms that would be caused to the competing interests
13 by a ruling in favor of Plaintiff and by a ruling in favor of Defendant. Here, Plaintiff
14 prevails in this comparison where: a) Plaintiff has established violations by Defendant of
15 federal and state statutes, b) Defendant has submitted no evidence supporting his
16 supposed fears of harassment, c) Defendant has submitted no evidence that Plaintiff's
17 claims are pretextual, and d) Plaintiff will be left without an effective remedy if it cannot
18 identify Defendant.

19 Defendant's Misconduct Harmed Plaintiff. As discussed above, Plaintiff has
20 submitted competent evidence that Defendant infringed its copyright in violation of 17
21 U.S.C. §501 and misappropriated its trade secrets in violation of California Civil Code
22 section 3426 *et seq.* Both of these statutes recognize the serious harm that results from
23 the proscribed conduct, even when that harm is not easily quantifiable. In fact, because
24 of the severity of the proscribed conduct, both statutes provide for the recovery of
25 damages that far exceed a plaintiff's actual damages (*i.e.* statutory damages under the
26 Copyright Act; double damages under the Uniform Trade Secrets Act). Moreover, the
27 copyright statute deems infringement so serious that that the statute makes
28 infringement a crime subject to a five-year prison sentence. See 17 U.S.C. §501, 18

1 U.S.C. §2319. Thus, California and federal law recognize that Defendant's violations
2 harmed Plaintiff, even in the absence of a provable loss, and that Plaintiff is entitled to
3 judicial relief for that harm.

4 Defendant summarily dismisses the notion that he harmed Plaintiff, arguing that
5 Plaintiff has not submitted sufficient evidence of actual harm. Defendant's argument
6 fails for multiple reasons. First, both the copyright and trade secret statutes recognize
7 that the harm caused by violations is so pernicious and difficult to establish, that a
8 plaintiff may recover damages without a provable loss—*i.e.* the copyright statute allows
9 statutory damages and hypothetical license fees; the trade secret statute allows a
10 reasonable royalty.

11 Second, and more importantly, Plaintiff is prepared to establish its actual
12 damages for both claims. As discussed above, Plaintiff intends to demonstrate the
13 amount of revenue it would have expected to derive from viewers of the improperly
14 posted materials.

15 Finally, even if Plaintiff is not entitled to monetary relief, that does not mean that
16 Plaintiff was not harmed or that Plaintiff is not entitled to a judgment finding that an
17 identifiable Defendant violated both the federal Copyright Act and the California Uniform
18 Trade Secrets Act. Plaintiff is entitled to use such a judgment to deter future
19 misconduct by this Defendant and as evidence of prior misconduct if Defendant again
20 infringes Plaintiff's copyrights or misappropriates Plaintiff's trade secrets. For all of
21 these reasons, Defendant is simply incorrect that Plaintiff has not been harmed and is
22 not entitled to relief.

23 Defendant Lacks Evidence of Any Harm. Defendant claims that his right to
24 privacy in anonymous political speech would be jeopardized if his identity were
25 revealed. In support of this claim, Defendant submitted a declaration stating that he
26 fears retaliation from Plaintiff if his identity were revealed. However, as Judge Lloyd
27 found, Defendant has submitted no admissible evidence supporting this claim. [D.E.
28 No. 90 at n.5.] To the contrary, Plaintiff's lawful litigation of this action belies any

1 argument that Plaintiff would engage in such misconduct. Thus, Defendant has failed to
2 demonstrate any harm under the second prong of *Highfields*.

3 Even if Defendant could demonstrate the possibility of harm, Defendant's "First
4 Amendment right to remain anonymous must give way to [Plaintiff's] right to use the
5 judicial process to pursue what appear to be meritorious copyright infringement claims."
6 See *Sony Music Entertainment*, 326 F. Supp. 2d at 567. To hold otherwise would shield
7 any defendant who feared being revealed as an infringer. Because Defendant has
8 failed to identify any harm—let alone a harm that sufficiently outweighs Plaintiff's right to
9 judicial relief for Defendant's violations of state and federal statutes—Plaintiff prevails
10 under the *Highfields* test.

11 Defendant Lacks Evidence of Any Pretext. Defendant argues that even though
12 Plaintiff has submitted evidence supporting its claims, Plaintiff's claims are really
13 pretextual, and that upon discovering Defendant's identity, Plaintiff will pursue draconian
14 remedies in other jurisdictions. (Mot. at 3:19-4:6; Amici Brief at 20:11-13.) Again,
15 Defendant offers no support for this theory. And contrary to Defendant's insinuations,
16 Plaintiff has adhered to both the letter and the spirit of the law in prosecuting this action,
17 evidencing nothing but the highest regard for the U.S. judicial system and its processes.
18 It is also worth noting that Defendant has forced Plaintiff to incur thousands-upon-
19 thousands of dollars in attorneys' fees, while Defendant has relied on the free
20 assistance of counsel and Amici. The fact that Plaintiff has continued to incur the
21 considerable expense of litigating in this forum, despite motion after motion filed by
22 Defendant and Amici, belies any argument that Plaintiff's claims are pretextual or that
23 Plaintiff intends to abandon this case or this forum upon discovering Defendant's
24 identity.

25 Plaintiff Will Be Left Without Any Remedy if the Subpoena Is Quashed. In his
26 motion, Defendant ignores the fact that he published Plaintiff's most sacred texts, which
27 serve not only as the cornerstone for Plaintiff's teachings, but also as the basis for
28 Plaintiff's revenue stream. Defendant cannot hide behind the First Amendment when

1 he admittedly engaged in conduct prohibited by state and federal law, particularly
2 where, as here, the misconduct involved Plaintiff's most valuable assets. Yet this is
3 precisely what Defendant seeks to do.

4 If Plaintiff is unable to identify Defendant, Plaintiff will be left without any effective
5 remedy for the misappropriation and infringement of its most valuable assets. Plaintiff
6 will not be able to enforce any judgment it obtains or police Defendant's future conduct.
7 Plaintiff will not be able to conduct effective discovery, take Defendant's deposition, or
8 examine Defendant at trial. Such a deprivation of Plaintiff's right to meaningful judicial
9 relief cannot satisfy the *Highfields* test. Thus, the Court should affirm Judge Lloyd's
10 Order.

11 **C. Plaintiff must learn Defendant's identity to proceed with this case.**

12 Regardless of whether the Court applies the *Sony* test or the *Highfields* test,
13 Plaintiff must learn Defendant's identity to proceed with this litigation. Defendant
14 disputes this point, arguing that even if Plaintiff obtains a judgment, there would still be
15 "no reason to strip [Defendant] of his anonymity unless he fails to pay the judgment."
16 (Mot. at 5:14-15.) Defendant's argument fails for multiple reasons.

17 First, Plaintiff is entitled to discovery from Defendant to learn about his motives
18 for and the extent of his misconduct. These areas of inquiry are directly relevant to
19 Plaintiff's claims. Even if Defendant concedes that he engaged in his misconduct
20 knowingly and maliciously, there would still be several open issues to which Plaintiff is
21 entitled to discovery (e.g. other persons involved in his misconduct and any financial
22 benefit he obtained from his misconduct). Moreover, Plaintiff is entitled to depose
23 Defendant and entitled to be face-to-face with Defendant when taking his deposition.
24 It's impossible to see how Plaintiff could obtain discovery and how Defendant could
25 comply with the Federal Rules of Civil Procedure if Defendant remains anonymous. For
26 this reason alone, this action cannot proceed if Defendant remains anonymous.

27 Second, Defendant contends that Plaintiff should be required to litigate this
28 action through judgment while Defendant remains anonymous, and that Plaintiff should

1 simply hope that Defendant will pay any judgment entered against him. (Mot. at 5:14-
2 15.) This proposal is absurd and likely violates the First and Fifth Amendments' rights
3 to Due Process and effective court access. Specifically, the U.S. Constitution requires
4 meaningful access to the courts and the ability to pursue legal redress for injuries; if the
5 State denies a person adequate, effective, and meaningful access to the courts, it
6 deprives that person of life, liberty, or property, without due process of law, in violation
7 of the First and Fifth Amendments. See *Rogan v. City of Boston*, 267 F.3d 24, 28 (1st
8 Cir. 2001); see also *Cefalu v. Vill. of Elk Grove*, 211 F.3d 416, 422 (7th Cir.2000)
9 (finding that the U.S. Constitution guarantees right to seek legal relief for asserted
10 injuries that have a reasonable basis in fact and in law); see also *Logan v. Zimmerman*
11 *Brush Co.*, 455 U.S. 422, 429-30 (1982) (finding that U.S. constitution prevents the
12 State "from denying potential litigants use of established adjudicatory procedures, when
13 such an action would be the equivalent of denying them an opportunity to be heard
14 upon their claimed rights") (internal quotations omitted). Requiring a plaintiff to litigate
15 against an anonymous defendant violates Plaintiff's Due Process rights.

16 Significantly, Plaintiff has already spent more money on this litigation than should
17 ever have been necessary as a direct result of Defendant's efforts to shield his identity.
18 Meanwhile, Defendant has provided no assurances that he will comply with a judgment
19 against him or that he has the resources to do so. In fact, Defendant has conceded that
20 he is being represented by counsel on a pro bono basis, raising questions about his
21 solvency. The Constitutional guarantees of effective court access and the right to
22 judicial relief cannot be satisfied by the claim of an anonymous Defendant that he may
23 pay a judgment entered against him.

24 Finally, a judgment against Defendant will be more than just a vehicle to obtain
25 monetary relief. A judgment will also deter future misconduct by Defendant and serve
26 as evidence of prior misconduct if Defendant continues to infringe Plaintiff's copyrights
27 and/or misappropriate Plaintiff's trade secrets. As in any infringement/misappropriation
28 case, Plaintiff is entitled to police Defendant's future conduct to ensure compliance with

1 a judgment. If Defendant remains anonymous, Plaintiff will be deprived of this basic
2 right.

3 Because Plaintiff will not be able to engage in any of these necessary activities
4 without Defendant's identity, Plaintiff must obtain Defendant's identity to proceed with
5 this lawsuit.

6 **CONCLUSION**

7 For all of the reasons set forth above, the Court should deny Defendant's motion
8 for relief from nondispositive pretrial order of magistrate judge.

9 DATED: September 16, 2011

KRONENBERGER BURGOYNE, LLP

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