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March 28, 2012

The Honorable Lucy H. Koh  
United States District Court  
Northern District of California  
Courtroom 8-4<sup>th</sup> Floor  
280 South 1<sup>st</sup> Street  
San Jose, California 95113

REDACTED VERSION

Filed herewith: Koltun Decl.  
(applies to both motions)

Re: *Art of Living Foundation v. Does, Case 10-cv 5022 LHK*  
*Opposition to Motion to Compel Disclose of Skywalker's Identity*

Dear Judge Koh:

Plaintiff seeks to compel disclosure of Skywalker's identity before this Court resolves the pending dispositive motions. Plaintiff contends that Skywalker's anonymity has prevented it from proceeding because "potential experts have expressed concerns regarding the engagement because they cannot check for conflicts due to Skywalker's anonymity." Significantly, however Plaintiff does not contend it has been unable to hire experts for this reason, and Mr. Kronenberg is silent about experts in his declaration.

A brief review of the background of Plaintiff's shifting damages theories suggests that what is really going on is that Plaintiff cannot find an expert willing to support the "junk science" that Plaintiff recently concocted, having abandoned the theory upon which it relied (again without expert support) in opposition to the pending dispositive motions. Indeed, Plaintiff's utter inability to present competent evidence of damages is an independent basis upon which the Court should grant the pending dispositive motions.

In opposition to the (First) Motion to Strike, Plaintiff submitted the expert testimony of Dr. Cohen (DE 54), who had no qualms about testifying despite the inability to do a conflict check on Klim and Skywalker. Plaintiff cited Dr. Cohen's expert opinion for the proposition that "73% of [Skywalker's] Blogs viewers are in the United States." Opp.MTS [DE 38] at 5:18-19. In fact, however, Dr. Cohen had said nothing of the kind. He had relied upon a commercial site, Alexa.com, which purported to indicate that 73% figure for the Skywalker Blog. *Id.* After reciting a bit of mumbo jumbo as to why he found Alexa.com reliable, Cohen was not willing to go any further than to opine that "a significant population of individuals from the United States visited [Skywalker's blogs] during the time frame over which these statistics were gathered." Cohen Decl., ¶ 7 (emphasis added).

But even this limited opinion by Dr. Cohen was junk. The Alexa report upon which Dr. Cohen relied stated that Skywalker's blog was ranked as "#778,102 in the world according to the three month Alexa traffic rankings" at the time he printed out the report (apparently March 2011). Cohen Decl., Exh. B, p.1. The Alexa.com website contains the following

disclaimer: “Due to statistical limitations for the remaining millions of sites, we are unable to provide accurate traffic data for sites not within the top 100,000.” Koltun Decl., Exh. A.

Does had argued that this Court’s dismissal of the defamation claims was fatal to Plaintiff’s ability to show damages, because Plaintiff could not possibly show whether any visitors to the Blog had been influenced by the publication of Trade Secrets or Copyrights not to take AOL paid course, as opposed to influenced by the (constitutionally protected) criticisms of AOL and Shankar. MFR at 2:7-3:2; 2<sup>nd</sup>MTS at 25:4-8; MSJ at 14:6-20. Plaintiff essentially conceded the point, but argued that it could sidestep that difficulty by proving its damages at trial on a “reasonable royalty”/“conversion rate” theory. Opp.MFR at 10:27-11:2; Opp.2dMTS at 20:13-17; Opp.MSJ at 14:4-8. Plaintiff’s Initial Disclosures (referenced in the briefs) stated that “Plaintiff is *working with an expert* to calculate a conversion rate ... and the reasonable royalty.” Koltun Decl., Exh. B at 3:26-28, 4:5-6 (emphasis added); *see also* Opp. MSJ at 14:6 (“finalize expert disclosure”).

Does responded that Plaintiff could not prevail on a “reasonable royalty” theory where, as here, the alleged Trade Secret/Copyright had not been commercially exploited. Reply.2ndMTS at 14:13-20; MSJ at 15:21-16:9; *see also* Koltun Decl. Exh. C (RFAs 24 & 46, Plaintiff admits that Trade Secret and BWSM were never licensed to anyone for quantifiable consideration).

Plaintiff recently abandoned its reasonable royalty theory and served amended disclosures whereby it purported to proceed on the dubious theory that it would be able to show the percentage of individual viewers of the Manuals/Notes/BWSM in the summer of 2010 on Skywalkers Blog, located in the United States, who “desired to obtain and use the [documents] for their own personal benefit ... as opposed to ... criticiz[ing], learning about, promot[ing] or question[ing] the Art of Living.” Koltun Decl., Exh. D at 5:4-6. Plaintiff stated that it was “working with an expert to finalize its damages calculations.” *Id.* at 4:16-18.

There is no space to review all of the statistical flaws in this dubious theory –many of which are obvious. But one flaw is notable for present purposes. Contrary to their contentions in March 2011, now Plaintiffs are contending that Alexa.com shows that 54% of the viewers were in the United States (!). *Id.* at 5:8-9 *see also id.*, Exh. C (Response to RFAs 60; admitting that the percentage of persons who viewed the BWSM on Skywalker’s blog who had already taken the BWSM course could not be determined; *see also* responses to RFA 61, 62).

Skywalker and Klim had no difficulty finding a statistics professor at a prominent university willing to debunk the junk science being proffered by Plaintiff. Koltun Decl. , ¶ 2. This is the first expert Doe’s counsel contacted. *Id.* The professor did not request the identities of any Does for conflicts check or any other purpose, and it has not been provided. *Id.*

The Court has found, to date, that the countervailing First Amendment interest in

preventing the chilling of anonymous critics who have participated on Skywalker’s Blog (not to mention Skywalker) outweighs the putative interest Plaintiff has in identifying him. Order (DE129) at 10:23-11:11, 13:9-14:21. Discovery taken to date shows that that this countervailing interest is extremely serious. (Depositions commenced the day these motions were filed).

To take one example, Michael Fishman, Plaintiff’s President and primary witness in this case, testified to the Court that “In my experience in the Art of Living, neither the organization nor its teachers have engaged in acts of violence.” Fischman Declaration (DE47) at 2:12-13. In his published autobiography, however, he described an incident in the Bangalore ashram of AOL in which he was angered by a fellow devotee, and punched the young man in the nose. Koltun Decl., Exh. E at 204. According to Fischman, “I could feel the cartilage crushing as my fist hit his nose [knocking him to the] ground. ... It was a miracle that I hadn’t killed him.” *Id.* at 204-205. Fishman then describes how Shankar disciplined him by relieving him of teaching duties, forcing him to symbolically wash people’s shoes, and excluding him from Shankar’s inner circle for a few months, until he was restored to teaching duties. *Id.* at 206-210. Curiously, Fischman does not say he ever worried about being arrested for nearly killing the man. In the introduction, he discloses that he “a couple of names ... were changed to protect ... privacy of certain individuals.” *Id.* at 4.

Fischman’s biography was the subject of a post on Skywalker’s blog, and a series of mocking anonymous comments followed. Koltun Decl., Exh. F. Among the comments was one asking whether there was a section in Fishman’s book describing in detail how he once, “while at the ashram ... nearly beat one of his fellow AOL teachers to death?” *Id.* Another: “I wonder if MF wrote ... about the time he almost beat and strangled Rajshree Patel to death – the big AoL secret the few who know swore never to reveal, in conspiracy with their guru (to save everyone’s ass because that, in the world, is called ‘CRIME’).” *Id.*

Ms. Patel, a “senior teacher,” submitted a declaration regarding a statement on the Blogs that Shankar had “waved off female *devotees* raped or beaten by his *devotees* ...” Patel Decl., (DE53) at 1:9-10 (emphasis added). But her “denial,” on closer inspection, is no denial at all -- “No female students of Art of Living have been raped by other students.” *Id.* at 1:14-15 (emphasis added).

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Doe Defendants respectfully submit that the First Amendment balancing of interest continues to favor respecting their anonymity.

/s/

Joshua Koltun ATTORNEY

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