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6
7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA
9 SAN JOSE DIVISION

10
11 ART OF LIVING FOUNDATION, a)
California corporation,)

12 Plaintiff,)

13 v.)

14 DOES 1-10, inclusive,)

15 Defendants.)
16)
17)
18)

Case No.: CV 10-5022 LHK HRL

REPLY IN SUPPORT OF MOTION FOR
RELIEF FROM NONDISPOSITIVE
PRETRIAL ORDER OF MAGISTRATE
JUDGE re MOTION TO QUASH

Joshua Koltun ATTORNEY

INTRODUCTION

1 Plaintiff has not shown that it needs any discovery from Skywalker in order to oppose the
2 pending dispositive motions. Thus the Court should grant the motion to quash, at least until those
3 motions are decided. Even if Plaintiff prevails on those motions, it may be appropriate to continue to
4 protect Skywalker's identity, depending on what issues remain. Disclosing Skywalker's identity
5 would irreparably rob him of his ability to anonymously criticize Shankar and AOL, and would render
6 him vulnerable to legal proceedings in venues where there is no equivalent to the First Amendment.
7

8 ***I. If Plaintiff Cannot Show, at a Minimum, That It Needs to Know Skywalker's Identity to
Overcome the Dispositive Motions, the Motion to Quash Should Be Granted***

9 Pending now before this Court is Defendant's Motion for Summary Judgment on the copyright
10 claim, filed on September 27 [DE 111]. In that Motion, Defendants argue that (i) Plaintiff is not the
11 owner of the copyright in the BWSM and fraudulently obtained registration of same, (ii) that
12 Skywalker's posting of the BWSM was "fair use," (iii) that Plaintiff cannot show that it is entitled to
13 any monetary damages, the only remedy it seeks, and (iv) that Plaintiff is seeking to leverage its
14 (putative) copyright to chill Skywalker and other Doe's speech on an issue of public importance,
15 which is copyright misuse.

16 The Motion to Quash was denied solely based on the copyright claim. 8.10 Ord. at 8:7-19.
17 Also pending is the second motion to strike the trade secret claim. In opposing that motion, Plaintiff
18 has withdrawn its Amended Trade Secret Designation and declared that it will redesignate its trade
19 secrets (for the third time) at some point in the future. Opp.2nd MTS at 21-23. So the stay on
20 Plaintiff's discovery on the trade secret claim under C.C.P. § 2019.210 must remain in effect.

21 If both motions were granted, that would dispose of the entire case. As a threshold matter, if
22 Plaintiff cannot show that knowing Skywalker's identity is "essential" to its ability to oppose such
23 motions under Rule 56(d), then it follows logically that the Court should grant the motion to quash, or
24 at least defer consideration of it until it has decided those motions.¹

25 The issue is similar to that which the Court considered on the defamation and trade libel

26 ¹ This Court has the inherent power to modify any nondispositive pretrial order by the Magistrate Judge or
27 indeed any nondispositive order of this Court – which power is not contrained by Rule 72. See MFR at 1
28 n. 1 (citing *Phillips v. Raymond Corp.*, 213 F.R.D. 521, 525 (N.D. Ill. 2003); 12 Wright & Miller, Federal
Practice and Procedure § 3069; *Amarel v. Connell*, 102 F.3d 1494, 1515 (9th Cir. 1997).

1 claims. Plaintiff was not entitled to discovery on “actual malice” because Plaintiff had not otherwise
2 stated a valid defamation claim. 6.15 Ord. at 13 n. 1.²

3 **II. *The Highfields Capital Standard Applies Where Defendants Have Appeared and Moved to***
4 ***Quash***

5 Plaintiff argues that the Amici brief is inapposite, because it contains a discussion of
6 “unrelated cases, namely lawsuits brought by recording companies to identify large numbers of
7 persons who downloaded music and videos.” Opp.MFR at 4:26-28. But the standard that Plaintiffs
8 propose, and that the Magistrate Judge purported to apply, is from precisely such an “unrelated” case,
9 namely *Sony Music Entert’mt v. Does*, 326 F. Supp. 2d 556 (SDNY 2004). In *Sony Music*, as in the
10 other “unrelated” music-downloading cases, the Defendants had not yet been served. *Id.* at 566. That
11 is the posture in which this Court considered Plaintiff’s motion for expedited discovery.

12 But the posture of this case changed, because this Court ordered that Skywalker be given
13 notice and an opportunity to move to quash, which he did. The posture here, as in *Highfields Capital*,
14 is that Defendants appeared, moved to quash, and raised substantive issues on the merits. *Highfields*
15 *Capital*, 385 F. Supp.2d at 970. On this posture, the Court must scrutinize Plaintiff’s purported need
16 for discovery, and balance it against defendant’s First Amendment rights. *Id.* at 975.

17 Here, unlike the plaintiff in *Sony*, Plaintiff has not been prevented from taking discovery, it
18 simply elected not to take any. MFR at 4:15-22. Plaintiff effectively conceded the point a few hours
19 after the Motion for Relief was filed, by serving its first discovery on Skywalker, and on Automatic
20 to determine the numbers of viewers of the Blogs. 2nd JCMS [DE 99] at 3:19-21

21 This Court in *Highfields Capital* wisely did not limit the inquiry to the question of whether the
22 plaintiff had presented *prima facie* evidence of the legal elements of its claim. Such an inquiry would
23 not weed out those cases in which the defendants may be able to show that they are “entitled to
24 judgment as a matter of law” – see Rule 56 (a) – either because they have a complete affirmative
25 defense or because they can show that Plaintiff is not entitled to any remedy.

26 The balancing test adopted in cases such as *Highfields Capital* is a flexible standard that

27 ² See also Opp. MTS at 6:12-20 (Rule 56 (d) discovery standard applied to motion to strike; citing
28 *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001.)); Reply MTS at 12:17-13:13
(that plaintiff has failed to meet Rule 56 (d) standard).

1 permits the Court to deny discovery provisionally, in order to strike the proper balance between
 2 Defendant’s First Amendment rights and Plaintiff’s (purported) need for discovery. Amici Brief [DE
 3 96-1] at 19:15-24. The balancing test under *Highfields*—or *Sony* for that matter -- permits the Court
 4 provisionally to allow Defendants to preserve their anonymity while some limited discovery proceeds,
 5 after which Plaintiff can renew its arguments as to why it needs Skywalker’s identity.

6 Here, for example, Plaintiff seeks to take Skywalker’s deposition so that it can take discovery
 7 of his “motives.” Opp.MFR at 7:15. Given that the Court has dismissed the case against Skywalker
 8 and the other Does based on their constitutionally protected criticisms of Shankar and AOL, such an
 9 inquiry would interfere with Skywalker and the other Does’ rights of freedom of speech, conscience,
 10 association and free exercise of religion. *Cf.* MTQ at 12:9-20.

11 Even if Plaintiff were to survive the dispositive motions, it might well still be appropriate to
 12 preserve Skywalker’s anonymity if there is a reasonable possibility that Skywalker might be able to
 13 renew his dispositive motions after certain discovery. This is consistent with analogous practice in
 14 defamation cases. For example a court may permit defendant to take discovery on falsity before
 15 allowing plaintiff discovery on actual malice. *See* MTQ at 7 (citing authorities). Here, the Court’s
 16 rulings on the dispositive motions might well determine that limited discovery or motion practice on
 17 certain residual matters may be sufficient to completely dispose of the case, without requiring the
 18 invasive discovery of Skywalker’s “motives” or other invasive matters. *See* Rule 56(e)(court may
 19 give party an opportunity to properly support a fact) & 56(g)(court may deny summary judgment but
 20 deem certain facts established) & 56(h) (sham declarations).

21 In any event, at least at this present juncture, Plaintiff has failed to show a sufficient need for
 22 Skywalker’s identity to outweigh his First Amendment privacy rights. Indeed, Plaintiff has failed to
 23 meet either prong of the *Highfields* test, or the multifactor *Sony Music* test.³

24 ***III. Plaintiff Has Not Presented a Prima Facie Case for Even Nominal Liability.***

25 Contrary to its assertion, Plaintiff has not presented a *prima facie* case of copyright
 26 infringement. Opp.MFR at 9:1-2. The existence of a registration obtained more than five years after

27 ³ *Sony Music*, 326 F. Supp.2d at 564-65 (“(1) a concrete showing of a prima facie claim of actionable
 28 harm, ... (4) a central need for the subpoenaed information to advance the claim,” or that “(5) the
 party's expectation of privacy”)

1 registration is *not prima facie* evidence of copyright infringement, 17 USC 410(c); MSJ at 7:1-5.
 2 Testimony that merely recites the ultimate legal conclusion that AOL FUS “authored” the BWSM
 3 (Dhall Decl. ¶ 37) -- without specific facts establishing the basis for that conclusion – is inadmissible.

4 **IV. The Balance of Harms Tips Decidedly in Skywalker’s Favor**

5 **A. Plaintiff has Not Shown that Denying It Discovery of Skywalker’s Identity, at Least**
 6 **Prior to Hearing the Dispositive Motions, Would Cause it Harm**

7 Assuming Plaintiff can show liability, as explained in the dispositive motions, Plaintiff cannot
 8 present *prima facie* evidence that it is entitled to monetary damages, the only remedy it seeks.

9 Assertions about Skywalker’s “profits,” not to mention *Klim*’s profits, are utterly speculative.
 10 MSJ at 13:2-11; Opp.MFR at 11:2-3. Skywalker posted the manuals on the internet, for free.

11 With regard to actual damages, Plaintiff only says that it is “prepared to establish” and “intends
 12 to demonstrate” actual damages Opp.MFR at 12:11-12. The Court should require Plaintiff to *actually*
 13 present *prima facie* evidence, both under the *Highfields* test and to survive the dispositive motions.

14 Although Plaintiff uses the term “actual damages,” it relies heavily on the proposition that it is
 15 entitled to a recovery even though it cannot show any “provable loss,” because Plaintiff is *presumed*
 16 to have suffered damages in the form of lost “hypothetical” royalties. Opp.MFR at 12:2, 7-9.

17 That proposition is wrong as a matter of law in this case. Under copyright law, a plaintiff is
 18 not entitled to *presumed* “hypothetical” license fees, but rather must prove that it *actually* lost license
 19 fees – i.e. that Defendant would have been willing to pay such fees. MSJ at 15:21-16:9 (citing *Oracle*
 20 *USA v. SAP AG*, 2011 US Dist LEXIS 98816 26-27).⁴

21 Similarly, under trade secret law, a hypothetical license fee is only available in cases in which
 22 the defendant commercially exploited the trade secret. MTS at 24:24-25; *University Computing Co. v.*
 23 *Lykes-Youngstown Corp.*, 504 F.2d 518, 536-537, 545 (5th Cir. 1974). Plaintiff’s cases all involve
 24 such commercial exploitation. Here, Skywalker simply posted the manuals on the internet, for free.
 25 Civ. C. § 3426.3. Moreover, “presumed damages” are unconstitutional where the speech at issue

26 ⁴ By the same token, Plaintiff’s reliance on the existence of statutory damages is wrongheaded. The
 27 legislative policy is to *deny* statutory damages to copyright owners (like Plaintiff) that fail to register
 28 their copyright until after the infringement occurs. 17 USC § 412. A similar policy denies the
 ordinary presumptions regarding copyright ownership where the plaintiff (as here) delays registration
 for more than five years after publication. 17 USC §410 (c); MSJ at 7:1-5.

1 involved an issue of public concern and where there is no “actual malice.” MTS at 24:27-28; *Dun &*
 2 *Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 763 (1985). (Here, the disclosures were true, so
 3 there is no actual malice). There is no basis in law or fact for a discretionary judicial award of a
 4 reasonable royalty here.

5 The fuss Plaintiff makes about the terrible harm it has suffered because of Skywalker’s
 6 ephemeral posting of the BWSM is ironic, because ***Plaintiff itself placed the BWSM into this Court’s***
 7 ***public PACER docket, thus placing it in the public domain forever.*** See MSJ at 18:2-14; MFR at 5
 8 n.4; cf. *Russ Berrie & Co. v. Jerry Elsner Co.*, 482 F. Supp. 980, 989 (S.D.N.Y. 1980) (no hardship
 9 where virtually identical work was in the public domain).⁵ Skywalker caused no “actual harm.”

10 ***B. Plaintiff Has Not Shown It Needs Skywalker’s Identity at this Juncture***

11 Plaintiff insists that it must learn Skywalker’s identity to proceed. Specifically, Plaintiff states
 12 that it needs discovery to establish (i) whether Skywalker acted “knowingly and maliciously,” (ii)
 13 whether others were ‘involved in his misconduct,’ (iii) whether he profited from his misconduct, and
 14 (vi) to enforce a monetary judgment. Opp.MFR at 14:20-22; 14:27-15:2; 7:14-17. None of this
 15 discovery is “essential” to Plaintiff’s efforts to oppose the dispositive motions. On the contrary, all of
 16 these are matters that ***presuppose*** that Plaintiff will survive the dispositive motions. Indeed,
 17 Plaintiff’s own authority shows that it can obtain a Doe’s identity in post-trial discovery to enforce a
 18 judgment. *Xcentric Ventures, LLC v. Arden*, 2010 U.S. Dist. LEXIS 13076 (N.D. Cal. Jan. 27, 2010).

19 More obscurely – and more ominously -- Plaintiff insists that even if it cannot recover any
 20 monetary relief from Skywalker, knowing his identity will enable it to “deter future misconduct”
 21 and to “police his future conduct to ensure compliance with a judgment.” Opp.MFR at 15:25-16-2.
 22 Plaintiff is not requesting an injunction, so what “compliance” could Plaintiff police? As to
 23 “misconduct,” Plaintiff persists in defining that term, ***even in the FAC*** to include “publish[ing]

24 ⁵ Plaintiff’s arguments about presumed harm under the copyright correlate to its argument that
 25 copyright infringement is not protected by the First Amendment, and thus Skywalker has no First
 26 Amendment right of anonymity here. Opp.MFR at 7:17-21. As explained on the MFR, even the *Sony*
 27 *Music* case recognized that the First Amendment balancing must take place. MFR at 3:2-13.

28 Moreover the copyright infringement analysis itself must accommodate First Amendment
 concerns by considering whether defendants’ copying was “fair use” and whether the infringement
 lawsuit is designed to chill speech, which is copyright misuse. See *Harper & Row, v. Nation Enters.*,
 471 U.S. 539, 560 (1985) (fair use); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303,
 311 (2d Cir. 1966)(concurring majority; misuse). Defendants assert both defenses. MSJ, at III and V.

1 falsehoods” and “destroying the reputations of Plaintiff and Ravi Shankar,” among other things. FAC,
 2 7:23 (“Defendants’ Misconduct”), ¶¶ 58, 62. As discussed in the next section, the Court’s discovery
 3 processes should not be leveraged to enable Shankar and AOL to “police” Skywalker’s and other
 4 Does’ constitutionally protected criticism.

5 **V. *Skywalker Will Be Irreparably Harmed By the Very Denial of His Right to Anonymously***
 6 ***Criticize Shankar and AOL; and There Is A Concrete Risk That His Identity Will Be Used***
 7 ***to Pursue Litigation in Venues Without First Amendment Protections***

8 Plaintiff contends that there is no evidence that Skywalker would suffer any harm if his
 9 identity were disclosed. OMFR at 12:23-13:12. But the law requires no additional evidence here,
 10 because the right to speak anonymously is a valuable constitutional right, *the denial of which is itself*
 11 *an irreparable harm*. As the Supreme Court has explained,

12 *quite apart from any threat of persecution*, an advocate may believe her ideas will be
 13 more persuasive if her readers are unaware of her identity. Anonymity thereby provides
 14 a way for a writer who may be personally unpopular to ensure that readers will not
 15 prejudice her message simply because they do not like its proponent.

16 *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342-43 (1995)(citation omitted, emphasis added);
 17 *cf. Perry v. Schwartzenegger*, 591 F.3d 1147, 1157-58 (9th Cir. 2010) (requiring disclosure of
 18 identities protected by First Amendment is irreparable harm).

19 Skywalker’s interest, “rooted in the First Amendment,” is in anonymously expressing views
 20 on matter of public concern *without “fear of expensive adverse consequences.”* *Highfields*, 385 F.
 21 Supp.2d at 974-75 (emphasis added). The question before this Court is whether Plaintiff has shown
 22 that its need to know Skywalker’s identity that outweighs that interest. *Id.* at 975-76.⁶

23 This Court should not ignore the context in which this case arose in determining the risks of
 24 harm to Skywalker. The peculiar sequence of events shows that the copyright claim was
 25 manufactured solely for the purpose of identifying Does in order to chill their criticisms of Shankar
 26 and his multiple affiliated organizations.

27 Plaintiff persists in contending that it (AOLFUS) “was able to get [the BWSM] removed
 28 through a Digital Millenium Copyright Act takedown notice,” FAC, ¶ 69; Dhall Decl., ¶ 48. But that
 is not what happened. As was the case on the Motion to Dismiss, Plaintiff continues to obfuscate

⁶ Although in this context an anonymous speaker does not bear any burden of showing a likelihood of persecution or harassment, Skywalker has in fact done so. ReplyMTQ at 5 n.1; MFR at 4 n.3.

1 regarding the fact that there are multiple “Art of Living” entities, only one of which has chosen to
 2 submit itself to the jurisdiction of this Court. The only takedown notice was from an Indian entity,
 3 Vyakti Vikas Kendra (“VVK”). 3rd SW Decl., ¶ 2, Exh. A. VVK claimed that “through our
 4 authorized Teachers we teach courses/programmes designed by His Holiness [Ravi Shankar]
 5 (popularly known as the Art of Living Courses) all over the world.” *Id.* VVK demanded that
 6 Skywalker disclose his name and residential address, demanded that he remove (unspecified)
 7 **defamatory** material and threatened further legal action. *Id.*

8 VVK succeeded in getting the BWSM and other materials taken down (in August 2011), but
 9 failed to intimidate Skywalker into removing his criticisms of AOL and Shankar. It was only then
 10 that Plaintiff AOLFUS entered the picture and manufactured the copyright registration and cause of
 11 action in connection with the filing of the defamation/trade libel case.⁷ (There is also a Swiss entity,
 12 IAOLF, which AOLFUS has certified has an “interest” in this case, that purports to own the
 13 intellectual property at issue in this case. Cert.Int.Party [DE 2]; 2nd SW Decl., ¶ 15, Exh. A).

14 The Court should not now overlook this context of the dispute. Plaintiff’s original complaint
 15 sounded in defamation and even under the FAC, Plaintiff persists in defining Skywalker’s
 16 “misconduct” as “publish[ing] falsehoods” and “destroying the reputations of Plaintiff and Ravi
 17 Shankar.” FAC, ¶¶ 58, 62. When it filed this case, Plaintiff declared its goal: an injunction
 18 **“restraining Defendants from operating the Blogs and requiring that the Blogs be removed from**
 19 **the internet.”** Complaint at 19:4-6.⁸

20 In the United States, of course, the relief Plaintiff sought is a flatly unconstitutional prior
 21 restraint. *See, e.g. Near v. Minnesota*, 283 U.S. 697 (1931) (no prior restraint against defamatory
 22 publications). This Court has indicated that Plaintiff would not be able obtain such an injunction.
 23 6.15 Order at 11 n.2. At the time of filing the lawsuit, however, Plaintiff apparently hoped that

24 ⁷ The copyright registration was itself fraudulently manufactured by Plaintiff on the advice of counsel
 25 and in conjunction with the filing of this lawsuit. As such, the registration was an abuse of the
 copyright process. MSJ at 6:11-7:12; 17:19-18:1.

26 ⁸ It should also not escape this Court’s attention that by filing a copyright cause of action, Plaintiff
 27 was able to assert federal jurisdiction, thus seeking to avail itself of (what Plaintiff argues are) more
 liberal discovery rules that apply to California SLAPP motions in federal court. Opp.MTS at 6:12-20
 28 (citing *Metabolife Intt’l*, 264 F.3d at 846).

1 Defendants would not obtain *pro bono* counsel to defend the action, and that in an uncontested default
2 proceeding Plaintiff would obtain such an injunction.

3 In any event, at the time of the filing of the lawsuit Plaintiff – or more specifically Ravi
4 Shankar and the multifarious Art of Living entities -- had every reason to hope that they would
5 quickly discover the identity and location of Does, at which point Shankar/ VVK/IAOLF or a local
6 chapter of AOL could pursue defamation claims and seek to shut down the Blogs in a different venue.

7 As counsel for Plaintiff explained to this Court, filing the lawsuit in this district

8 is the only avenue the Foundation has. We looked at places to potentially bring this
9 action. The Northern District of California was really the only place we could think to
bring this action because we do not know the identities of these Does.

10 Transcript, 5.26 hearing at 45:6-10. Plaintiff had every reason to hope that, in an uncontested
11 proceeding, it would be able to quickly obtain Does' identities.⁹ Plaintiff's counsel advertises:

12 We're also adept at leveraging the subpoena powers of state and federal courts to
13 discover the server logs and other digital footprints of online perpetrators. Unlike most
14 traditional firms, we relish the challenge of stalking, identifying and bringing Internet
actors to justice - often before they even know we're onto them.

15 4th RJN, ¶ 2, Exh. B (Kronenberer Burgoyne LLP website).

16 Fortunately for Defendants, however, this Court declined to issue Plaintiff's proposed order,
17 which would have authorized it to issue subpoenas to Google, Automatic, and unspecified other third
18 parties without notice to Defendants. *Compare* Amended Proposed Order, [DE 7], with 12.17.2010
19 Order [DE 10]. Instead, this Court ordered that Google and Automatic give notice to Defendants and
20 thirty days file a motion to quash. *Id.* at 5:15-17.

21 Even then, however, Plaintiff had every reason to assume that Does would be unable to find
22 *pro bono* U.S. counsel willing and able to get a motion to quash on file in such a short time. Plaintiff
23 inadvertently confirms that this was its expectation when it complains that it ***“has already spent more
24 money on this litigation than should ever have been necessary as a direct result of Defendant's
25 efforts to shield his identity.”*** Opp.MFR at 15:16-18; *cf.* 13:18-20 (“it is worth noting that Defendant

26 ⁹ This Court's order that Defendants be given notice and an opportunity to quash implicitly
27 recognizes the risk that any ruling issued in an uncontested proceeding may be erroneous. *Cf.*,
28 *compare* 12.17.2010 Order [DE 10] (ruling after uncontested hearing that defamation and trade libel
claims would survive a motion to dismiss) *with* 6.15.2011 Order (dismissing defamation and trade
libel claims after contested proceeding).

1 has forced Plaintiff to incur thousands upon thousands of dollars in attorneys' fees, while Defendant
2 has relied on the free assistance of counsel.”)

3 In other words, Plaintiff never expected to have to litigate the merits of its causes of action,
4 much less take any of them forward through discovery and trial.¹⁰ The remark confirms the
5 unfortunate reality that plaintiffs in the United States can quite reasonably hope, at little expense, to
6 discover the identity of Does “by leveraging the subpoena powers of state and federal courts.” 4th
7 RJN, Exh. B, *see* Amici Brief [DE 96-1] 16:4-17:3 (citing literature on this prevalent practice).

8 Strangely, Plaintiff complains about the thousands of dollars it is spending seeking *monetary*
9 *relief only* against a defendant, Skywalker, who Plaintiff (correctly) believes does not have the
10 resources to pay a judgment of any consequence. Opp.MFR at 15:18-21. But of course monetary
11 relief is not the goal. Shutting down the Blogs is the goal.

12 It is difficult to imagine a case more obviously pursued for no other reason than to intimidate
13 and obtain unfair leverage over defendant. The facts of *Rosemont* pale by comparison. In that case,
14 at least, Howard Hughes (and the corporate entity through which he operated) did not openly declare
15 his goal of shutting down his critics. And here, there are numerous entities --VVK, IAOLF, national
16 AOL chapters – with numerous other “avenues” than the United States Courts through which (if the
17 Motion to Quash is denied) they may accomplish the goal of silencing Skywalker and his Blog.

18 The obvious question from the outset of this case– with which the Court began the hearing on
19 May 26 – was: *why isn't Ravi Shankar a plaintiff?* To which the reply was: “there’s no need for Mr.
20 Ravi Shankar to be a Plaintiff. The harm here was suffered by the Art of Living Foundation” of the
21 United States. 5.26. Hearing at 2:22-3:4.

22 The Court rejected that proposition and dismissed the defamation case, but granted leave to
23 amend. *See* 6.15 Order at 9:19 (“Ravi Shankar would have a good argument that Defendants’
24 statements are ‘of and concerning’ him because the statements expressly mention his name numerous
25 times.”). But neither Ravi Shankar, nor VVK, nor IAOLF has elected to submit himself/itself to the

26 ¹⁰ Plaintiff’s complaint about the “motion after motion filed by Defendant” might make more sense if
27 those motions had been dilatory. But Plaintiff ignores the fact that it *lost* the motion to dismiss its
28 defamation claims. Defendant respectfully submits that the pending dispositive motions are
meritorious as well.

1 jurisdiction of this Court. Why should they? This Court has indicated it would not issue an injunction
 2 shutting down the Blogs. But if Plaintiff can obtain Doe's identities, then, as plaintiff's counsel
 3 suggested to this Court, other "avenues" would open for Shankar and AOL entities worldwide.

4 At that point, Shankar/VVK/IAOLF could sue in India, or in the United Kingdom, which has,
 5 quite notoriously, made itself a haven for non-resident "libel tourists" to avail themselves of favorable
 6 libel laws, just as Switzerland has made itself a tax haven by virtue of its bank secrecy laws. *See*
 7 *Telnikoff v. Matusevitch*, 347 Md. 561, 602 (1997) (citing British media law treatise for the
 8 proposition that "British libel law is so notoriously favorable to plaintiffs that an increasing number of
 9 forum- shopping foreigners are taking action in London against newspapers and books that are
 10 printed, and mainly circulated, abroad.") This problem of libel tourism is so serious that Congress
 11 passed legislation giving defendants a right to remove foreign libel judgments to federal court to
 12 ensure that the judgment comports with the First Amendment. 23 U.S.C. § 4101 *et seq.*¹¹

13 In the United Kingdom and other common law countries, for example, it is the defendant's
 14 burden to prove falsity, and there is no requirement that public figures show actual malice. *Telnikoff*
 15 347 Md. at 595-600 (refusing to enforce English libel judgment because English libel law is contrary
 16 to the First Amendment). It is thus difficult to imagine that Shankar or IAOLF would not prefer to
 17 avail themselves of a more favorable jurisdiction, were that "avenue" to open up.

18 Plaintiff respectfully requests that the Motion to Quash be granted in its entirety. In the event
 19 that the Motion to Quash is denied, Plaintiff's respectfully requests that the Court grant a stay of at
 20 least 14 days to permit Skywalker to petition the Court of Appeal for mandamus relief, "in light of the
 21 significant interests at stake in this action, including First Amendment rights and privacy rights,"
 22 which will be irreparably harmed if the motion is denied. 8.31.Ord at 2:1-2 [DE 97], *see Perry*, 591
 23 F.3d at 1158 (granting mandamus on First Amendment privilege issue of first impression).

24 Dated September 30, 2011 /s/
Joshua Koltun
Attorney for Doe/Skywalker

26 ¹¹ *See* Annotations, 28 USC § 4101 (congressional finding that "some persons are obstructing the free
 27 expression rights of United States authors and publishers, and in turn chilling ***the first amendment to***
 28 ***the Constitution of the United States interest of the citizenry in receiving information*** on matters of
 importance, by seeking out foreign jurisdictions that do not provide the full extent of free-speech
 protections to authors and publishers that are available in the United States.") (emphasis added).