

1 Joshua Koltun (Bar No. 173040)
Attorney
2 101 California Street
Suite 2450, No. 500
3 San Francisco, California 94111
Telephone: 415.680.3410
4 Facsimile: 866.462.5959
joshua@koltunattorney.com

5 Attorney for Defendants
6 Doe/Klim and Doe/Skywalker

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

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

13 Plaintiff,)

14 v.)

15 DOES 1-10, inclusive,)

16 Defendants.)

Case No.: CV 10-5022 LHK HRL

**REPLY MEMORANDUM IN
SUPPORT OF MOTION TO QUASH**

Date: June 14, 2011

Time: 10:00 am

Judge: Hon. Howard R Lloyd

Courtroom: 2

Joshua Koltun ATTORNEY

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1 **INTRODUCTION**

2 In response to the Complaint in this action, Defendants Doe/Klim and Doe/Skywalker
3 specially appeared and brought a motion to dismiss, a special motion to strike, and this motion to
4 quash on behalf of themselves and on behalf of the other unserved Doe Defendants. The other Doe
5 Defendants are not parties to this Motion, but Plaintiff does not dispute that Defendants Doe and Klim
6 have standing to assert their First Amendment interests. See MTQ at 12. The motion to dismiss and
7 motion to strike are currently set to be heard by this Court (the Honorable Lucy H. Koh) on May 26.

8 Among the issues to be determined on the motion to dismiss and the motion to strike are
9 whether Plaintiff has stated and substantiated a *prima facie* claim of defamation, trade libel or trade
10 secret misappropriation, whether it has suffered any actual or special damages as a result thereof, and
11 whether Plaintiff has shown that it is entitled to postpone resolution of the motion to strike in order to
12 take further discovery under Federal Rule of Procedure 56(d). The issues on this motion to quash are
13 inextricably intertwined with issues on the motion to dismiss and the motion to strike, as further
14 discussed herein.

15 On this motion to quash, the Court must determine whether "there is a *real evidentiary basis*
16 for believing that the defendant has engaged in *wrongful conduct* that has caused *real harm* to the
17 interests of the plaintiff." *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969, 970-71 (N.D.
18 Cal. 2005)(emphasis added). This is a stringent two part test that requires both a *prima facie* showing
19 of wrongdoing *and* a showing that any cognizable harm suffered by Plaintiff is sufficiently serious to
20 outweigh the harms to Defendants' First Amendment interests. *Id.*, 385 F.Supp.2d at 975-76.
21 Plaintiff has not shown that any less stringent standard applies here.

22 Thus assuming arguendo that the Court decides on the motion to strike that Plaintiff has (i)
23 presented a *prima facie* claim of defamation, trade libel or trade secret misappropriation and has (ii)
24 has suffered any actual or special damages as a result thereof, the question before this Court on this
25 motion will be whether such damages constitute "real harm" -- in other words are sufficiently
26 substantial to outweigh Defendants' First Amendment interests in anonymity.

27 As explained on the motion to strike, there is simply no evidence in the record showing that
28 Plaintiff has suffered any actual or special damages as a result of *anything* published on the Blogs, let

1 alone anything **actionable** published on the Blogs. With regard to the copyright claim, any claim of
 2 actual damages is even weaker, because the copyrighted work at issue, the Breath Water Sound
 3 Manual (“BWSM”) is a teacher’s manual that relates to a course that Plaintiff offers for free. There is
 4 no admissible evidence showing that the brief posting of the BWSM on Skywalker’s Blog harmed
 5 Plaintiff, and harm may not be presumed.

6 Assuming *arguendo* that Plaintiff were able to show that it has suffered any damages as a
 7 result of any cognizable wrongdoing, Plaintiff cannot show that its damages outweigh the First
 8 Amendment privacy interests of Defendants. Certainly Plaintiff cannot obtain discovery of Klim or
 9 any of the other “Does” based on boilerplate assertions by counsel that other Doe Defendants
 10 “possibly” may have conspired with Skywalker when he posted the BWSM. Plaintiff also contends
 11 that it is entitled to pursue Klim for copyright infringement because Klim is thinking about writing a
 12 book about his experiences in AOL. The contention is patently frivolous.

13 The copyright claim is at best *de minimis* and is obviously a pretext to seek discovery of the
 14 identity of Plaintiff’s anonymous critics. The Defendants’ First Amendment rights in anonymity
 15 outweigh any *de minimis* injury Plaintiff may have suffered when Skywalker posted the BWSM on his
 16 Blog in the summer of 2010.

17 ***I. To Defeat the Motion to Quash, Plaintiff Must Show A Prima Facie Basis For Its Claims,***
 18 ***and Also that It Has Suffered “Real Harm”***

19 ***A. Before Stripping a Speaker of His Anonymity, the Court Must Determine Not Only***
 20 ***that Plaintiff Has Made a Prima Facie Showing of Actionable Wrongdoing, But Also***
 21 ***That Any Harm Caused Thereby Is Serious Enough to Outweigh Defendant’s***
 22 ***Interest in Anonymity***

23 This Court has held that where a private plaintiff seeks to discover the identity and address of
 24 an anonymous speaker, the Court should determine that "there is a real evidentiary basis for believing
 25 that the defendant has engaged in wrongful conduct that has caused real harm to the interests of the
 26 plaintiff." *Highfields Capital*, 385 F. Supp. 2d at 970-71 (2005) (upholding ruling of Magistrate
 27 Judge). This test involves two separate components:

28 [First]... the plaintiff must adduce competent evidence -- and the
 evidence plaintiff adduces must address all of the inferences of fact that
 plaintiff would need to prove in order to prevail under at least one of the
 causes of action plaintiff asserts. In other words, the evidence that

1 plaintiff adduces must, if un rebutted, tend to support a finding of each
2 fact that is essential to a given cause of action. The court may not
enforce the subpoena if, under plaintiff's showing, any essential fact or
finding lacks the requisite evidentiary support.

3 The court proceeds to the second component of the test if, but only if,
4 the plaintiff makes an evidentiary showing sufficient to satisfy the court
in the first component of the test. If reached, the second component of
5 the test requires the court to assess and compare the magnitude of the
6 harms that would be caused to the competing interests by a ruling in
favor of plaintiff and by a ruling in favor of defendant. If, after such an
7 assessment, the court concludes that enforcing the subpoena would
8 cause relatively little harm to the defendant's First Amendment and
privacy rights and that its issuance is necessary to enable plaintiff to
protect against or remedy serious wrongs, the court would deny the
motion to quash.

9 *Id.* , 385 F. Supp. 2d 969, 975-76 (N.D. Cal. 2004) (Magistrate Judge's Ruling of Law).

10 Plaintiff does not discuss the *Highfields Capital* case. But Plaintiff argues that any applicable
11 test is met so long as "Plaintiff has established that this Court has personal jurisdiction over
12 Defendants and where Plaintiff has submitted prima face evidence of its claims for defamation, trade
13 libel, copyright infringement, and misappropriation of trade secrets." Opp.MTQ. 8:12-14. This
14 formulation summarizes only the first prong of the test and ignores the second ("real harm") prong,
15 which requires a showing that any cognizable harm suffered by Plaintiff is sufficiently serious to
16 outweigh the harms to Plaintiff's First Amendment interests. *Id.*, 385 F.Supp.2d at 970-71, 975-76.

17 ***B. Plaintiff Has Not Shown That This Court Can or Should Dispense With the "Real
18 Harm" Prong***

19 Plaintiff contends – without discussing this Court's decision in *Highfields Capital* -- that it is
20 "far from clear" that it is required to show "real harm." Opp.MTQ at 20:12-14. Actually, what is "far
21 from clear" is why Plaintiff thinks it might be entitled to dispense with that requirement. Plaintiff
22 cites *Anonymous Online Speakers v. U.S. Dist. Ct.* for the proposition that "the nature of the speech
23 should be the driving force in choosing a standard by which to balance the rights of anonymous
24 speakers in discovery disputes." Opp.MTQ at 8:5-8 (citing *id.* , 2011 WL 61645 at * 5; 2011 U.S.
25 App. LEXIS 487 , 17-18 (9th Cir. 2011). But this "nature of the speech" inquiry does not assist
26 Plaintiff.

27 Quite the contrary. In *Anonymous Online Speakers*, the Court initially raised the question
28

1 what standard of protection for anonymity might be appropriate where the speech at issue was
 2 “commercial speech,” which is accorded a lesser level of First Amendment protection compared to
 3 “political, religious, or literary speech,” which are traditionally afforded the “highest” level of
 4 protection. *Id.*, 2011 U.S. App. LEXIS 487 , 18-19. *7, *18.

5 In the underlying case (*Quixtar*), the trial court had imposed what the Ninth Circuit
 6 characterized as the “highest bar to disclosure” – that is to say the most stringent standard for
 7 protecting the speaker’s anonymity. *Id.* at *17. Although the Ninth Circuit sometimes referred to
 8 this standard as the “prima facie” standard, the standard involves more than simply making a “prima
 9 facie” showing. Specifically the trial court’s standard required the plaintiff

10 (1) to undertake efforts to notify the anonymous poster that he is the
 11 subject of a subpoena or application for an order of disclosure, and
 12 to withhold action to afford the anonymous defendant a reasonable
 13 opportunity to file and serve opposition to the application. In the
 14 internet context, the plaintiff’s efforts should include posting a
 15 message of notification of the discovery request to the anonymous
 16 defendant on the same message board as the original allegedly
 17 defamatory posting;

18 (2) to set forth the exact statements purportedly made by the
 19 anonymous poster that the plaintiff alleges constitute defamatory
 20 speech;

21 (3) to satisfy the prima facie or "summary judgment standard"; [and]

22 (4) [to] balance the defendant's First Amendment right of
 23 anonymous free speech against the strength of the prima facie case
 24 presented and the necessity for the disclosure of the anonymous
 25 defendant's identity in determining whether to allow the plaintiff to
 26 properly proceed.

27 *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1212, 1216 (D. Nev. 2008) (citing
 28 *Doe v. Cahill*, 884 A.2d 451, 460 (Del. 2005) and *Highfields*, 385 F. Supp. 2d at 974 n.6, 975 n.8) As
 in *Highfields Capital*, once a prima facie showing was made, a further showing of serious harm was
 required – a balancing of the legal interests of the Plaintiff against the First Amendment right of the
 defendant to anonymity.

The Ninth Circuit indicated in dictum that the “highest bar” (*Cahill/Highfields*) was not
required for commercial speech. *Anonymous Online Speakers* at *18. There is no express holding on
 the issue, however. The Court declined to determine whether the speech as issue was “commercial

1 speech,” holding that *even if* the speech had been commercial speech, the trial court had acted within
 2 its discretion in choosing to apply the *Cahill/Highfields* test. *Id.*,*18-19.

3 By the same token, there was no express holding where “political, religious, or literary speech”
 4 (afforded the “*highest*” First Amendment protection) is at stake, the court is *required* to apply the
 5 “*highest* bar to disclosure” (*Cahill/Highfields*). But the Court’s reasoning very strongly indicates that
 6 this is the case. At a minimum, the decision holds that a trial court will not err if it applies the
 7 *Cahill/Highfields* standard.¹

8 **C. The Speech at Issue Here Concerns Religious Matters and Other Issues of Public**
 9 **Interest; as such, Defendants Are Entitled to the Highest Level of Protection of Their**
 10 **Anonymity**

11 Here, there can be no serious contention that the speech at issue is “commercial speech.”
 12 Commercial speech is “usually defined as speech that does no more than propose a commercial
 13 transaction.” *United States v. United Foods*, 533 U.S. 405, 409 (2001). There is no evidence that the
 14 speech here proposed a commercial transaction, and it certainly does more than that.

15 On the contrary, the speech at issue is the sort of “political, religious, or literary” speech that
 16 the Court in *Anonymous Online Speakers* recognized was entitled to the highest level of protection.

17 _____
 18 ¹ Other cases discussed by the Court in *Anonymous Internet Speakers*, such as *Perry v.*
 19 *Schwartzenegger*, 591 F.3d 1147, 1163 (9th Cir. 2010) and *Doe v. Reed*, 130 S. Ct. 2811 (2010)
 20 involve circumstances not present in *Cahill* or *Highfields*. Although on the one hand they involve
 21 political speech or association, they also involve a compelling countervailing public interest in the
 22 integrity and transparency of the referendum process. In such circumstances the Court has inquired as
 23 to whether the person seeking anonymity reasonably feared harassment or retaliation.

24 A showing of fear of harassment or retaliation is similarly required when a *plaintiff* seeks to
 25 *file a lawsuit* anonymously, because lawsuits are presumptively public. *Doe v. Advanced Textile*
 26 *Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000). In cases such as *Highfields* and *Cahill*, by contrast, the
 27 anonymous speaker defendant has been involuntarily haled into court, and thus is not required to
 28 make any showing that he fears harassment.

In any event, Klim and Skywalker have shown that they reasonably fear such harassment.
 Klim Decl., ¶ 3, SW Decl., ¶ 4. Plaintiff’s objection that the declarations are inadmissible because
 defense counsel has redacted the identities/signatures is absurd. Opp.MTQ at 6:10. It would be a
 cruel joke if a person seeking anonymity were required to publicly identify himself in order to do so.
 (Although Plaintiff’s counsel do not appear to be questioning defense counsel’s attestation that he
 possesses signed copies of the declarations, Klim and Skywalker are willing to submit to the Court’s
in camera inspection thereof in the event the Court concludes that such inspection is necessary to
 adjudicate their rights to anonymity.) Insofar as the Declarations and Request for Judicial Notice
 bring to the Court’s attention statements that tend to support Defendant’s fears of harassment or
 retaliation, such statements are not submitted for the truth of any matters stated therein but rather to
 show that Defendant’s fears are reasonable.

1 On the motion to strike, Defendants argued that they had satisfied the first prong of C.C.P. section
 2 425.16 because the question whether AoL is a cult – that is to say an insular and excessively
 3 controlling organization, potentially harmful to its members --is an “issue of public interest.” Indeed,
 4 as the Supreme Court recently held, speech concerning the “scandals involving the Catholic clergy,”
 5 is “speech on [a] public issue[,which] occupies the highest rung of the hierarchy of First Amendment
 6 values, and is entitled to special protection.” *Snyder v. Phelps*, 131 S. Ct. 1207, 1215, 1217 (2011).

7 Whether Defendant’s speech involved “issues of public interest” is presently before this Court
 8 on the motion to strike. Significantly, ***Plaintiff did not dispute*** that the [allegedly defamatory]
 9 Statements at issue in this case concerned “issues of public interest.” See Opp.MTS. To be sure,
 10 Plaintiff did contend that the disclosure of the Manuals and Principles did not “further the defendant’s
 11 other protected speech.” Opp.MTS at 19:23-25. This contention is without merit, since Skywalker’s
 12 (brief) posting of these materials was for the stated purpose of corroborating his assertion that AoL is
 13 a cult. See MTS at 6 & n.4; S.W. Decl., ¶ 9 RJN, ¶ 5 & Exh E10. Specifically, the stated purpose was
 14 to debunk the notion that Shankar’s “secret” mystical knowledge was so powerful that it “can be
 15 dangerous to people who are not yet ready to assimilate it” and thus has to be tightly controlled
 16 through proper AoL channels, whereas in fact, according to Skywalker, the secrets are “ramblings”
 17 that are so absurd that no one will believe it without some preliminary brainwashing.” Decl.SW, ¶ 9;
 18 RJN, ¶ 5, & Exh. E10. Thus the Principles and Manuals and BWSM were disclosed as part of the
 19 discussion of an “issue of public interest.”

20 Nor can there be any serious dispute as to whether the speech at issue here concerns religious
 21 matters. (This issue is before the Court on the motions to dismiss and strike as well. See Reply MTD
 22 at 13-14; Reply MTS at 11-12). Together, the Complaint and the Manuals and Principles submitted to
 23 the Court show that AoL and Plaintiff are a religious organization. AoL and Plaintiff are dedicated to
 24 propagating the teachings of their Guru Sri Sri Ravi Shankar, a prodigy in the study of Vedic (i.e.
 25 sacred Hindu) literature/science, who is regarded as a “hol[y]” man and an enlightened master, whose
 26 “mind, body and emotional achievements are a foundational component of Plaintiff’s Art of Living
 27 course” and whose teachings are sacred, divine transmissions within a tradition that contains those of
 28 other great teachers such as Buddha, Jesus, and Krishna, and whose Yogic breathing techniques work

1 through the mysterious grace and presence of the Guru. Complaint, ¶¶ 16, 30; Dhall Decl., Exh. B, p.
 2 4; 9; Exh. D, p. 2, 3. Plaintiff cannot evade the religious aspect of AoL by labeling its “teachings” a
 3 trade secret.

4 Nor do Plaintiff’s authorities suggest that this Court should dispense with the “real harm”
 5 prong because Plaintiff has a copyright claim. See Opp.MTQ at 18:18-21 (citing *Arista Records, LLC*
 6 *v. Doe*, 604 F.3d 110 (2d Cir 2010), and *Sony Music Entm’t v. Does*, 326 F.Supp.2d 556, 566
 7 (S.D.NY 2004)). On the contrary, as the Second Circuit explained, among the factors that the court
 8 must consider is the “concrete[ness of the plaintiff’s] showing of a prima facie claim of actionable
 9 harm,” *Arista Records*, 604 F.3d at 118-19) (citing *Sony Music*, 326 F.Supp.2d at 564-65). Both of
 10 these cases involved illicit peer-to-peer downloading of pirated music. It was not disputed that the
 11 music recordings at issue were copyrighted, registered, and sold and/or licensed for profit. Thus, upon
 12 a prima facie showing of infringement, the music companies had necessarily showed that they had
 13 suffered concrete, actionable harm. Here, by contrast, the work was not registered and related to a
 14 course AoL offered for free.

15 Moreover, the Court in *Arista Records* further required a showing on a number of factors, “(2)
 16 [the] specificity of the discovery request, . . . (3) the absence of alternative means to obtain the
 17 subpoenaed information, . . . (4) [the] need for the subpoenaed information to advance the claim, . . .
 18 and (5) the [objecting] party’s expectation of privacy.” *Id.*(citations omitted) Plaintiff here ignores
 19 those factors.

20 As the Court in *Sony* explained, a person engaged in peer-to-peer copying of music “is not
 21 seeking to communicate a thought or convey an idea. Instead, the individual’s real purpose is to obtain
 22 music for free.” *Id.* 326 F.Supp.2d at 564 . Thus the copying at issue only marginally at best
 23 implicated the First Amendment. Here, by contrast, the posting of the BWSM was for the express
 24 purpose of corroborating Skywalker’s argument on an issue of public interest – to wit, whether AoL is
 25 a cult. It is thus entitled to greater First Amendment protection than pirated music.

26 Plaintiff has not shown that this Court can or should dispense with the “real harm” inquiry.
 27
 28

1 **D. Plaintiff Cannot Evade the Two-Prong Prima Facie/Real Harm Test By Seeking**
 2 **“Jurisdictional” Discovery**

3 The question whether this Court has jurisdiction over any Defendant is before the Court on the
 4 12(b)(2) portion of the motion to dismiss. If Plaintiff cannot make a prima facie showing of
 5 wrongdoing causing Plaintiff “real harm,” see *Highfields Capital, supra*, Plaintiff should not be
 6 allowed to discover the identity of any Doe Defendant by characterizing the discovery as
 7 “jurisdictional.”

8 As a general matter, courts will not allow jurisdictional discovery where it is simply a “fishing
 9 expedition.” See MTQ at 4-5.² *A fortiori*, where, as here, important First Amendment interests in
 10 anonymity are at stake, those interests cannot be evaded by seeking “jurisdictional” discovery.
 11 Indeed, the requirement that a plaintiff show that this Court has personal jurisdiction over a defendant
 12 is itself a constitutional requirement designed to protect the Due Process rights of the defendant. *Int’l*
 13 *Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The issue of personal jurisdiction thus does not
 14 give Plaintiff an excuse to invade the First Amendment privacy of Defendants in the absence of some
 15 showing that Plaintiff has suffered some serious cognizable injury. And in the absence of any showing
 16 of any “real harm,” there is no injustice if, as Plaintiff complains, it will be “unable to bring this action
 17 in any court.” Opp.MTQ at 10.

18 This is especially so where, as here, Plaintiff’s failure to show the existence of personal
 19 jurisdiction is intertwined with Plaintiff’s failure on the merits to show that it has suffered any
 20 cognizable injury. Plaintiff cannot show (for jurisdictional purposes) that Defendants “purposefully
 21 availed themselves” of the forum for *precisely* the same reason that (on the merits) Plaintiff cannot
 22 show that any of the statements at issue are “of and concerning” Plaintiff—the Art of Living
 23 Foundation, *United States Chapter* (“AOLFUS”). See Reply MTD at 1-4, 5-8; *Church of*
 24 *Scientology v. Adams*, 584 F.2d 893 (9th Cir. 1978). Similarly, there can be no showing of purposeful
 25 availment with respect to the trade secret and copyright claims, since there has been no showing of

26 _____
 27 ² *America West Airlines v. GPA Group*, cited by Plaintiff, does not suggest that Plaintiff may embark
 28 on a fishing expedition to try to prove that this Court has jurisdiction over Defendants, in the absence
 of any reason to believe that they are likely to be successful. *Id.* 877 F.2d 793, 801 (9th Cir. 1989).

1 any reason why Skywalker might have believed that in disclosing the Manuals or Principles or
 2 BWSM he was causing injury to AOLFUS in particular. *Pavlovich v. Sup.Ct.*, 29 Cal. 4th 262, 278
 3 (2002) (where a trade secret is disclosed on the internet, the “purposeful availment” prong cannot be
 4 based on the premise the defendant “should have known” that the trade secret disclosure would have
 5 an impact on an industry in California.). Indeed, the takedown notice to which Skywalker responded
 6 came from an AOL entity based in *India*. Decl.SW, ¶ 10 & Exh. F. The BWSM bears no indication
 7 that it was authored or published by AOLFUS, and indeed, AOLFUS did not seek to register the
 8 copyright for the BWSM until after Skywalker had posted the BWSM and then taken it down. SW
 9 Decl., ¶ 10, Complaint, ¶ 81.

10 Moreover, jurisdiction cannot be asserted over either Klim or the other Doe defendants based
 11 on Skywalker’s actions. One defendant cannot be haled into a court in the forum state because of the
 12 unilateral activities of another defendant. *Brainerd v. Governors of University of Alberta*, 873 F.2d
 13 1257, 1259 (9th Cir. 1989).

14 ***II. Plaintiff Has Failed to Present a Prima Facie Showing on Its Claims***

15 The question whether Plaintiff has made a *prima facie* showing on its defamation, trade libel
 16 and trade secret claims is before the Court on the motion to strike.

17 With respect to the copyright claim, Plaintiff has submitted no evidence to show that any
 18 Defendant has infringed its copyrights. The only evidence on the subject is Skywalker’s Declaration,
 19 wherein he states that he briefly posted the BWSM certain documents on his BAOL Blog. SW Decl.,
 20 ¶ 9; Opp.MTQ at 5:9-8-10 (relying solely on Skywalker Declaration to show that “Skywalker
 21 (possibly in coordination with other anonymous Defendants)” posted the BWSM on his blog.
 22 Plaintiff has objected to Skywalker’s declaration in its entirety, and asked the Court to exclude it in its
 23 entirety. *Id.* at 6:11. If the Court excludes the Skywalker Declaration, it should rule that there is no
 24 admissible evidence of copyright infringement. Certainly the unsupported assertion of counsel that
 25 Skywalker “possibly” acted “in coordination with other anonymous Defendants” is insufficient reason
 26 to allow discovery of any other Defendant besides Skywalker.

1 **III. Plaintiff Has Failed To Show That It Suffered Any Damages or Other Cognizable Harm**

2 **A. Plaintiff Cannot Obtain An Injunction Based On Presumed Harm**

3 Plaintiff argues that “the Copyright Act recognizes that copyright infringement harms
4 copyright owners in various ways, and thus provides copyright owners with multiple remedies against
5 an infringer,” including injunctive relief. Opp.MTQ at 20:15-17. Although at one time many courts
6 effectively presumed “irreparable harm” in copyright cases and grant injunctions upon a showing of
7 infringement, the Supreme Court has emphatically disapproved that practice. *eBay Inc. v.*
8 *MercExchange, L.L.C.*, 547 U.S. 388, 392-393 (2006) (“this Court has consistently rejected
9 invitations to replace traditional equitable considerations with a rule that an injunction automatically
10 follows a determination that a copyright has been infringed.”); *see also Salinger v. Colting*, 607 F.3d
11 68, 76 (2d Cir. 2010) (*ebay* abrogated the common practice of granting injunctions in copyright cases
12 upon a showing of infringement).

13 Thus in a copyright case, where the infringement at issue has ceased, no injunction should
14 issue absent a showing of a threat of continuing violations. *Berry v. Dillon*, 291 Fed. Appx. 792, 795-
15 796 (9th Cir. 2008).³ Here there is no such threat. Indeed, the record shows that Skywalker removed
16 the posting promptly upon first receiving a request from the (putative) copyright holder. SW Decl. ¶
17 10. The BWSM does not indicate who authored it, or that the author claims copyright therein. SW
18 Decl, Exh. E.

19 Plaintiff is in no position to seek the equitable relief of an injunction with respect to the
20 BWSM. In a good faith effort to protect Plaintiff’s putative copyright in the BWSM, Skywalker’s
21 counsel declined to file a copy of the BWSM in open court, where it would be available to all over the
22 internet through the PACER system. Instead, Skywalker’s counsel offered, and Plaintiff’s counsel
23 stipulated, that Skywalker would seek to file the BWSM under seal. Admin.Motion to File Under
24 Seal, Stipulation (Docket 34, 35). Plaintiff, however, subsequently decided to file the BWSM as an

25 ³ *Walt Disney Co. v. Powell*, 897 F.2d 565, 567, 283 U.S. App. D.C. 111 (D.C. Cir. 1990) relied
26 upon by Plaintiff, is not to the contrary. The case involved a person in the ongoing commercial
27 business of infringing Disney paraphernalia, who ceased doing so only after his business was raided.
28 Insofar as that case stands for the proposition that an injunction should issue based on presumptions of
irreparable harm, that proposition is no longer good law. *Wilson v. Brennan*, 666 F. Supp. 2d 1242,
1264-65 (D.N.M. 2009)(noting abrogation of *Disney*).

1 unsealed exhibit in open court. *See* Dhall Decl., Exh. E. Having made the BWSM available generally
2 and permanently available to anyone who wishes to download it from PACER, Plaintiff should not be
3 heard to seek any injunctive relief against Skywalker, let alone the radical and unconstitutional
4 remedy of a prior restraint shutting down the Blogs entirely. *See* Complaint at 19:4-7.

5 ***B. Plaintiff Has Not Shown That It Has Suffered Any Cognizable Damage***

6 The question whether Plaintiff has suffered any actual damages or “special damages” with
7 respect to the defamation, trade libel, and trade secret claims is presently before the Court on the
8 motion to strike. Reply MTS at 6-7.

9 There is no evidence that AOLFUS has suffered any actual loss as a result of any of
10 Defendants’ allegedly wrongful acts. The sole evidence submitted by Plaintiff to show that it has
11 suffered actual damages is the bare declaration that “Since the false and defamatory statements were
12 published on the Blogs and the Manuals, Principles, and Breath Water Sound Manual were disclosed,
13 Art of Living’s enrollment and revenue has dropped.” Dhall Decl., ¶ 68. The Declarant does not
14 purport to opine as to whether the former was the cause of the latter. Plaintiff’s *counsel* contends that
15 the drop in revenue was “at least partly as a result of the Statements,” but that is not evidence.
16 Opp.MTS at 19:14-16. Moreover, the financial document submitted together with this statement
17 simply does not support any inference of such causation. Dhall Decl, ¶ 69, Exh. F. On the contrary, it
18 shows that enrollment in the AOL Course was essentially *flat* between 2009 and 2010, and that
19 although revenue dropped from 2009 to 2010, it had begun dropping at least as early as 2008, well
20 before the first Blog posting in November 2009. *Id.*, Exh. F & ¶ 43. Thus even if Plaintiff’s
21 (nonexpert) witness *had* opined that Defendant’s misconduct had caused a drop in revenue, such an
22 opinion would not meet any test of reliability under *Daubert v. Merrill Dow*, 509 U.S. 579 (1993) and
23 *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999).

24 With respect to the copyright claim, Plaintiff’s contention that it has suffered actual damages is
25 even weaker (if that is possible). The BWSM relates to a course which is offered for free. The sole
26 evidence concerning any possible connection to AOLFUS’s drop in revenue is the following: “Based
27 on my personal experience, for many people in post-Katrina New Orleans, BWS served as a first step,
28

1 which led them to enroll in the fee-based Art of Living course.” Kaharick Decl., ¶ 10; *see also* Dhall
 2 Decl., ¶ 41. Assuming, for the moment, that one credits the proposition that people who take the free
 3 BWS course might later take fee-based courses, it simply doesn’t follow logically that Skywalker’s
 4 posting of the teaching manual to the BWS course had any tendency to reduce the number of people
 5 who might wish to take the paid course. There is no testimony in the record even purporting to opine
 6 to such causation. If there had been, it would be inadmissible on the ground that there was no logical
 7 support for the inferences drawn. *See, e.g., Pearson v. Ramos* 237 F.3d 881, 886 (7th Cir.
 8 2001)(excluding lay opinion that lack of exercise outside cell caused tooth to fall out); *Alexis v.*
 9 *McDonald’s Restaurants*, 67 F.3d 341, 347 (1st Cir. 1995) (excluding conclusory lay opinion where
 10 no basis shown for the inference of racial animus).

11 Moreover, even if Plaintiff had shown a correlation between the publications on the Blogs and
 12 its falling revenues – which it has not -- Plaintiff cannot show actual damages in copyright unless it
 13 could show some causal nexus between the falling revenues and the alleged copyright infringement.
 14 As this Court explained in *Religious Tech. Ctr. v. Netcom On-Line Commun. Servs.*, “[t]o the extent
 15 that Erlich's postings suppress demand for the original works by ‘persuading [potential buyers] that
 16 [L. Ron Hubbard, the founder of Scientology] was a charlatan’ or that the Church is a fraud, as clearly
 17 Erlich intends, such a ‘devastating critique’ is not within the scope of copyright protection.” *Id.*, 923
 18 F. Supp. 1231, 1248 (N.D. Cal. 1995)(citations omitted).⁴ If the Blogs had any effect at all on
 19 AOLFUS’ revenue, it was not because of the ephemeral posting of the BWSM.

20 Thus far we have been discussing the copyright claim actually outlined in the Complaint,

21 _____
 22 ⁴ Plaintiff’s cases do not show a basis for actual damages. *Wall Data Inc. v. L.A. County Sheriff’s*
 23 *Dep’t*, involved a software product that was commercially licensed to Defendant. *Id.*, 447 F.3d 769
 24 774-775. (9th Cir. 2006). Defendant had exceeded the scope of permitted use, uploading the software
 25 onto 6007 computers where it was only licensed to do so on 3663 computers. *Id.* On those facts, the
 26 Court ruled that it was possible to determine, without “speculation,” a hypothetical fee that the parties
 27 might have agreed to had they negotiated over the excess use as a basis for determining actual
 28 damages. *Id.* at 786 . Here, plaintiff has not and cannot show that there is any basis to find such
 actual damages. The parties here were not in a contractual relationship which under which they had
 already determined the commercial value of the work. On the contrary, the work is one which related
 to a course which Plaintiff offered for free. And here the copying of the BWSM was purely
 ephemeral. *Global Videos, Inc. v. Niekerk*, 187 Fed. Appx. 689, 2006 WL 1727413 is a *nonciteable*
 decision in which a finding of causation was upheld as a “close call.” The decision does not set forth
 the underlying facts, so there is no basis to compare the finding of causation there to Plaintiff’s
 speculative and illogical inferences here.

1 namely the (brief) posting by Skywalker of the BWSM. Complaint, ¶¶ 47-50; 71, 76-88. In the
 2 opposition papers, however, Plaintiff raises an entirely new copyright claim. Plaintiff contends that
 3 Klim has indicated on his blog that he is “writing a book about his or her experiences with Plaintiff.”
 4 Opp.MTQ at 22. Plaintiff states that it “is informed and believes that Klim’s book is derived in part
 5 from Plaintiff’s copyrighted materials.” *Id.* Therefore, Plaintiff contends, it will be entitled to
 6 “wrongful profit damages regarding Klim’s use of Plaintiff’s copyrighted materials in his or her book,
 7 and it is Klim’s burden to show the elements of profits attributable to factors other than Plaintiff’s
 8 copyrighted work.” *Id.* What works Plaintiff “is informed and believes” will be infringed is not
 9 specified. Aside a comment on Klim’s blog that “a book project is baking in the oven,” no factual
 10 foundation whatsoever is cited for the belief that Klim will someday infringe any copyrighted works.
 11 *Id.* (citing Rosenfeld Decl. ¶ 22 & Exh. T).

12 Plaintiff cites no authority for the proposition that it is entitled to seek copyright damages from
 13 Klim based on Plaintiff’s speculative “belief” that Klim’s as-yet-unwritten book will infringe some
 14 unspecified copyrighted work of Plaintiff. There is none, of course. The proposition is thoroughly
 15 frivolous. Alternatively, Plaintiff appears to be arguing that it will be Klim’s burden to prove that the
 16 (hypothetical *future*) profits from *Klim’s* (unwritten, unpublished) book are *not* derived from
 17 *Skywalker’s* infringement of the BWSM. Opp. at 21:24-26 (“indirect profits arise even when the
 18 infringer does not sell the copyrighted work, but rather uses the copyrighted work to sell another
 19 product.”) This contention is equally frivolous. As Plaintiff’s own authorities show, such indirect
 20 profits can only arise where plaintiff has shown by non-speculative evidence that there is some causal
 21 nexus between the use of the copyrighted work and the sale of the other product. *Associated*
 22 *Residential Design v. Molotky*, 226 F. Supp. 2d 1251, 1256 (D. Nev. 2002)(citing *Frank Music Corp.*
 23 *v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 517 (9th Cir. 1985)).

24 In *Andreas v. Volkswagen of Am, Inc.*, relied upon by Plaintiff, there was a causal nexus
 25 because the copyrighted work was incorporated into (and was a major part of) an advertisement that
 26 Volkswagen used to sell cars. 336 F.3d 789, 796 (8th Cir. 2003). Here, by contrast, no such nexus has
 27 been or could conceivably be shown. Skywalker’s brief posting of the BWSM took place in the
 28 summer of 2010. Klim’s book has not even been written yet. It is difficult to imagine a more

1 speculative proposition.

2
3 **IV. Assuming Plaintiff Were Able to Show It Suffered Any Cognizable Harm At All, Such Harm Is Outweighed By Defendants' First Amendment Interests In Anonymity**

4 That Plaintiff is willing to make the truly bizarre argument that it is entitled to copyright
5 damages for a book that Klim has not even written yet shows the desperate lengths to which Plaintiff
6 is willing to go to seek to silence one of its most prominent critics. As in *Rosemont Enterprises v.*
7 *Random House, Inc.* the copyright claim is obviously a pretext for another agenda, an agenda aimed at
8 censoring all anonymous speakers on the Blogs. *Id.*, 366 F.2d 303, 311-12 (2d Cir. 1966)(concurring
9 opinion).

10 Indeed, it is highly significant that the subpoena at issue here **does not seek the identity of the**
11 **authors of Statements F, G, H, L, N, O, or Q** (i.e., anwer@freefall, anyone using the “Anonymous”
12 moniker, Ronin or Former AoL Patient). See Decl. Kronenberger in Supp. Mot. Expedited Discovery
13 (Docket 6). It seems highly likely that Plaintiff filed the Complaint for the sole purpose of using this
14 Court’s subpoena power, not because it had any interest in actually pursuing its claims on the
15 Statements identified in the Complaint.

16 That the *de minimis* (at best) copyright claim -- and for that matter the rest of the claims -- are
17 obviously pretextual is highly relevant because the “real harm” prong of the *Highfields Capital* test
18 requires the Court to balance any cognizable harm suffered by Plaintiff is sufficiently serious to
19 outweigh the harms to Plaintiff’s First Amendment interests. *Highfields Capital*, 385 F.Supp.2d at
20 975-76.

21 Assuming *arguendo* that Plaintiff is entitled to further discovery so that it could show it has
22 suffered any “real harm,” there is still no showing as to why Defendant requires discovery of
23 Skywalker. Skywalker is simply not in a position to testify as to any copyright damages. Skywalker
24 has no objection to limited discovery being taken of Automatic with regard to purely statistical
25 information concerning how many persons, or how many Americans, viewed the Blogs, so long as the
26 First Amendment anonymity of viewers is not compromised by the disclosure of any identifying
27 information.
28

1 As to any defendant other than Skywalker – that is to say those Defendants against which
2 Plaintiff actually bothered to seek discovery by listing them in the subpoena -- Plaintiff has failed to
3 show any basis to pursue discovery of the identity of any such persons. Certainly Plaintiff should not
4 be able to obtain further discovery based on counsel’s conclusory assertions that Skywalker “possibly
5 [acted in] coordination with other anonymous Defendants” in posting the BWSM. MTQ at 4:28-5:1.
6 Plaintiff should not be allowed to use this *de minimis* and transparently pretextual copyright claim
7 against Skywalker as a Trojan Horse allowing it to bypass the protections of the First Amendment.

8 ***Conclusion***

9 For the reasons stated, Defendants respectfully request that the motion to quash be granted.

10
11 Dated: April 28, 2011

_____/s/_____
Joshua Koltun
Attorney for Defendants
Doe/Klim and Doe/Skywalker

Joshua Koltun ATTORNEY