EXHIBIT C

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VIA E-MAIL AND U.S. MAIL
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Peter J. Korneffel, Jr., Esq.
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Re: ***Façonnable USA Corp. v. John Does 1-10,*** **Case No. 11-CV-00941-CMA-BNB (D. Colo.) – Subpoena to Skybeam, Inc.**

Dear Peter:

As you know, I am counsel to Skybeam, Inc. ("Skybeam"). This letter follows up on my email message to you this morning and is in response to your letter of April 15, 2011 and the Subpoena duces tecum served on Skybeam on April 20, 2011 in the above-referenced action (the "Subpoena"). Façonnable's Subpoena requests that, by April 26, 2011 Skybeam produce personally identifiable information with respect to Internet end-users (Skybeam subscriber(s)) using specific IP addresses on specific dates and times listed in Exhibit A of the Subpoena. For the reasons set forth below, Skybeam objects to Façonnable's Subpoena and no documents will be produced without further order of the Court.[1] So you are aware, Skybeam has preserved information identifying which of its subscribers used the listed IP addresses on the dates and times listed in items 1-3 of the Subpoena, but at no time ever had any documents, electronic or other, relating to any of its subscribers accessing any websites, as set forth and requested in items 4-6 of the Subpoena.

Moreover, you asked that we provide convenient dates for a 30(b)(6) deposition of Skybeam. As I explained in my email earlier today, I ask you to defer consideration of any deposition until after we have resolved the Subpoena issues. Your email indicates that the inquiry would relate to the process by which Skybeam identifies subscribers using IP addresses, which will be unnecessary in the event the court orders Skybeam to reveal the identity of any Skybeam subscriber(s). If you instead intend to use a 30(b)(6) deposition to obtain the same personally identifiable information that you seek in the Subpoena, a deposition for such purpose would be improper before the Subpoena issue is resolved. In any event, as I explained, I am out of town from tomorrow, April 22, through Tuesday, April 26, and the person responsible for the

[1] Unless Façonnable agrees to withdraw its subpoena and stipulate to a modification to the Order authorizing expedited discovery (Doc. # 7), Skybeam will move to quash the subpoena and modify the Court's order and also seek a protective order.

management of this segment of Skybeam's operations is out of the country for 2 weeks as of tomorrow, April 22. If, despite the foregoing, you serve a 30(b)(6) notice anyway, we will simply add that to our upcoming motion for a protective order. As you know, once such a motion is filed, under Local Rule 30.2, absent a ruling on such motion, no deposition may be taken.

When we last spoke, I explained that the standard for ordering an Internet Service Provider to disclose the identity of subscriber(s) alleged to have posted defamatory statements is not simply "good cause." In that regard, the Court's April 18, 2011 discovery order ("Order") should be amended because it is based on your mistaken assertion that *20/20 Financial Consulting, Inc. v. John Does 1-5*, No. 10-cv-01006-CMA-KMT, 2010 WL 1904530 (D. Colo. May 11, 2010) provides support for the expedited discovery of the John Doe defendants' identities in this action. In *20/20 Financial*, the court erred in allowing discovery of the identities of the anonymous defendants on a showing of good cause only. *20/20 Financial*, 2010 WL 1904530, at * 1. Although *20/20 Financial* was a defamation case and involved issues similar to those presented here, the court authorized discovery of the defendants' identities based almost entirely on a copyright infringement case, *Arista Records, LLC v. John Does 1-19*, 551 F. Supp. 2d 1, 6 (D.D.C. 2008), which the *20/20 Financial* court deemed to be "analogous." *Id.* In *Arista Records*, however, that court explained that its decision to permit discovery of anonymous defendants' identities under a "good cause" standard[2] was limited to cases involving allegations of copyright infringement, which involved "exceedingly small" First Amendment interests. *See Arista Records*, 551 F. Supp. 2d at 6-8 (citing *Laface Records, LLC v. Atlantic Recording Corp.*, Civ. A. No. 07-187, 2007 U.S. Dist. LEXIS 72225 at * 4-*5 (W.D. Mich. Sept. 27, 2007)). Notably, *Arista Records* specifically distinguished the First Amendment issues involved in copyright infringement actions from those in actions involving "actual speech." *See Arista Records*, 551 F. Supp. 2d at 19-20 (citing *Mobilisa, Inc. v. John Doe 1*, 170 P.3d 712, 715 (Ariz. App. 2007) (involving an intimate email sent from plaintiff's protected computer system and setting forth a multi-part test requiring a plaintiff to show, among other elements, that its claims could survive a motion for summary judgment)); s*ee also Arista Records*, 551 F. Supp. 2d at 7 n.6 (citing *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001) (involving Internet message boards and First Amendment-protected speech and recognizing that the application of a balancing test is required under Fed. R. Civ. P. 45 when a subpoena seeks the identity of an anonymous Internet user)).

Façonnable's instant action involves allegations of defamation based on John Doe defendants' "actual speech," not allegations of copyright infringement. Because the Court's Order was based primarily on Façonnable's mistaken contention that *20/20 Financial* permitted discovery of defendants' identities, the Order does not serve to authorize the discovery requested by Façonnable's Subpoena. As will be presented to the Court, and as discussed further below,

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[2] Even under the "good cause" standard, the *Arista Records* court considered potential First Amendment concerns and the strength of the plaintiff's allegations before permitting discovery of the John Doe defendants' identities. Skybeam notes that, in a copyright case such as *Arista Records*, the plaintiff's valid copyright registration alone presents part of such a prima facie showing.

prior to ordering disclosure of an anonymous speaker's identity, a court must balance a plaintiff's need for discovery against the anonymous speakers' First Amendment rights.[3]

Façonnable's reliance on certain Ninth Circuit precedent is also misplaced. Façonnable's April 15, 2011 letter states that "the Ninth Circuit recently rejected the test [as articulated in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005)] that Skybeam is attempting to impose on Façonnable in the context of speech involving commercial matters. *See In re Anonymous Speakers Online*, 611 F.3d 653 (9th Cir. 2010)." However, in January of this year, the Ninth Circuit withdrew the opinion that Façonnable cites and issued a new opinion declining to decide whether the anonymous online speech at issue was commercial speech and declining to use *Cahill* for the speech at issue in that case only."[4] *Anonymous Online Speakers v. United States Dist. Court (In re Anonymous Online Speakers)*, --- F.3d ---, 2011 U.S. App. LEXIS 487, at *17-*18 (9th Cir. Jan. 7, 2011).

The 2011 *In re Anonymous Online Speakers* opinion declined to outline a "one size fits all" analysis for the level of protection to be afforded to anonymous speech. Instead, the Ninth Circuit instructed that the "nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes." *Id.* at *18 (citing *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160-61 (9th Cir. 2010)). In so doing, a court must consider the "important value of anonymous speech balanced against ... [the plaintiff's] need for relevant discovery" before ordering discovery of any documents or information identifying anonymous speakers.[5] *Id.* at *17.

Here, the nature of defendants' speech is undetermined. It is the nature of this speech that will establish the correct standard by which to balance Façonnable's need for discovery against John Does defendants' First Amendment rights. At this juncture, Skybeam need not address why a heightened standard such as that imposed in *Cahill* is appropriate in the instant action. *See In re Anonymous Online Speakers*, 2011 U.S. App. LEXIS 487, at *17 ("Because *Cahill* involved political speech, that court's imposition of a heightened standard is understandable."). To object to Façonnable's Subpoena, it is enough for Skybeam to demonstrate that a "good cause" standard is inadequate. Skybeam intends to provide notice to its subscriber(s) whose identities would be disclosed if the Court orders disclosure. If and when the Court revisits the April 18 Order and amends the standard, Skybeam subscriber(s) would have the opportunity to address protections for their speech and the appropriate balancing test.

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[3] In its Motion for Expedited Order Authorizing Discovery, Façonnable additionally cited *Pod-Ners, LLC v. Northern Feed & Bean of Lucerne Ltd.*, 204 F.R.D. 675 (D. Colo. 2002) in support of its assertion that the Court should order discovery of defendants' identities under a "good cause" standard. *See* Doc. # 2 ¶ 7. However, similar to *Arista Records*, *Pod-Ners* involved allegations of infringement and unfair competition, not "actual speech." *See* Pod-Ners, 204 F.R.D. at 676. Façonnable cited no other authority in its Motion.

[4] Specifically, the Ninth Circuit's 2011 *In re Anonymous Online Speakers* opinion omitted the earlier statement that *Cahill* "extends too far" in the context of "commercial speech," instead stating that it extended too far in the context of "the speech at issue here." *In re Anonymous Online Speakers*, 2011 U.S. App. LEXIS 487, at *17.

[5] The Ninth Circuit additionally advised courts authorizing discovery of the identities of anonymous speakers to consider the "appropriate scope and procedures" for disclosure of this information. *Id.* at *19-*20 & n.2.

Finally, Façonnable's litigation may be a Strategic Lawsuit Against Public Participation ("SLAPP"). While Colorado does not have an anti-SLAPP statute, Colorado case law provides for early dismissal of litigation aimed at suppressing the valid exercise of free speech. *See Protect Our Mountain Environment, Inc. v. District Court of County of Jefferson* ("*POME*"), 677 P.2d 1361 (Colo. 1984) (Colorado's seminal case defining the First Amendment right to petition); *Concerned Members of Intermountain Rural Elec. Assoc. v. District Court Colorado Supreme Court*, 713 P.2d 923 (Colo. 1986) (applying the *POME* standards to a claim for libel). Thus, Façonnable has the burden of showing that defendants' speech activities were not immunized from liability by the First Amendment. *See also Krystkowiak v. W.O. Brisben Cos.*, 90 P.3d 859, 864 (Colo. 2004).

Finally, Façonnable has not committed to reimburse Skybeam for the costs of compliance with its Subpoena,[6] and the timetable in Façonnable's Subpoena would not allow for Skybeam to give reasonable notice to its subscriber(s) before being ordered to turn over any records.

For all the reasons above, Skybeam objects to Façonnable's Subpoena pursuant to Federal Rule of Civil Procedure 45 and no documents or information will be produced.

Very truly yours,

John D. Seiver

[6] *United States v. Columbia Broadcasting Sys. Inc.*, 666 F.2d 364, 371-72 (9th Cir. 1981) *cert denied*, 457 U.S. 1118 (1982).