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

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16 **ART OF LIVING FOUNDATION,**

17 Plaintiff,

18 vs.

19 **DOES 1-10, inclusive,**

20 Defendants.

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

**PLAINTIFF'S OPPOSITION TO
 DEFENDANTS DOE/KLIM AND
 DOE/SKYWALKER'S MOTION FOR
 SUMMARY JUDGMENT; MOTION
 FOR DENIAL OF DEFENDANTS'
 MOTION UNDER FED. R. CIV. P.
 56(D); EVIDENTIARY OBJECTIONS**

Date: January 12, 2012
 Time: 1:30 PM
 Ctrm: Courtroom 4, 5th Floor
 Judge: The Honorable Lucy H. Koh

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1 Plaintiff Art of Living Foundation (“Plaintiff”), by and through its counsel of record,
2 respectfully submits the following: a) memorandum of points and authorities in
3 opposition to the Motion for Summary Judgment of Defendants Doe/Klim and
4 Doe/Skywalker (collectively, “Defendants”); motion for denial of Defendants’ motion for
5 summary judgment under Federal Rule of Civil Procedure 56(d); and c) evidentiary
6 objections.

7 **I. INTRODUCTION**

8 Plaintiff is an educational and humanitarian organization, which offers courses on
9 breathing, meditation, and yoga. Among Plaintiff’s courses is the Breath Water Sound
10 course. The methods used in the Breath Water Sound Course are contained in a written
11 Breath Water Sound Manual (the “BWS Manual”). Plaintiff owns the copyright to the
12 BWS Manual.

13 Without Plaintiff’s consent, Defendant Skywalker (possibly in coordination with
14 other anonymous Defendants) published the full text of the BWS Manual on his blog.
15 Thereafter, Plaintiff filed this lawsuit, asserting a claim for copyright infringement.
16 Skywalker has moved for summary judgment as to Plaintiff’s copyright claim. However,
17 Defendants’ motion is more manifesto than legal argument supported by admissible
18 evidence. The Court should deny Defendants’ motion for the following reasons, and as
19 explained more fully herein:

- 20 • Contrary to Defendants’ claims, Plaintiff owns the copyright to the BWS Manual.
21 To the extent there is an ambiguity or mistake in the copyright registration, that
22 circumstance does not affect Plaintiff’s claim.
- 23 • Defendants’ affirmative defense of fair use fails under all of the fair use factors
24 where Defendants copied and posted the entirety of the BWS Manual without
25 transforming the work at all. Moreover, courts have found that educational and
26 spiritual works like the BWS Manual are creative works and offer value to their
27 owners, thereby requiring a significant showing by Defendants to establish fair
28 use. Defendants have failed to make such a showing.

- 1 • While Plaintiff need not quantify its damages to succeed on its copyright claim, it
- 2 has done so here. Specifically, Plaintiff has shown that a percentage of the
- 3 students of its Breath Water Sound course subsequently enroll in Plaintiff's fee-
- 4 based courses. Defendants' posting of the BWS Manual deterred these students.
- 5 • While Defendants accuse Plaintiff of filing this suit as a pretext, and that
- 6 Defendants should succeed on the theory of copyright misuse, Defendants have
- 7 offered no evidence of misuse. To the contrary, Plaintiff brought its copyright
- 8 claim solely to enforce its copyright in the BWS Manual.

9 For all of these reasons, the Court should deny Defendants' motion. As an
 10 additional basis for denial, the Court should exclude most of Defendants' evidence
 11 because it is unauthenticated, lacking foundation, constituting hearsay, and/or violating
 12 the best evidence rule. Without this evidence, Defendants' motion fails. Finally, even if
 13 the Court finds that Defendants have met their evidentiary and legal burdens, the Court
 14 should still deny Defendants' motion under Rule 56(d) where Plaintiff has not had a
 15 meaningful opportunity to pursue discovery.

16 **II. BACKGROUND**

17 **A. Plaintiff & Plaintiff's Teachings**

18 Plaintiff, the Art of Living Foundation, is a California non-profit corporation based
 19 in Goleta, California. (Declaration of Ashwani Dhall [D.E. No. 40] ("Dhall Decl.") ¶11.)
 20 Plaintiff is a non-denominational educational and humanitarian organization dedicated
 21 to the teachings of Sri Sri Ravi Shankar ("Shankar"). (*Id.* ¶13.) Plaintiff offers courses
 22 on breathing, meditation, and yoga, including Sudarshan Kriya, a rhythmic breathing
 23 technique. (*Id.* ¶14.)

24 Generally, individuals who wish to take a course offered by Plaintiff must register
 25 and pay the course fee. (Dhall Decl. ¶18.) The fee is typically \$250 for the Art of Living
 26 Course, which teaches the basics of Sudarshan Kriya. (*Id.* ¶18.) Plaintiff uses the
 27 money it raises through its courses to maintain its facilities, to train new teachers for its
 28 courses, and to provide humanitarian aid and community service. (*Id.* ¶19.)

1 **B. Plaintiff's Breath Water Sound Course & Manual**

2 Prior to 2002, Shankar came up with the idea for the Breath Water Sound
 3 course, which explains some of Shankar's basic teachings, including basic breath
 4 exercises, sound relaxation methods, meditation techniques, tools for healthy living, and
 5 processes to work together as a community. (Dhall Decl. ¶40; Declaration of Jaina
 6 Desai in Opposition to Defendants' Motion for Summary Judgment ("Desai Decl.") ¶2.)
 7 The Breath Water Sound course is typically offered by Plaintiff at no charge. (Dhall
 8 Decl. ¶39.) Many students who take the Breath Water Sound course subsequently
 9 enroll in one of Plaintiff's fee-based courses. (*Id.* ¶41; Declaration of Natalie Kaharick
 10 [D.E. No. 43] ("Kaharick Decl.") *passim*; Declaration of Michael Fischman in Opposition
 11 to Defendants' Motion for Summary Judgment ("Fischman Decl.") ¶4.)

12 Prior to 2002, Shankar also came up with the idea of memorializing the Breath
 13 Water Sound course in a written manual. (Desai Decl. ¶3; Fischman Decl. ¶5.)
 14 Thereafter, Shankar and employees and volunteers at the Art of Living Foundation in
 15 India, the Art of Living Foundation in the U.S., and other Art of Living chapters began
 16 writing the BWS Manual. (Desai Decl. ¶4; Fischman Decl. ¶6.) This work was done for
 17 the benefit of the Art of Living Foundation in India with the understanding that the Art of
 18 Living Foundation in India would own the all of the rights to this BWS Manual. (Desai
 19 Decl. ¶4; Fischman Decl. ¶6.) The 2002 publication attached to the third Skywalker
 20 declaration as Exhibit B was a draft of the BWS Manual. (Desai Decl. ¶4; Fischman
 21 Decl. ¶6.)

22 In 2003, control over the work on the BWS Manual was transferred from the Art
 23 of Living in India to Plaintiff. (Desai Decl. ¶5; Fischman Decl. ¶7.) All copyrights in the
 24 BWS Manual were also assigned to Plaintiff. (Desai Decl. ¶5; Fischman Decl. ¶7.) In
 25 2003, Plaintiff finalized the BWS Manual, and in 2010, Plaintiff registered the Manual
 26 with the United States Copyright Office, Registration No. TX0007240203. (Dhall Decl.
 27 ¶¶37-38 & Ex. D; Fischman Decl. ¶9 & Ex. A.)

28 //

1 **C. Defendants' Blog**

2 In or before May 2010, Defendant Skywalker (in coordination with other
3 anonymous Defendants) started the blog entitled Beyond the Art of Living and located at
4 <aolfree.wordpress.com> (the "Blog"). (Dhall Decl. ¶44; Declaration of Doe/Skywalker
5 [D.E. No. 15] ¶3.) The ostensible purpose of the Blog is to provide former students of
6 Plaintiff and those doubting Plaintiff's teachings a space to heal, find answers, and
7 understand the experiences they went through as students of Plaintiff. (Declaration of
8 Jeffrey M. Rosenfeld in Opposition to Defendants' Motion to Dismiss, Special Motion to
9 Strike, and Motion to Quash [D.E. No. 39] ¶¶3-5 & Exs. A-C.) In fact, the Blog is used to
10 disparage Plaintiff and its teachings to thousands of viewers each month. (Dhall Decl.
11 ¶46; Declaration of Dr. Frederick B. Cohen in Opposition to Defendants' Motions [D.E.
12 No. 54] ¶2-7 & Exs. A-B.)

13 In or around July 2010, Defendant Skywalker (possibly in coordination with other
14 anonymous Defendants) published the full text of the BWS Manual on the Blog.
15 (Declaration of Doe/Skywalker [D.E. No. 15] ¶10 & Ex. E.)

16 **III. PROCEDURAL BACKGROUND**

17 On November 5, 2010, Plaintiff filed its initial complaint against several Doe
18 Defendants who operate and contribute to the Blog [D.E. No. 1.] The initial complaint
19 asserted claims for copyright infringement, misappropriation of trade secrets,
20 defamation, and trade libel. [D.E. No. 1.] On December 17, the Court granted Plaintiff's
21 motion to take expedited discovery, authorizing Plaintiff to issue subpoenas to identify
22 the pseudonymous Defendants. [D.E. No. 10.] Thereafter, Plaintiff served subpoenas
23 on Google, Inc. and Automattic, Inc. (Declaration of Jeffrey M. Rosenfeld in Opposition
24 to Defendants' Motion for Summary Judgment ("Rosenfeld Decl.") ¶2.)

25 On January 31, 2011, pseudonymous Defendants Klim and Skywalker filed a
26 motion to quash the subpoenas to Google and Automattic. [D.E. Nos. 11-13.] On
27 August 10, Magistrate Judge Lloyd denied the motion to quash in part. [D.E. No. 90.]
28 Thereafter, Defendant Skywalker filed a Motion for Relief from Nondispositive Pretrial

1 Order of Magistrate Judge Re: Motion to Quash. [D.E. No. 92.] As of the date of this
2 opposition, Skywalker's motion is pending before the Court.

3 On September 12, 2011 Defendants filed a special motion to strike Plaintiff's
4 trade secret claim under California Code of Civil Procedure 425.16. [D.E. No. 100.] As
5 of the date of this opposition, Defendants' motion to strike is also pending before the
6 Court.

7 On August 24, 2011 Plaintiff served its first set of requests for production and first
8 set of interrogatories on Skywalker. (Rosenfeld Decl. ¶3.) Additionally, on August 29,
9 2011 Plaintiff served a subpoena on Automattic seeking, among other things, all of the
10 analytic data associated with the Blog. (*Id.* ¶4 & Ex. A.) Plaintiff has received
11 objections and responses from Skywalker and an emailed response from Automattic.
12 (*Id.* ¶¶5-8 & Exs. B-D.) While Plaintiff finds these responses highly deficient, it has
13 chosen not to move to compel further responses or to conduct depositions until the
14 resolution of Skywalker's pending special motion to strike and motion for relief from the
15 magistrate judge's order. (*Id.* ¶9.) Plaintiff made this decision to keep its costs down
16 until Defendants' dispositive motions are resolved. (*Id.*)

17 **IV. ARGUMENT**

18 Federal Rule of Civil Procedure 56 permits the entry of summary judgment, after
19 adequate time for discovery, against a party who fails to make a showing sufficient to
20 establish the existence of an element essential to that party's case, and on which that
21 party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322
22 (1986).

23 Where a defendant moves for summary judgment based on an affirmative defense
24 for which it has the burden of proof, the defendant must establish beyond peradventure
25 all of the essential elements of the defense in order to justify judgment in its favor. *Stuart*
26 *v. Radioshack Corp.*, 259 F.R.D. 200, 202 (N.D. Cal. 2009) (quoting *Martin v. Alamo*
27 *Cnty. College Dist.*, 353 F.3d 409, 412 (5th Cir.2003)).

28 //

1 Where the non-moving party bears the burden of proof at trial, the moving party
 2 must establish that there is an absence of evidence to support the non-moving party's
 3 case. *Celotex Corp.*, 477 U.S. at 325. If the moving party meets that burden, the burden
 4 then shifts to the non-moving party to designate specific facts demonstrating the
 5 existence of genuine issues for trial. *Id.* The non-moving party must submit evidence
 6 from which a jury could reasonably render a verdict in the non-moving party's favor. See
 7 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1989). In determining whether a jury
 8 could reasonably render a verdict in the non-moving party's favor, all justifiable
 9 inferences must be drawn in the non-moving party's favor. *Celotex*, 477 U.S. at 330 n.2
 10 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

11 Here, Defendants have failed to submit evidence supporting the elements of their
 12 affirmative defenses, and they have failed to establish an absence of a genuine issue of
 13 material fact as to Plaintiff's claims. Thus, the Court should deny Defendants' motion for
 14 summary judgment. Alternatively, the Court should find that Plaintiff has not had an
 15 opportunity to present facts essential to its opposition, where it has not had any
 16 meaningful opportunity to pursue discovery, and on that basis, should deny Defendants'
 17 motion under Rule 56(d).

18 **A. Plaintiff owns the copyright to the BWS Manual; any ambiguity or mistake in**
 19 **Plaintiff's copyright registration does not affect Plaintiff's copyright claim.**

20 Defendants argue that Plaintiff cannot prevail on its copyright claim because
 21 Plaintiff does not own the copyright to the BWS Manual. (Mot. at 6:10-7:12.) This is
 22 incorrect. Plaintiff was an author of the BWS Manual, and all copyrights to the BWS
 23 Manual have been assigned to Plaintiff. (Desai Decl. ¶5; Fischman Decl. ¶7.) Thus,
 24 Plaintiff is entitled to enforce its copyright in the BWS Manual. 17 U.S.C. §501(b).

25 Defendants argue that Plaintiff knowingly failed to advise the Copyright Office of a
 26 prior published work (*i.e.* Exhibit B to the 3rd Skywalker Declaration), and thus Plaintiff's
 27 copyright should be invalidated. (Mot. at 6:19-7:12.) This argument also fails. First,
 28 Exhibit B to the third Skywalker Declaration is not a prior, published work. Rather, it is

1 another version of the BWS Manual. Second, even if Exhibit B were a prior work,
2 Plaintiff's mistake in not identifying it in its copyright application does not affect its
3 infringement claim. The Ninth Circuit has been clear that in the absence of an intent to
4 mislead the Copyright Office, mistakes on registration certificates do not invalidate a
5 copyright and thus do not bar infringement actions. See *United Fabrics Int'l, Inc. v. C&J*
6 *Wear, Inc.*, 630 F.3d 1255, 1259 (9th Cir. 2011); *Lamps Plus, Inc. v. Seattle Lighting*
7 *Fixture Co.*, 345 F.3d 1140, 1145 (9th Cir. 2003).

8 Because Plaintiff has submitted evidence that it owns the copyright to the BWS
9 Manual, Defendants' motion fails.

10 **B. Defendants' complete infringement of the BWS Manual cannot qualify for**
11 **fair use protection.**

12 Under the Copyright Act, the copyright owner has the exclusive right to reproduce
13 and distribute the work. See *Worldwide Church of God v. Philadelphia Church of God,*
14 *Inc.*, 227 F.3d 1110, 1115 (9th Cir. 2000). Fair use is an exception to a copyright holder's
15 exclusive rights, which recognizes that some limited use of copyrighted material may be
16 necessary to allow artists and authors to improve upon, to comment on, or to criticize
17 prior works. See *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1150-51 (C.D. Cal. 2010).
18 However, "[t]he fair use doctrine is not a license for corporate theft, empowering a court
19 to ignore a copyright whenever it determines the underlying work contains material of
20 possible public importance." See *Worldwide Church of God*, 227 F.3d at 1115-16
21 (quoting *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 558 (1985)).

22 The Copyright Act identifies four factors to consider in evaluating a fair use claim:
23 1) the purpose and character of the use, including whether such use is of a commercial
24 nature or is for nonprofit educational purposes; 2) the nature of the copyrighted work; 3)
25 the amount and substantiality of the portion used in relation to the copyrighted work as a
26 whole; and 4) the effect of the use upon the potential market for or value of the
27 copyrighted work. 17 U.S.C. §107. Because fair use is an affirmative defense, the
28

1 defendant bears the burden of proving fair use. *See Campbell v. Acuff-Rose Music, Inc.*,
2 510 U.S. 569, 590 (1994).

3 The issue of fair use in this action closely parallels the discussion in *Worldwide*
4 *Church of God v. Philadelphia Church of God, Inc.* 227 F.3d 1110 (9th Cir. 2000). In
5 *Worldwide Church of God*, the plaintiff, a religious organization, held a copyright in a
6 book entitled *Mystery of the Ages* (“MOA”), which it had distributed to over nine million
7 people at no charge. *Id.* at 1113. The plaintiff brought an infringement action against a
8 competing religious organization, which had made copies of MOA to use in connection
9 with its religious services. *Id.* The defendant claimed that MOA was central to its
10 religious services, and that it was entitled to make copies under the fair use doctrine. *Id.*
11 The Ninth Circuit analyzed the four fair use factors and rejected the defendant’s
12 argument, finding that none of the factors supported the defendant’s position. *See Id.* at
13 1117-1120.

14 The situation is the same here. As in *Worldwide Church of God*, Defendants have
15 failed to submit sufficient evidence that any of the fair use factors support their position,
16 let alone that a weighing of all of the factors establishes that their infringement was a fair
17 use. Thus, the Court should deny Defendants’ motion.

18 **1. The first fair use factor weighs against Defendants when they did not**
19 **transform the BWS Manual in any way.**

20 Under the first fair use factor, the Court considers the extent to which the new
21 work is transformative. *Henley*, 733 F. Supp. 2d at 1151. To be transformative,
22 something new must be added to the original work, altering its purpose or character with
23 new expression, meaning, or message. *See id.* “There must be real, substantial
24 condensation of the materials, and intellectual labor and judgment bestowed thereon;
25 and not merely the facile use of the scissors; or extracts of the essential parts,
26 constituting the chief value of the original work.” *Worldwide Church of God*, 227 F.3d at
27 1117 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841)).

28 //

1 In *Worldwide Church of God*, 227 F.3d at 1117, the Ninth Circuit analyzed the
2 purpose and character of the use of MOA and found that the defendant's "copying of
3 [MOA] in its entirety bespeaks no intellectual labor and judgment. It merely supersedes
4 the object of the original MOA, to serve religious practice and education."

5 Similarly, Defendants' publication of the BWS Manual was not transformative in
6 any way. Defendants posted the entirety of the BWS Manual on the Internet, as
7 originally published by Plaintiff. (Declaration of Doe/Skywalker [D.E. No. 15] ¶9 & Ex. E.)
8 Defendants did not modify, annotate, or otherwise transform the BWS Manual. (*Id.*)
9 Rather, Defendants posted the BWS without commentary, allowing others to view it and
10 use it as they pleased. (*Id.*) Defendants claim that their use of the BWS Manual was
11 transformative because it was posted as part of a larger argument about Plaintiff. (Mot.
12 at 9:18-19.) Even if that was Defendants' subjective intent, nothing of that intent was
13 reflected in any addition or change to the BWS Manual. In other words, Defendants have
14 failed to show that they used any intellectual labor or judgment to transform the BWS
15 Manual into a new work.

16 Despite the foregoing, Defendants argue that the first fair use factor weighs in their
17 favor because their use was non-commercial. (Mot. at 9:3-4.) This argument fails for
18 several reasons. First, while the commercial/non-commercial distinction is relevant to the
19 first fair use factor, it is less important than whether the work is transformative. See
20 *Calkins v. Playboy Enter. Int'l, Inc.*, 561 F. Supp. 2d 1136, 1141 (E.D. Cal. 2008).
21 Second, it is unclear that Defendants' use of the BWS Manual was non-commercial, and
22 Plaintiff has not had an opportunity to conduct discovery about this issue. See *infra* Part
23 VI. Third, even if Defendants' posting of the BWS Manual were non-commercial, the crux
24 of the profit/nonprofit distinction is not whether the motive for the use was monetary gain,
25 but whether the user stood to benefit from exploiting the copyrighted material without
26 paying the customary price. See *Worldwide Church of God*, 227 F.3d at 1118. Thus, in
27 *Worldwide Church of God*, the Ninth Circuit found that the defendant benefitted from its
28 distribution of MOA when it did not have to account to the plaintiff, even though the

1 defendant was a non-profit organization that did not sell its copies of MOA. See *id.* at
2 1118. The same situation exists here. Defendants used the complete text of the BWS
3 Manual for unclear reasons (*e.g.* to spark discussion about the Manual, to attract users to
4 their Blog, to advocate for competing ideologies, or for some other reason) without
5 accounting to Plaintiff. Under *Worldwide Church of God*, Defendants' alleged non-
6 commercial status does not support their fair use argument.

7 Because Defendants engaged in wholesale copying of the BWS Manual without
8 any transformation, the first fair use factor weighs strongly against them.

9 **2. The second fair use factor weighs against Defendants when the BWS**
10 **Manual is a creative approach to teaching concepts of energy,**
11 **breathing, and meditation.**

12 The second fair use factor asks whether the original work is informational or
13 creative. See *Henley*, 733 F. Supp. 2d at 1151. Defendants assume that the BWS
14 Manual is informational. (Mot. at 10:7-8.) However, this assumption does not comport
15 with the case law.

16 In *Worldwide Church of God*, the Ninth Circuit addressed whether the religious
17 book, MOA, was informational or creative. See *Worldwide Church of God*, 227 F.3d at
18 1118. Even though MOA was described by the parties as primarily a textual, historical
19 account of views on the Bible, the court found that the creativity, imagination, and
20 originality embodied in MOA tilted the scale against fair use. See also *Designer Skin,*
21 *LLC v. S & L Vitamins, Inc.*, 560 F. Supp. 2d 811, 824 (D. Ariz. 2008) (finding that the
22 appropriate test under second fair use factor was whether original work was created for
23 purpose of selling products rather than for aesthetic or educational purposes); *Newport-*
24 *Mesa Unified Sch. Dist. v. State of California Dep't of Educ.*, 371 F. Supp. 2d 1170, 1177-
25 78 (C.D. Cal. 2005) (finding that development of test questions was creative, imaginative,
26 and original process under second fair use factor).

27 Because the BWS Manual is a creative approach to the teaching of personal
28 energy, breathing, and meditation, the second fair use factor weighs strongly against
Defendants under *Worldwide Church of God* and its progeny.

1 **3. The third fair use factor weighs against Defendants when they copied**
 2 **the entirety of the BWS Manual.**

3 The third fair use factor asks the Court to examine the amount and substantiality
 4 of the portion used in relation to the copyrighted work as a whole. 17 U.S.C. §107.
 5 “While wholesale copying does not preclude fair use per se, copying an entire work
 6 militates against a finding of fair use. *Worldwide Church of God*, 227 F.3d at 1118
 7 (quoting *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1150-51 (9th
 8 Cir.1986)) (internal quotations omitted). Moreover, “the fact that a substantial portion of
 9 the infringing work was copied verbatim is evidence of the qualitative value of the copied
 10 material, both to the originator and to the plagiarist who seeks to profit from marketing
 11 some else’s copyrighted expression.” See *id.* (quoting *Harper & Row*, 471 U.S. at 565)
 12 (internal quotations omitted).

13 Here, the third fair use factor weighs strongly against Defendants where they
 14 copied the entirety of the BWS Manual. (Declaration of Doe/Skywalker [D.E. No. 15] ¶9
 15 & Ex. E.)

16 **4. The fourth fair use factor weighs against Defendants when**
 17 **Defendants’ use of the BWS Manual deterred people from taking**
 18 **Plaintiff’s courses.**

19 The fourth fair use factor considers the effect of the defendant’s use on the
 20 potential market for or value of the copyrighted work. 17 U.S.C. §107. The burden is on
 21 the defendant seeking protection under the fair use doctrine to submit evidence that
 22 potential markets will not be harmed by the defendant’s use of another’s copyright. See
 23 *Henley*, 733 F. Supp. 2d at 1151.

24 Even when a conventional market for a work does not exist, such as where the
 25 copyrighted is owned by a nonprofit, the owner’s use of the work may be affected. See
 26 *Worldwide Church of God*, 227 F.3d at 1119. “If evidence of actual or potential monetary
 27 loss were required, copyrights held by nonprofits would be essentially worthless.
 28 Religious, educational and other public interest institutions would suffer if their
 publications invested with an institution’s reputation and goodwill could be freely

1 appropriated by anyone.” *Id.* Thus, the fair use analysis is not limited to market effect,
2 but looks at any effect on the plaintiff’s ability to obtain the benefits guaranteed under the
3 Copyright Act. *See id.*

4 Thus, in *Worldwide Church of God*, the Ninth Circuit found that even though
5 millions of copies of MOA had been given away for free by its non-profit owner, MOA’s
6 value continued as a marketing device for the plaintiff. *See Worldwide Church of God*,
7 227 F.3d at 1119. Moreover, the court found that people who received copies of MOA
8 from the defendant were actual or potential adherents of the plaintiff. *See id.* Thus, by
9 reproducing MOA, the defendant deterred actual and potential adherents of the plaintiff
10 away from the plaintiff’s service, making the fourth fair use factor at best neutral for the
11 defendant. *See id.* at 1119-20.

12 The same situation exists here. Plaintiff does not use the BWS Manual as part of
13 a fee-based course, but does use it, for among other reasons, to encourage students to
14 enroll in Plaintiff’s fee-based course. (Dhall Decl. ¶41; Kaharick Decl. *passim*; Fischman
15 Decl. ¶4.) Defendants’ posting of the BWS Manual deterred existing and potential
16 students of Plaintiff from taking Plaintiff’s courses. (*Id.*) Thus, under *Worldwide Church*
17 *of God*, this factor is at best neutral for Defendants.

18 Defendants argue that their publication of the BWS Manual did not displace but
19 rather discouraged demand for the original work as a result of the Blog’s critical context.
20 (Mot. at 11:2-13.) Defendants argue that such discouragement is not a cognizable harm
21 under the Copyright Act. (*Id.*) However, Defendants have submitted no evidence
22 showing that their posting of the BWS Manual discouraged as opposed to displaced
23 viewers from enrolling in Plaintiff’s courses, and it is their burden to do so. Moreover,
24 Defendants’ argument is belied by the fact that Defendants posted the BWS Manual in its
25 entirety, without any criticism, parody, or other annotation that would discourage viewers.
26 Conversely, Plaintiff has demonstrated through competent evidence that a percentage of
27 people who take Plaintiff’s Breath Water Sound course enroll in Plaintiff’s fee-based
28 course. (Dhall Decl. ¶41; Kaharick Decl. *passim*; Fischman Decl. ¶4.) This is the same

1 situation as *Worldwide Church of God*. Because Defendants' use of the BWS Manual
 2 directly affected Plaintiff's conversion of students from the Breath Water Sound course to
 3 its fee based course, the fourth fair use factor doesn't assist Defendants.

4 As a reminder, Defendants bear the burden of proof for their fair use defense, and
 5 must establish all of the essential elements of the defense through competent evidence.
 6 Here, Defendants have failed to establish that any of the fair use factors weigh in their
 7 favor. Thus, the Court should deny Defendants' motion.

8 **C. Plaintiff is prepared to show recoverable damages caused by Defendants'
 9 infringement.**

10 Defendants claim that they are entitled to summary judgment because Plaintiff cannot
 11 show any recoverable damages. Defendants' argument fails for multiple reasons.

12 First, quantifiable damages is not an element of a claim for copyright infringement.
 13 See *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1178 (9th Cir. 2011). Rather, the
 14 Copyright Act specifically permits judicial relief even when damages are not readily
 15 quantifiable. See 17 U.S.C. §501 *et seq.* In Plaintiff's prayer for relief, Plaintiff asks the
 16 Court to enter a judgment finding that Defendants have infringed on Plaintiff's copyright.
 17 Plaintiff is entitled to this relief regardless of whether it can demonstrate recoverable
 18 monetary damages.

19 Second, Plaintiff has submitted evidence supporting its actual damages under 17
 20 U.S.C. §504(b). Specifically, Plaintiff has submitted evidence that a percentage of
 21 students of Plaintiff's free Breath Water Sound course later enroll in Plaintiff's fee-based
 22 courses—this percentage is referred to as a “conversion rate.” (Dhall Decl. ¶41;
 23 Kaharick Decl. *passim*; Fischman Decl. ¶4.) Plaintiff seeks damages in the amount equal
 24 to the conversion rate multiplied by the number people to whom Defendants improperly
 25 showed the BWS Manual. Defendants claim that only 498 people viewed the BWS
 26 Manual as posted on the Blog. (Mot. at 15:10-18.) However, Defendants have refused
 27 to produce data supporting this claim despite a specific discovery request by Plaintiff,
 28

1 and Plaintiff has serious reservations about the accuracy of Defendants' evidence.¹
 2 (Rosenfeld Decl. ¶7 & Ex. C at Nos. 15-22.) Moreover, Defendants' 498 number does
 3 not include viewers of any other publication of the BWS by Defendants. But even if the
 4 498 number were accurate, Plaintiff is entitled to damages equal to 498 multiplied by the
 5 conversion rate. The conversion rate is a topic appropriate for expert testimony, and
 6 Plaintiff has not had an opportunity to finalize an expert disclosure, given that the cutoff
 7 date for such disclosures is not until February 2012. Based on this evidence and the
 8 case posture, the Court should deny Defendants' motion.

9 Finally, Plaintiff is entitled to Defendants' wrongful profits under 17 U.S.C. §504(b).
 10 Specifically, Plaintiff is entitled to any revenue that Defendants earned from their
 11 publication of the BWS Manual, including any indirect profits. See *Masterson Mktg., Inc.*
 12 *v. KSL Recreation Corp.*, 495 F. Supp. 2d 1044, 1049 (S.D. Cal. 2007) (describing
 13 recoverability of indirect profits). While Skywalker claims that he has not derived any
 14 revenue from the Blog or the BWS Manual, the sole support for this claim is his
 15 anonymous declaration. This is hardly competent evidence, particularly where Skywalker
 16 has refused to produce relevant information or make himself available for deposition.
 17 (Rosenfeld Decl. ¶6 & Ex. B at Nos. 13-14.) Plaintiff has the right to determine if
 18 Skywalker has earned revenue from the BWS Manual and to recover that revenue under
 19 17 U.S.C. §504(b).

20 For all of these reasons, Plaintiff has established its right to relief under the
 21 Copyright Act, and Defendants' motion should be denied.

22 //

23 //

24 _____
 25 ¹ While Defendants have submitted a single printout of their supposed analytic data in
 26 support of their motion, they have refused to produce this data to Plaintiff in any format,
 27 let alone in native electronic format, in response to Plaintiff's specific discovery requests.
 28 (Rosenfeld Decl. ¶7 & Ex. C at Nos. 15-22.) It's entirely unclear from Defendants'
 printout whether the 498 number accurately represents the number of people who
 viewed the BWS Manual on the Blog, and Plaintiff has had no opportunity to vet this
 number.

1 **D. Plaintiff has brought a bona fide copyright claim, despite Defendants’**
 2 **unsupported accusation of pretext.**

3 Defendants have also moved for summary judgment on their affirmative defense of
 4 copyright misuse, arguing that Plaintiff’s lawsuit is pretextual. Defendants’ argument fails
 5 where Plaintiff owns the copyright to the BWS Manual and has done nothing more than try to
 6 enforce its rights in the Manual under the Copyright Act.

7 Misuse is a defense to copyright infringement. The misuse defense “prevents
 8 copyright holders from leveraging their limited monopoly to control areas outside of the
 9 monopoly. See *McIntosh v. N. California Universal Enter. Co.*, 670 F. Supp. 2d 1069,
 10 1102 (E.D. Cal. 2009). The test for copyright misuse asks whether the plaintiff’s use of
 11 its copyright violates the public policy embodied in the grant of a copyright. See *In re*
 12 *Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1103 (N.D. Cal. 2002). As a
 13 practical matter, however, this test inevitably requires courts to rely on antitrust principles
 14 or language to some degree. See *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d at
 15 1103. Thus, courts require the proponent of the misuse defense to submit sufficient
 16 evidence to establish a nexus between the alleged anti-competitive leveraging and the
 17 policy of the copyright laws, namely evidence that the copyright holder has leveraged its
 18 copyright to restrain creative activity. See *Metro-Goldwyn-Mayer Studios, Inc. v.*
Grokster, Ltd., 454 F. Supp. 2d 966, 997 (C.D. Cal. 2006).

19 Plaintiff has submitted evidence that it owns the copyright to the BWS Manual.
 20 (Fischman Decl. ¶9 & Ex. A.) Plaintiff has also submitted evidence that it earns revenue
 21 using the BWS Manual by encouraging students to enroll in Plaintiff’s fee-based courses.
 22 (Dhall Decl. ¶41; Kaharick Decl. *passim*; Fischman Decl. ¶4.) Skywalker has admitted
 23 that he copied and posted the complete text of the BWS Manual on his Blog, which is
 24 viewed by thousands of people each month. (Declaration of Doe/Skywalker [D.E. No.
 25 15] ¶10 & Ex. E.) Cohen Decl. [D.E. No. 54] ¶2-7 & Exs. A-B.) Plaintiff’s copyright claim
 26 challenges this misconduct, seeking only to protect Plaintiff’s rights under the Copyright
 27 Act.

1 As a reminder, Defendants bear the burden of proof for their misuse defense, and
 2 must establish this defense through competent evidence. Defendants have failed to
 3 show that Plaintiff has sought to leverage its copyright in the BWS Manual to control
 4 areas outside of the monopoly. Thus, the Court should deny Defendants' motion.

5 **V. EVIDENTIARY OBJECTIONS**

6 A district court's ruling on a motion for summary judgment may only be based on
 7 admissible evidence. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385 (9th Cir. 2010).
 8 Unauthenticated documents and hearsay evidence are inadmissible, and consequently,
 9 may not be considered on summary judgment. *Moore v. Thomas*, 653 F. Supp. 2d 984,
 10 991 (N.D. Cal. 2009). Moreover, the party seeking admission of evidence on a motion for
 11 summary judgment bears the burden of showing its admissibility. *See id.* Here, the
 12 Court should exclude the following evidence of Defendants as inadmissible, and on that
 13 basis deny Defendants' motion.

- 14 • Skywalker Third Declaration Generally: Rule 56(e) requires that declarations be
 15 made on personal knowledge, set forth such facts as would be admissible in evidence,
 16 and show affirmatively that the affiant is competent to testify to the matters stated therein.
 17 *Block v. City of Los Angeles*, 253 F.3d 410, 419 (9th Cir. 2001). Plaintiff objects to the
 18 third declaration of Skywalker [D.E. No. 115] in its entirety, as Skywalker's anonymous
 19 testimony lacks the foundation required by the Federal Rules of Evidence, and deprives
 20 Plaintiff of the opportunity to assess the accuracy of the declaration. Specifically,
 21 Skywalker has not established that his declaration is based on his personal knowledge or
 22 the source of that knowledge. Fed. R. Evid. 602. Moreover, Skywalker asks the Court
 23 and Plaintiff to believe his testimony without providing Plaintiff any opportunity to contest
 24 it or assess it. Such a presumption is antithetical to the U.S. judicial system, particularly
 25 on summary judgment where Skywalker seeks a dispositive ruling as to the entire case.
 26 Thus, the Court should exclude Skywalker's third declaration in its entirety.

- 27 • Lacking Foundation & Authentication: Federal Rule of Evidence 602 provides that
 28 a witness may not testify to a matter unless sufficient evidence is introduced to support a

1 finding that the witness has personal knowledge of that matter. Moreover,
 2 unauthenticated documents cannot be considered in a motion for summary judgment.
 3 The authentication of a document requires evidence sufficient to support a finding that
 4 the matter in question is what its proponent claims. *Las Vegas Sands, LLC v. Nehme*,
 5 632 F.3d 526, 532-33 (9th Cir. 2011). Skywalker's third declaration is riddled with
 6 unauthenticated testimony. In particular, Skywalker fails to provide any explanation
 7 about the purported analytic data he attaches as Exhibit D to his declaration. Skywalker
 8 fails to explain how he obtained this data, what the data purports to represent, how the
 9 data was calculated, or even if Skywalker has any knowledge about this data. The Court
 10 should exclude the following portions of Skywalker's third declaration as lacking the
 11 required foundation and authentication: 2:10-12, 2:13-19, 2:26-3:3, 3:4-13 and Exhibits
 12 B, D, and E.

- 13 • Containing Hearsay: Under Federal Rule of Evidence 802, hearsay is not
 14 admissible unless it falls within one of the specific exceptions in Rules 804 and 805.
 15 Exhibit D contains inadmissible hearsay where it consists of a statement by a third party
 16 (presumably Automattic), offered in evidence to prove the truth of the matter asserted
 17 (*i.e.* the number of viewers of a page on the Blog). Plaintiff has no idea how Skywalker
 18 obtained this document or whether it accurately represents the data of Automattic. The
 19 Court should exclude Exhibit D as containing inadmissible hearsay.

- 20 • Violating the Best Evidence Rule: The best evidence rule, Fed. R. Evid. 1002,
 21 excludes secondary evidence offered to prove the contents of a writing, recording, or
 22 photograph. Exhibit D to Skywalker's third declaration purportedly summarizes analytic
 23 data from the Blog. The analytic data that Exhibit D purportedly represents is an
 24 electronic file created by a third party, presumably Automattic. Defendants have refused
 25 to produce that file to Plaintiff, and Plaintiff has no way of assessing the accuracy of the
 26 purported data in Exhibit D, including whether the numbers are accurate and what the
 27 numbers represent. Thus, the Court should exclude Exhibit D.

28 //

1 Because most of Defendants' evidence is inadmissible, the Court should deny
2 Defendants' motion for summary judgment.

3 **VI. MOTION FOR DENIAL OF DEFENDANTS' MOTION**
4 **UNDER FED. R. CIV. P. 56(D)**

5 Even if the Court finds that Defendants' have met their evidentiary and legal
6 burdens, the Court should still deny Defendants' motion under Rule 56(d). Under Rule
7 56(d), the Court may deny a motion for summary judgment or defer considering the
8 motion where the non-moving party cannot present facts essential to its opposition. Rule
9 56(d) applies with particular force where a summary judgment motion is filed early in the
10 litigation, before a party has had a meaningful opportunity to pursue discovery relating to
11 its theory of the case. See *Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes*
12 *of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003). In such situations, courts
13 should freely grant a Rule 56(d) motion because courts disfavor summary judgment
14 where relevant evidence remains to be discovered. See *id.*; *Klinge v. Eikenberry*, 849
15 F.2d 409, 412 (9th Cir. 1988). In order to rely on Rule 56(d), the requesting party must
16 show: 1) that it has set forth in an affidavit the specific facts it hopes to elicit from further
17 discovery, 2) that the facts sought exist, and 3) that the sought-after facts are essential to
18 oppose summary judgment. See *Getz v. Boeing Co.*, 690 F. Supp. 2d 982, 1000 (N.D.
19 Cal. 2010) *aff'd*, 10-15284, 2011 WL 3275957 (9th Cir. Aug. 2, 2011). Plaintiff has
20 satisfied this three-factor test.

21 First, Plaintiff intends to elicit the following specific facts through further discovery
22 and by compelling responses to discovery that Plaintiff has already served:

- 23 • All fora and media on which Skywalker—and other anonymous Defendants—
24 posted the BWS Manual. This information will be obtained from Skywalker.
25 While Plaintiff has requested this information from Skywalker through written
26 discovery, his response is ambiguous and Plaintiff would like the opportunity to
27 depose Skywalker about the accuracy of his response. (Rosenfeld Decl. ¶¶6-
28 7, 10 & Exs. B-C.)

- 1 • The number of viewers of all of Skywalker’s publications of the BWS Manual.
 2 This process will involve a clarification of the source of the supposed analytic
 3 numbers in Exhibit D to the third Skywalker declaration, including what these
 4 numbers represent and how they were calculated. While Plaintiff has
 5 requested this information from Skywalker through written discovery,
 6 Skywalker has refused to produce it. (Rosenfeld Decl. ¶¶6-7, 10 & Exs. B-C.)
 7 • Skywalker’s sources of income, including specifically any that relate to the
 8 teaching of breathing, meditation, or yoga, and any in which he may have used
 9 Plaintiff’s BWS Manual. While Plaintiff has requested this information from
 10 Skywalker through written discovery, Skywalker has refused to produce it.
 11 (Rosenfeld Decl. ¶¶6-7, 10 & Exs. B-C.)

12 Second, the facts identified above exist. The facts are straightforward and should
 13 be easily obtainable. The facts either reside with Skywalker (e.g. media on which
 14 Skywalker published the BWS Manual, Skywalker’s sources of income) or consist of data
 15 that is readily accessible to Skywalker or third parties (e.g. the analytics). Plaintiff has
 16 served discovery requests on Skywalker and third parties regarding these facts.
 17 However, the responses received to date have all been highly deficient. (Rosenfeld
 18 Decl. ¶¶6-8 & Exs. B-D.) While Defendants’ other dispositive motions are pending,
 19 Plaintiff has intentionally postponed compelling further responses and conducting
 20 depositions, in order to save what may prove unnecessary costs. (*Id.* ¶9.)

21 Finally, the sought-after facts are essential to oppose Defendants’ motion for
 22 summary judgment. In their motion, Defendants argue that Plaintiff cannot establish its
 23 actual damages, and that Defendants have earned no revenue from the BWS Manual.
 24 As described above, *see supra* Part IV.C, Plaintiff is entitled to actual damages equal to
 25 Plaintiff’s conversion rate multiplied by the number of viewers of Defendants’ wrongful
 26 publications of the BWS Manual. (Rosenfeld Decl. ¶11.) Defendants have not produced
 27 sufficient, credible data for Plaintiff to perform this calculation. (*Id.*) Moreover, Plaintiff is
 28 entitled to any revenue that Defendants earned from their misuse of the BWS Manual.

1 Defendants have not produced sufficient information for Plaintiff to perform this
2 assessment either. (*Id.* ¶12.) The facts set forth above are directly relevant to Plaintiff's
3 calculation of its actual damages and Defendants' wrongful profits.

4 For the foregoing reasons, if the Court does not deny Defendants' motion outright
5 for Defendants' failure to meet their burden, the Court should deny it under Rule 56(d)
6 where Plaintiff has not had a meaningful opportunity to discover essential facts.

7 **VII. CONCLUSION**

8 For all of the reasons set forth above, the Court should deny Defendants' motion
9 for summary judgment.

10 DATED: October 11, 2011

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