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27 **UNITED STATES DISTRICT COURT**
28 **NORTHERN DISTRICT OF CALIFORNIA**
SAN JOSE DIVISION

29 ART OF LIVING FOUNDATION,) CASE NO. 10-cv-5022 LHK HRL
30 a California Corporation)
31)
32 Plaintiff,) **BRIEF AMICI CURIAE OF PUBLIC**
33) **CITIZEN, AMERICAN CIVIL**
34 v.) **LIBERTIES UNION FOUNDATION**
35) **OF NORTHERN CALIFORNIA, AND**
36 DOES 1-10, INCLUSIVE,) **ELECTRONIC FRONTIER**
37) **FOUNDATION**
38 Defendants.)
39) Hon. Lucy H. Koh
40) Courtroom 8, 4th Floor

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1 This appeal involves an issue which, until the magistrate judge’s ruling in this case, has been
2 addressed consistently by state appellate courts and federal trial courts across the country: what
3 procedures apply, and what showings are required, when a plaintiff asserts a claim for defamation or
4 some other tort based on anonymous online speech and seeks to identify the anonymous speaker?
5 Based on the well-accepted First Amendment right to speak anonymously, and recognizing that First
6 Amendment rights cannot be infringed without a compelling state interest, these courts have uniformly
7 held that anonymous would-be defendants must be notified of the threat to their First Amendment
8 right to speak anonymously, would-be plaintiffs must make both a legal and an evidentiary showing
9 of merit before government power may be deployed to identify anonymous critics, and the court must
10 balance the interests of the plaintiff in securing relief from genuine harm based on a real violation of
11 his rights, and of the defendant in remaining anonymous. The magistrate judge’s decision in the case
12 at bar conflicts with these principles and should not stand.

13 This case began as an action for defamation by the United States chapter of “Art of Living”
14 (“AoL”), an international “nondenominational” organization “dedicated to the teachings of His
15 Holiness Sri Sri Ravi Shankar.” DN 37 at 2; Complaint ¶¶ 16, 23. The anonymous defendants are
16 former members of the AoL movement, resident abroad, who publish two blogs that savage plaintiff
17 as a religious cult that rips off its adherents, and that seek to demystify AoL’s teachings which, they
18 contend, are either glorified versions of well-known yoga techniques or utter bunk. *See generally*,
19 Request for Judicial Notice, DN 29-2, 29-3. In addition to publishing their own critical comments,
20 defendants provided a forum for comments by other anonymous critics, some of whom have also been
21 named as anonymous defendants. *Id.* In addition to bringing defamation claims, plaintiff alleged
22 posting the “Breath Water Sound” manual infringed the plaintiff’s copyright, and that the manuals
23 containing the “teachings” are trade secrets. Plaintiff issued subpoenas for the identities of the
24 bloggers and commenters, and sought an injunction compelling removal of the entire blogs from the
25 Internet, as well as compensatory and punitive damages.

26 After this Court dismissed plaintiff’s defamation claims, DN 83, plaintiff amended its
27 complaint to drop the defamation claims, DN 85, but still sought to identify the defendant bloggers.

28

1 Magistrate Judge Lloyd granted discovery to identify one of the two bloggers based on the copyright
2 claims alone, DN 90, predicated on an erroneous legal conclusion.

3 Well-established precedent in state and federal courts throughout the United States requires
4 a court to balance a plaintiff’s interest in proceeding with a valid lawsuit against the First Amendment
5 right of anonymous speakers to retain their anonymity by requiring plaintiffs to produce evidence
6 —not mere allegations in a complaint—showing that there is a realistic chance that the lawsuit will
7 be successful. Judge Lloyd declined to apply that authority because he concluded that copyright is
8 somehow different, and that when a plaintiff sues for copyright infringement, it is sufficient that
9 plaintiff **allege** key factual points. *Id.* at 6. Amici, who have played a leading role in developing the
10 national consensus standard regarding the test for identifying anonymous Internet speakers, and have
11 also been deeply involved in anonymous speech cases involving claims of copyright infringement,
12 submit this brief to explain why Judge Lloyd’s analysis should be rejected.

13 **INTEREST OF AMICI CURIAE**

14 As more fully set forth in the motion for leave to file as amici curiae, Public Citizen is a
15 consumer advocacy organization, and the ACLU, ACLU Foundation of Northern California, and
16 Electronic Frontier Foundation are civil liberties organizations. Amici work on a range of issues;
17 among those issues is the right of Internet users to speak anonymously so long as they have done no
18 wrong. Since the turn of the century, amici have sought to encourage the development of First
19 Amendment precedent requiring courts to cast a skeptical eye on subpoenas that seek to compel the
20 identification of anonymous Internet speakers, and they have been involved in many of the major cases
21 in which the standard for deciding whether to allow or to enforce such subpoenas has been established.
22 Amici have also appeared, largely as amici, in many cases in which recording companies and movies
23 companies have sought to identify large numbers of anonymous individuals charged with making
24 copies of recordings and movies available for downloading through file-sharing software; in those
25 cases, amici have argued for appropriate procedural safeguards for the defendants. This experience
26 makes amici uniquely well equipped to explain why Judge Lloyd has understated the evidentiary
27 requirements imposed on plaintiffs in the “infringement-by-downloading” cases and overstated the

1 difference between the legal standards in the two classes of cases. Amici also explain the dangers
2 posed by Judge Lloyd's adoption of a rule that plaintiffs seeking to identify their anonymous critics
3 can evade the normal standard for enforcement of such subpoenas by changing the name of the cause
4 of action on which those subpoenas are based.

5 SUMMARY OF ARGUMENT

6 Federal and state courts throughout the country have applied well-accepted First Amendment
7 principles to cases such as this one and have held, following the so-called *Dendrite*^{1/} test, that
8 anonymous would-be defendants must be notified of the threat to their First Amendment right to speak
9 anonymously, would-be plaintiffs must make both a legal and an evidentiary showing of merit before
10 government power may be deployed to identify anonymous critics, and the court must balance the
11 interests of the plaintiff in securing relief from genuine harm based on a real violation of his rights,
12 and of the defendant in remaining anonymous.

13 The principal advantage of the *Dendrite* test is its flexibility. It balances the interests of the
14 plaintiff who claims to have been wronged against the interest in anonymity of the Internet speaker
15 who claims to have done no wrong. In that way, it provides for a preliminary determination based on
16 a case-by-case, individualized assessment of the equities. It avoids creating a false dichotomy between
17 protection for anonymity and the right of victims to be compensated for their harms. It ensures that
18 online speakers who engage in flagrant infringement of intellectual property rights or who make
19 actionable statements about public figures, companies, or private individuals will not be immune from
20 identification and from being brought to justice. At the same time, the standard helps ensure that
21 persons with legitimate reasons for using others' intellectual property, or for criticizing public figures,
22 will be allowed to maintain the secrecy of their identity as the First Amendment allows.

23 The *Dendrite* test also has the advantage of discouraging lawsuits whose real objective is the
24 "outing" of anonymous speakers. In the first few years of the Internet, thousands of lawsuits were
25 filed seeking to identify online speakers, and enforcement of subpoenas was almost automatic. ISPs

26
27 ^{1/} *Dendrite Int'l v. Doe*, 775 A.2d 756 (N.J. App.2001).

1 reported staggering statistics about the number of subpoenas they received. Although no firm numbers
2 can be cited, experience leads amicus to believe that the number of suits being filed to identify online
3 speakers dropped after *Dendrite* was decided. Decisions that adopted strict legal and evidentiary
4 standards for defendant identification sent a signal to would-be plaintiffs and their counsel to stop and
5 think before they sue. At the same time, the identification of many online speakers, and publicity
6 about verdicts against formerly anonymous defendants, discouraged some would-be posters from
7 indulging in the sort of Wild West behavior that once prevailed.

8 Judge Lloyd decided not to follow the *Dendrite* line of cases because copyright infringement
9 is not protected by the First Amendment and, he thought, federal courts apply a different standard in
10 such cases. But Judge Lloyd applied a false dichotomy – neither defamation, nor trademark
11 infringement, nor any of the other allegedly wrongful speech at issue in the *Dendrite* line of cases is
12 protected by the First Amendment, but that has never been taken as a reason why plaintiffs alleging
13 such wrongdoing should be able to obtain their critics’ identities based on mere allegations, without
14 a **showing** of wrongdoing. The cases on which Judge Lloyd relied effectively applied a *Dendrite*-type
15 balancing analysis because they deemed the speech at issue to be low-value speech, but the reason why
16 the speech was devalued was not simply that infringement was the cause of action, but because of the
17 nature of the speech — making hundred of musical recordings or copyrighted movies available for
18 download without any use of the songs for commentary on an issue of public interest, much less
19 transformative use of the material. Here, in contrast, the materials are used to support an argument
20 that AoL is not what it appears and to allow for commentary on that argument. And even in cases
21 involving non-transformative music downloads, the plaintiffs provided not just allegations of
22 infringement but admissible evidence arguably sufficient to make out a case of infringement against
23 each of the defendants, and the courts weighed the interests of copyright holders in preventing
24 widespread infringement against the interests of the alleged downloaders. Yet Judge Lloyd accepted
25 mere allegations on a key issue, the existence of actual harm, and conducted no balancing of the
26 parties’ respective interests. Consequently, his analysis should be rejected and his order granting
27 plaintiff’s discovery motion should be reversed.

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ARGUMENT

A. The Constitution Limits Compelled Identification of Anonymous Internet Speakers.

The First Amendment protects the right to speak anonymously:

[A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible. Whatever the motivation may be . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, **an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.**

* * *

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

McIntyre v. Ohio Elec. Cmsn., 514 U.S. 334, 341-342, 356 (1995) (emphasis added).

Internet speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or their gender. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the group feels the same way. They may want to say or imply things about themselves that they are unwilling to disclose otherwise. And they may wish to say things that might make other people angry and stir a desire for retaliation.

Although the Internet allows anonymous communication, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. Because of the Internet’s technology, any speaker who sends an e-mail or visits a website leaves an electronic footprint that, if saved by the recipient, starts a path that can be traced back to the original sender. *See Lessig, The Law of the Horse: What Cyber Law Might Teach*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel disclosure of the information, can learn who is saying what to whom. To avoid the Big Brother implications of unlimited enforcement of such power to uncover the identities of anonymous Internet speakers who have done nothing but exercise their First Amendment rights, the law must allow such subpoenas only

1 where the party seeking disclosure can make some evidentiary showing that the lawsuit has actual
2 merit, when the balance of the parties' interests warrants such disclosure.

3 The courts have recognized the serious chilling effect that subpoenas seeking to identify
4 anonymous speakers can have on dissenters and the First Amendment interests that are implicated
5 by such subpoenas. *E.g.*, *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284-1285 (11th
6 Cir. 1982); *Ealy v. Littlejohn*, 569 F.2d 219, 226-230 (5th Cir. 1978); *Bursey v. United States*, 466
7 F.2d 1059, 1084-1086 (9th Cir. 1972). In an analogous area of law, courts developed a standard for
8 compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against
9 disclosure of otherwise anonymous sources. In those cases, courts apply a three-part test, under which
10 a litigant seeking to identify an anonymous speaker has the burden of showing that (1) the issue on
11 which the material is sought is not just relevant to the action, but goes to the heart of the case; (2)
12 disclosure of the source to prove the issue is "necessary" because the party seeking disclosure is likely
13 to prevail on all the other issues in the case; and (3) the discovering party has exhausted all other
14 means of proving this part of his case. *Lee v. Department of Justice*, 413 F.3d 53, 60 (D.C. Cir.
15 2005); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000); *Shoen v. Shoen*, 5 F.3d 1289 (9th
16 Cir.1993); *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972).

17 As one court said in refusing to order identification of anonymous Internet speakers whose
18 identities were allegedly relevant to the defense against a shareholder derivative suit, "If Internet users
19 could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil
20 discovery, this would have a significant chilling effect on Internet communications and thus on basic
21 First Amendment rights." *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001). *See*
22 *also Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999):

23 People are permitted to interact pseudonymously and anonymously with each
24 other so long as those acts are not in violation of the law. This ability to speak one's
25 mind without the burden of the other party knowing all the facts about one's identity
26 can foster open communication and robust debate. . . . **People who have committed
no wrong should be able to participate online without fear that someone who
wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain
the power of the court's order to discover their identities.**

27 (emphasis added).

1 **B. The Qualified Privilege for Anonymous Speech Supports a Five-Part**
 2 **Standard for Identification of Doe Defendants That Demands Showings,**
 3 **Not Just Allegations, and Balancing Interests.**

4 Applying these concerns, courts have recognized that the mere fact that a plaintiff has filed
 5 a lawsuit over a particular piece of speech does not create a compelling government interest in taking
 6 away the defendant’s anonymity. The challenge for courts is to find a standard that makes it neither
 7 too easy nor too hard to identify anonymous speakers. Setting the bar “too low will chill potential
 8 posters from exercising their First Amendment right to speak anonymously. The possibility of losing
 9 anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments
 10 or simply not commenting at all.” *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005). But setting the bar
 11 too high will make it impossible for plaintiffs with perfectly valid claims to identify wrongdoers and
 12 proceed with their cases.

13 Court have drawn on the media’s privilege against revealing sources in civil cases to enunciate
 14 a similar rule protecting against the identification of anonymous Internet speakers. The leading
 15 decision on this subject, *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001), established a five-part
 16 standard that been a model followed or adapted throughout the country:

17 **1. Give Notice:** Courts require the plaintiff (and sometimes the Internet Service
 18 Provider) to provide reasonable notice to the potential defendants and an opportunity
 19 for them to defend their anonymity before issuance of any subpoena.

20 **2. Require Specificity:** Courts require the plaintiff to allege with specificity the
 21 speech or conduct that has allegedly violated its rights.

22 **3. Ensure Facial Validity:** Courts review each claim in the complaint to ensure that
 23 it states a cause of action upon which relief may be granted based on each statement
 24 and against each defendant.

25 **4. Require An Evidentiary Showing:** Courts require the plaintiff to produce
 26 evidence supporting each element of its claims.

27 **5. Balance the Equities:** Weigh the potential harm (if any) to the plaintiff from
 28 being unable to proceed against the harm to the defendant from losing the First
 Amendment right to anonymity.

Id. at 760-61.

A somewhat less exacting standard, formulated in *Cahill*, requires the submission of evidence
 to support the plaintiff’s claims, but not an explicit balancing of interests after the evidence is deemed

1 otherwise sufficient to support discovery. *Cahill*, 884 A.2d 451. In *Cahill*, the Delaware Superior
2 Court had ruled that a town councilman who sued over statements attacking his fitness to hold office
3 could identify the anonymous posters so long as he was not proceeding in bad faith and could
4 establish that the statements about him were actionable because they might have a defamatory
5 meaning. However, the Delaware Supreme Court ruled that a plaintiff must put forward evidence
6 sufficient to establish a prima facie case on all elements of a defamation claim that ought to be within
7 his control without discovery, including that the statements are false. The *Cahill* court rejected the
8 final “balancing” stage of the *Dendrite* standard.

9 All of the other state appellate courts, plus several federal district courts, that have addressed
10 the issue of subpoenas to identify anonymous Internet speakers have adopted some variant of the
11 *Dendrite* or *Cahill* standards. Several courts expressly endorse the *Dendrite* test, requiring notice and
12 opportunity to respond, legally valid claims, evidence supporting those claims, and finally an explicit
13 balancing of the reasons supporting disclosure and the reasons supporting continued anonymity.
14 These decisions include:

15 *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007), where a private company sought to
16 identify the sender of an anonymous email message who had allegedly hacked into the
17 company’s computers to obtain information that was conveyed in the message.
18 Directly following the *Dendrite* decision, and disagreeing with the Delaware Supreme
19 Court’s rejection of the balancing stage, the court analogized an order requiring
20 identification of an anonymous speaker to a preliminary injunction against speech.
21 The Court called for the plaintiff to present evidence sufficient to defeat a motion for
22 summary judgment, followed by a balancing of the equities between the two sides.

23 *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009), where the court
24 required notice to Doe, specification of the defamatory words in full context, prima
25 facie showing, and, “if all else is satisfied, balanc[ing] the anonymous poster’s First
26 Amendment right of free speech against the strength of the prima facie case of
27 defamation presented by the plaintiff and the necessity for disclosure of the
28 anonymous defendant’s identity.” 966 A.2d at 457.

29 *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184 (N.H.
30 2010), where a mortgage lender sought to identify the author of comments saying that
31 its president “was caught for fraud back in 2002 for signing borrowers names and
32 bought his way out.” The New Hampshire Supreme Court held that “the *Dendrite* test
33 is the appropriate standard by which to strike the balance between a defamation
34 plaintiff’s right to protect its reputation and a defendant’s right to exercise free speech
35 anonymously.”

36 *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011), which held that a city council

1 chair had to meet the *Dendrite* test before she could identify constituents whose
2 scabrous accusations included selling out her constituents, prostituting herself after
having run as a reformer, and getting patronage jobs for her family.

3 Several other courts use a *Cahill*-like summary judgment standard. For example:

4 *Krinsky v. Doe 6*, 72 Cal. Rptr.3d 231 (Cal. App. 2008), where the appellate court
5 reversed a trial court decision allowing an executive to learn the identity of several
6 online critics who allegedly defamed her by such references as “a management
consisting of boobs, losers and crooks.”

7 *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007), which reversed a decision
8 allowing a hospital to identify employees who allegedly violated patient
9 confidentiality and disparaged their employer through posts on a blog.

10 *Solers v. Doe*, 977 A.2d 941 (D.C. 2009), where the court held that a government
contractor could identify an anonymous whistleblower who said that plaintiff was
11 using unlicensed software if it produced evidence that the statement was false. The
12 court adopted *Cahill* and expressly rejected *Dendrite*'s balancing stage.^{2/}

13 Similarly, in *Melvin v. Doe*, 49 Pa. D&C 4th 449 (Pa. Com. Pl. 2000), *rev'd on other grounds*,
14 836 A.2d 42 (2003), the trial judge ordered disclosure only after finding genuine issues of material
15 fact requiring trial. Although its holding reached only the issue of appellate jurisdiction, in reversing
16 the order of disclosure, the Pennsylvania Supreme Court expressly recognized the right to speak
17 anonymously and sent the case back for a determination of whether, under Pennsylvania libel law,
18 actual economic harm must be proved as an element of the cause of action:

19 [C]ourt-ordered disclosure of Appellants' identities presents a significant possibility
20 of trespass upon their First Amendment rights. There is no question that generally, the
21 constitutional right to anonymous free speech is a right deeply rooted in public policy
22 that goes beyond this particular litigation, and that it falls within the class of rights that
23 are too important to be denied review. Finally, it is clear that **once Appellants'
24 identities are disclosed, their First Amendment claim is irreparably lost as there
25 are no means by which to later cure such disclosure.**

26 836 A.2d at 50 (emphasis added)

27 Federal district courts have repeatedly followed *Cahill* and *Dendrite*. *See Best Western Int'l*
28 *v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006) (court used five-factor test drawn from *Cahill*,
Dendrite and other decisions); *Fodor v. Doe*, 2011 WL 1629572 (D. Nev. April 27, 2011) (followed

^{2/} In *Maxon v. Ottawa Publ'g Co.*, 929 N.E.2d 666 (Ill. App. 2010), the Illinois Court of Appeals
found it unnecessary to apply the First Amendment to a petition for pre-litigation discovery
because the state's rules already required a verified complaint, specification of the defamatory
words, determination that a valid claim was stated, and notice to the Doe.

1 *Dendrite*); *Koch Industries v. Doe*, 2011 WL 1775765 (D. Utah May 9, 2011) (rejecting discovery
2 to identify defendants in case alleging various trademark claims, breach of contract, and violation of
3 the Computer Fraud and Abuse Act because “The case law . . . has begun to coalesce around the
4 basic framework of the test articulated in *Dendrite*,” quoting *SaleHoo Group v. Doe*, 722 F. Supp.2d
5 1210, 1214 (W.D. Wash. 2010) (alleging trademark and defamation claims)); *In re Baxter*, 2001 WL
6 34806203 (W.D. La. Dec. 20, 2001) (preferred *Dendrite* approach, required showing of reasonable
7 possibility or probability of success); *Sinclair v. TubeSockTedD*, 596 F. Supp.2d 128, 132 (D.D.C.
8 2009) (did not choose between *Cahill* and *Dendrite* because plaintiff loses under either standard);
9 *Alvis Coatings v. Does*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004) (identification allowed based
10 on defamation and trademark claims after considering detailed affidavit about how comments were
11 false); *Doe I and II v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn.
12 2008) (identification ordered after plaintiffs provided detailed affidavits showing basis for claims of
13 defamation and intentional infliction of emotional distress).

14 Although these cases set out slightly different standards, each requires a court to weigh the
15 plaintiff’s interest in identifying the person who has allegedly violated its rights against the interests
16 implicated by the potential violation of the First Amendment right to anonymity, thus ensuring that
17 First Amendment rights are not trammled unnecessarily. Put another way, the qualified privilege
18 to speak anonymously requires courts to review a would-be plaintiff’s claims and the evidence
19 supporting them to ensure that the plaintiff has a valid reason for piercing the speaker’s anonymity.

20 **C. Consistent Authority in This District Requires an Evidentiary Showing,
21 Not Just a Properly Pleaded Complaint.**

22 Until Judge Lloyd issued his ruling, consistent authority in the Northern District of California
23 required proof, not just allegations, before discovery to identify anonymous Internet speakers could
24 be enforced. The leading opinion was authored by Magistrate Judge Wayne Brazil in *Highfields
25 Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005), and adopted by Judge Chesney.
26 This case involved postings on a Yahoo! message board about Highfields, the largest shareholder in
27 a company called Silicon Graphics, including a number of comments that purported to be authored

1 by Highfields, in context mocking both Highfields and SGI. Highfields’s complaint cited various
2 theories of defamation, commercial disparagement, and unfair competition, as well as a variety of
3 state and federal trademark claims, but the court refused to allow discovery to identify the anonymous
4 posters. Judge Brazil’s opinion squarely endorsed the *Dendrite* analysis and held that there was
5 insufficient evidence of likely confusion, of false statements of fact, or of damage to the plaintiff. *Id.*
6 at 977-989. But even if there had been some proof of wrongdoing, Judge Brazil recommended
7 quashing the subpoena because there was so little reason to believe that any possibly wrongful
8 conduct had harmed the plaintiff and because the right to post anonymous criticisms of publicly
9 traded companies was too important to be sacrificed in such a case; consequently, the balance of
10 harms tipped decidedly in favor of retaining anonymity. *Highfields* was followed in *USA*
11 *Technologies v. Doe*, 713 F. Supp.2d 901 (N.D. Cal. 2010), where the plaintiff claimed both
12 defamation and federal securities law violations.

13 The need for evidence is also shown by *Columbia Insurance Co. v. Seescandy.com*, 185
14 F.R.D. 573, 578 (N.D. Cal. 1999). The claim in *Seescandy* was that the anonymous registrant of
15 certain domain names infringed the plaintiff’s trademark. Although the opinion discussed a motion
16 to dismiss standard, its ultimate ruling depended on the consideration of evidence — that defendant
17 had sent the plaintiff copies of thirty-one emails that defendant had received requesting plaintiff’s
18 products: “[M]ost importantly, plaintiff can show actual confusion, courtesy of the 31 emails . . .
19 Evidence of actual confusion is strong proof of the fact of likelihood of confusion. . . . Plaintiff’s
20 showing is sufficient to demonstrate that the Kumar defendants have committed an unlawful act for
21 which a federal cause of action can subsist.” *Seescandy*, 185 F.R.D. at 580 (punctuation and citation
22 omitted).

23 **D. Cases Involving Downloading of Copyrighted Songs and Movies Do Not Justify**
24 **Adoption of a Weaker Standard for Identifying Anonymous Speakers.**

25 Judge Lloyd declined to apply *Highfields Capital* because he believed that there is a lesser test
26 requiring only allegations of wrongdoing when the plaintiff alleges copyright infringement. To
27 support this ruling, Judge Lloyd cited both *Sony Music Entertainment v. Does 1–40*, 326 F. Supp.2d
28

1 556 (S.D.N.Y.2004), and *Arista Records v. Doe 3*, 604 F.3d 110, 119 (2d Cir.2010), which applied
2 *Sony's* holding. For several reasons, this argument is wrong.

3 Both cases, and many others like it, were filed by recording companies against large numbers
4 of anonymous Internet users who downloaded copyrighted recordings of popular music through file-
5 sharing services. The present amici also filed as amici in *Sony*, and have filed as amici in several
6 other such cases (including more recent cases brought by movie studios). Amici became involved
7 in those cases, not out of any sympathy for the downloading of copyrighted recordings, but because
8 the mass nature of the lawsuits posed a danger that procedural and substantive justice for some of the
9 individual defendants might be overlooked in the plaintiffs' haste to discourage illegal downloading.
10 Although the plaintiffs in those cases were generally well-established copyright holders, unless
11 plaintiffs were required to come forward with real evidence to identify defendants, less scrupulous
12 plaintiffs whose real objective was to identify critics for purposes of humiliation or retaliation might
13 abuse copyright litigation to achieve those ends. Accordingly amici argued that plaintiffs in file-
14 sharing cases should be required to present actual evidence, as opposed to mere allegations, before
15 disclosure of identifying information was required.

16 And, in fact, that is what the courts held, and that is what the plaintiffs in the file-sharing cases
17 consistently did. In the typical case, the plaintiff would file a complaint that listed several different
18 copyrighted sound recordings of well-known musical artists the downloading of which could be
19 attributed to each of the several hundred defendants. Plaintiff would also attach an affidavit
20 explaining the method by which the downloading had been detected, and averring that the affiant had,
21 in fact, listened to the musical files being downloaded to ascertain that each individual defendant was
22 offering the specified copyrighted recording for download. In *Sony*, the opinion of then-District Judge
23 Denny Chin held that this evidence was **required** for the defendants to be identified. 326 F. Supp.2d
24 at 565-566. Although *Arista Records* did not expressly hold that actual evidence was required, it
25 recited the evidence in the record that was comparable to what *Sony* had held was required, 604 F.3d
26 at 121-123, and it endorsed *Sony's* holding that plaintiff must make a prima facie "showing."
27 Moreover, the *Arista Records* court analyzed Doe's fair use argument, finding that the evidence in

1 the record supported the plaintiff on three of the four fair use factors, and that only once defendant
2 was identified could the court evaluate his argument that he “may” have had a permissible purpose
3 for copying and sharing the music found in his file-sharing folder.”

4 Moreover, although the courts in the file-sharing cases did not expressly adopt the *Dendrite*
5 balancing stage, they implicitly did so insofar as they based their decisions on what they characterized
6 as the low value of the speech at issue. In *Sony*, Judge Chin agreed that the choice of which musical
7 recordings to make available for download, and the “performance” of those works when they were
8 actually downloaded, involved speech, but both courts agreed that such speech is distant from the core
9 concerns of the First Amendment, and hence that the level of First Amendment protection for such
10 speech is low, or even “limited.” 326 F. Supp.2d at 564. Another court called the First Amendment
11 interest at stake in such cases “minimal,” explaining that “file-sharers’ ultimate aim ‘is not to
12 communicate a thought or convey an idea’ but to obtain movies and music for free.” *Call of the Wild*
13 *Movie v. Does 1-1,062*, 770 F. Supp.2d 332, 349 (D.D.C. 2011).

14 But it was the nature of the speech, not the name of the cause of action, that affected the level
15 of protection afforded under the First Amendment. This approach is confirmed by the Ninth Circuit’s
16 decision in *Anonymous Online Speakers v. United States District Court*, 2011 WL 61635 (9th Cir.
17 2011). Plaintiff brought a variety of claims against a rival, including defamation, tortious interference
18 with business relations and with contract, and after discovery to identify Doe speakers connected with
19 the rival was denied in part and granted in part, both sides sought mandamus. As Doe argued in his
20 papers in this case, DN 73 at 4-5, strictly speaking the Ninth Circuit’s opinion does not determine the
21 precise standard to be applied in future cases because, on mandamus, the court of appeals reviews
22 only for clear error. *Id.* at *6. However, in deciding that the trial court did not commit clear error in
23 granting discovery about the identity of three of the defendants, the Ninth Circuit said that, if the
24 speech of the Does in that case was commercial, then the district court’s application of the *Cahill*
25 standard to allow this compelled identification would not be clear error because that standard affords
26 greater protection than would be accorded to anonymous commercial speech. The nature of the
27 causes of action did not figure into the analysis.

1 Moreover, the fact that a plaintiff alleges copyright infringement is no more reason to grant
2 discovery of a speaker's identity than the fact than a plaintiff may allege defamation, or trademark
3 infringement, or tortious interference with business expectancies, or disclosure of confidential
4 information in breach of an employment agreement, or invasion of privacy or computer fraud and
5 abuse, or any of the other causes of action that have been at issue in *Dendrite* and its progeny. Just
6 as copyright infringement is unprotected by the First Amendment, so are false statements published
7 about public figures with actual malice unprotected by the First Amendment, and so is the disclosure
8 or trade secrets, or of confidential information obtained through employment under a promise of
9 secrecy and the like. The key insight of the *Dendrite* line of cases is that, at the initial stages of the
10 litigation when discovery is being sought to identify the defendant, the plaintiff has only **alleged** the
11 wrongdoing which, if found, would remove the speech from the First Amendment's protection. The
12 denial of First Amendment protection based on the assumption that the speech is unprotected begs
13 the question.

14 To avoid the substitution of allegation for proof in the sensitive context of the First
15 Amendment right to anonymous speech, an evidentiary showing should be required before a speaker
16 is unmasked. Despite the broad nationwide consensus on this point, Judge Lloyd decided to accept
17 mere allegations that AoL had suffered actual harm from the publication.

18 Indeed, as the Arizona Court of Appeals said in *Mobilisa v. Doe*, several policy reasons
19 counsel against adopting a "less-stringent standard . . . depend[ing] on the manner in which a plaintiff
20 has framed its claim. Whether the claim is one for defamation or a property-based claim, the potential
21 for chilling anonymous speech remains the same." 170 P.3d at 719. Moreover, "adopting differing
22 standards could encourage assertion of non-defamation claims simply to reap the benefit of a
23 less-stringent standard." *Id.* This case provides an excellent example of this phenomenon: a copyright
24 claim based on the posting of a brochure used around the world appears to have been manufactured
25 for the purpose of pursuing this lawsuit, with the California chapter of AoL having registered the
26 copyright only after Doe had removed the document from his web site. Finally, "adopting a single
27 standard would both permit ease of application . . . and better enable consistent decision making." *Id.*

1 Based on questions asked at argument in some of these cases, two other distinctions between
2 the run of *Dendrite* cases and cases based on file-sharing may well have animated such decisions as
3 *Sony* and *Call of the Wild Movie*. First, in most such cases, the plaintiff is a well-established music
4 or movie company, or an agent acting on their behalf, that is unlikely to have any motivation for
5 pursuing the litigation apart from the desire to obtain damages or, indeed, to deter infringement by
6 others. Second, in most such cases, it is highly unlikely that an anonymous defendant who has been
7 wrongly sued will suffer retaliation or other adverse consequences, apart from the disagreeable
8 circumstance of having to defend the action on the merits or pay a settlement to avoid having to
9 defend the case, as a result of being wrongly identified despite the absence of a valid claim for relief.^{3/}

10 In sum, there is no principled reason why AoL's intellectual property claim in this case should
11 receive less scrutiny than the intellectual property claims at issue in such cases as *Highfields Capital*
12 and *Columbia Insurance*, before the Doe loses his right of anonymous speech. Judge Lloyd's
13 departure from the standards previously accepted in this Court, and in cases around the country,
14 should be rejected.

15 **E. Plaintiff Has Not Followed the Steps Required Before Identification of**
16 **John Doe Speaker May Be Ordered in This Case.**

17 The first, second and third stages of the *Dendrite* test have been satisfied—the Does got notice
18 and an opportunity to oppose discovery, plaintiff identified the words whose publication is the subject
19 of the litigation, and plaintiff has pleaded the bare elements of a copyright infringement action. AoL,
20 however, has not produced admissible evidence supporting its claim or satisfied the balancing test.

21 **1. Plaintiff Has Not Produced Sufficient Evidence to Show That It Can Succeed on**
22 **the Merits of Its Claim.**

23 No person should be subjected to compulsory identification through a court's subpoena power
24 unless the plaintiff produces sufficient evidence supporting each element of a cause of action to show
25 a realistic chance of winning a lawsuit against that defendant. This requirement has been followed

26 ^{3/} The situation may be different if the material allegedly shared is deemed shameful, such as in
27 recent cases where allegedly downloaded work is a pornographic film. *E.g., Mick Haig*
Productions v. Does 1-670, 3:10-cv-01900-N (N.D. Tex.).

1 by every federal court and every state appellate court that has addressed the standard for identifying
2 anonymous Internet speakers, because it prevents plaintiffs from being able to identify critics simply
3 by filing facially adequate complaints.

4 Plaintiffs often argue that they need to identify the defendants simply to proceed with their
5 case. However, no relief is generally awarded to plaintiffs until they come forward with **evidence** in
6 support of their claims, and the Court should recognize that identification of otherwise anonymous
7 speakers is a major form of relief in cases like this. Requiring actual evidence to enforce subpoenas
8 is particularly appropriate where the relief itself may undermine, and thus violate, defendants' First
9 Amendment right to speak anonymously.

10 Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then
11 sought no further relief from the court. Thompson, *On the Net, in the Dark*, California Law Week,
12 Volume 1, No. 9, at 16, 18 (1999). Some lawyers who are highly respected in their own legal
13 communities have admitted that identification of their clients' anonymous critics may be all that they
14 desire to achieve in the lawsuit. *E.g.*, Werthammer, *RNN Sues Yahoo Over Negative Web Site*, Daily
15 Freeman, November 21, 2000, [www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&](http://www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&dept_id=4969&rfi=8)
16 [PAG=461&dept_id=4969&rfi=8](http://www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&dept_id=4969&rfi=8). An early advocate of using discovery procedures to identify
17 anonymous critics has urged corporate executives to use discovery first, and to decide whether to sue
18 for libel only after the critics have been identified and contacted privately. Fischman, *Your Corporate*
19 *Reputation Online*, www.fhdlaw.com/html/corporate_reputation.htm; Fischman, *Protecting the*
20 *Value of Your Goodwill from Online Assault*, www.fhdlaw.com/html/bruce_article.htm.

21 Lawyers who represent plaintiffs in these cases have also urged companies to bring suit, even
22 if they do not intend to pursue the action to a conclusion, because “[t]he mere filing of the John Doe
23 action will probably slow the postings.” Eisenhofer & Liebesman, *Caught by the Net*, 10 Business
24 Law Today No. 1 (Sept.-Oct. 2000), at 40. These lawyers have similarly suggested that clients decide
25 whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.* See *Swiger v.*
26 *Allegheny Energy*, 2006 WL 1409622 (E.D. Pa. May 19, 2006) (company represented by one of
27 largest and most respected law firms in Philadelphia filed Doe lawsuit, obtained identity of employee

1 who criticized it online, fired the employee, and dismissed the lawsuit without obtaining any judicial
2 remedy other than the removal of anonymity). Even the pendency of a subpoena may have the effect
3 of deterring other members of the public from discussing the plaintiff.

4 To address this potential abuse, courts have borrowed by analogy the holdings of cases
5 involving the disclosure of anonymous sources. Those cases require a party seeking discovery of
6 information protected by the First Amendment to show that there is reason to believe that the
7 information sought will, in fact, help its case. *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5,
8 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). In
9 effect, the plaintiff should be required to present admissible evidence establishing a prima facie case
10 to “satisfy the trial court that he has evidence to establish that there is a genuine issue of fact regarding
11 the falsity of the publication.” *Downing v. Monitor Publ’g Co.*, 415 A.2d 683, 686 (N.H. 1980);
12 *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir. 1972). “Mere speculation and conjecture about
13 the fruits of such examination simply will not suffice.” *Id.* at 994.^{4/}

14 The extent to which a plaintiff who seeks to compel identification of an anonymous critic
15 should be required to offer proof to support each of the elements of his claims at the outset of his case
16 varies with the nature of the element. In suits for defamation or disclosure of inside information,
17 several elements of the plaintiff’s claim will ordinarily be based on evidence to which the plaintiff,
18 and often not the defendant, is likely to have easy access. For example, the plaintiff is likely to have
19 ample means of proving that a statement is false (in a defamation action) or rests on confidential
20 information (in a suit for disclosure of inside information). Where, as here, the Doe defendant has
21 a substantial fair use claim, based on the contention that he published the Breath Water Sound manual
22 to show that its contents were meaningless pap, the copyright owning plaintiff should be able to show
23 that the fair use factors tend in its favor; and, as in *Arista*, the Court should consider those fair use
24 factors that can be properly explored without a deposition of the anonymous defendant. Moreover,

25 ^{4/} *Downing* took comfort from the fact that plaintiff there was represented by “respected
26 counsel.” 415 A.2d at 686. However, the standard should not rest on the quality of the
27 lawyers appearing in the case. Less experienced lawyers, and even pro se parties, who often
28 seek subpoenas to identify anonymous critics, should receive equal respect before the law.

1 there is a real question in this case whether plaintiff is entitled to any relief, because the manual was
2 removed from the blog months before this lawsuit was initiated, following a copyright complaint from
3 a different Art of Living entity, and the belated registration of the copyright precludes any claim for
4 statutory damages or attorney fees. Because the manual is generally disseminated for free, there are
5 no lost profits, and the original allegations of actual damages was based on the adverse effect of the
6 Does' criticisms, which is defamation injury, not intellectual property injury. *Cf. Universal*
7 *Communication Systems v. Lycos, Inc.*, 478 F.3d 413, 423-424 (1st Cir. 2007).

8 Nor can plaintiff effectively argue that requiring evidence to support their claims is a burden
9 so onerous that plaintiffs who can likely succeed on the merits of their claims will be unable to
10 present such proof at the outset of their cases. Many plaintiffs succeeded in identifying Doe
11 defendants in jurisdictions that follow *Dendrite* and *Cahill*. *E.g., Does v. Individuals whose true*
12 *names are unknown, supra; Alvis Coatings v. Does, supra*. Indeed, in *Immunomedics v. Doe*, 775
13 A.2d 773 (N.J. Super. 2001), a companion case to *Dendrite*, where the plaintiff claimed defendant
14 had breached an employment agreement, disclosed confidential information, and violated her duty
15 of loyalty, the court applied *Dendrite* but ordered that the anonymous speaker be identified. In
16 *Dendrite* itself, two of the Does were identified while two were protected against discovery.

17 Finally, unlike the typical *Dendrite*-type case in which discovery is needed so that plaintiff
18 can serve the defendant, the Doe has waived formal service, answered the complaint, and apparently
19 plans to move for summary judgment. Doe has also stipulated that he will respond to written
20 discovery, and plaintiff has not shown that it needs any other discovery to prevail on its claims. The
21 case thus resembles the approach followed in Pennsylvania even before a Pennsylvania appellate
22 court adopted *Dendrite* in *Pilchesky v. Gatelli*: Doe defendants were allowed to take discovery from
23 the plaintiff to pierce its affidavits and to move for summary judgment. Only if that motion was
24 denied did the court enforce the subpoena to identify the Doe. *Reunion Industries v. Doe 1*, 80 Pa.
25 D. & C.4th 449, 2007 WL 1453491 (Pa. Com. Pl. 2007); *Melvin v. Doe*, 49 Pa. D. & C. 4th 449, 451-
26 452, 2000 WL 33311704 (Pa. Com. Pl. 2000), *app. disp.*, 789 A.2d 696 (Pa. Super. 2001), *rev'd*, 836
27 A.2d 42 (Pa. 2003). At the very least, the Court should withhold judgment on discovery until it has

1 addressed Doe's planned motion for summary judgment.

2 **2. The Balance of Interests Tips Decidedly in Doe's Favor.**

3 Even if AoL had presented enough evidence to warrant identifying defendant,

4 [t]he final factor to consider in balancing the need for confidentiality versus discovery
5 is the strength of the movant's case If the case is weak, then little purpose will
6 be served by allowing such discovery, yet great harm will be done by revelation of
7 privileged information. In fact, there is a danger in such a case that it was brought just
8 to obtain the names On the other hand, if a case is strong and the information
9 sought goes to the heart of it and is not available from other sources, then the balance
10 may swing in favor of discovery if the harm from such discovery is not too severe.

11 *Missouri ex rel. Classic III v. Ely*, 954 S.W.2d 650, 659 (Mo. App. 1997).

12 Similarly, *Dendrite* called for such individualized balancing when the plaintiff seeks to
13 compel identification of an anonymous Internet speaker:

14 [A]ssuming the court concludes that the plaintiff has presented a prima facie cause of
15 action, the court must balance the defendant's First Amendment right of anonymous
16 free speech against the strength of the prima facie case presented and the necessity for
17 the disclosure of the anonymous defendant's identity to allow the plaintiff to properly
18 proceed.

19 775 A.2d at 760.

20 A standard comparable to the test for grant or denial of a preliminary injunction, where the
21 court considers the likelihood of success and balances the equities, is particularly appropriate because
22 an order of disclosure is an injunction—not even a preliminary injunction. In every case, a refusal
23 to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once
24 speakers lose anonymity, they can never get it back. But denial of a motion to identify the defendant
25 based on either lack of sufficient evidence or balancing the equities does not compel dismissal of the
26 complaint. Plaintiffs can renew their motions after submitting more evidence. Moreover, the
27 inclusion of a balancing stage allows Does to show that identification may expose them to significant
28 danger of extra-judicial retaliation. In that case, the court might require a greater quantum of evidence
on the elements of plaintiff's claims so that the equities can be correctly balanced.

This case presents a striking example of the importance of the balancing stage of the *Dendrite*
analysis. Doe internet speakers around the world use Internet Service Providers based in the United
States for their online dissenting activities because American ISP's are normally protective of their

1 users' anonymity, and because the First Amendment limits the use of government power to strip
2 dissenters of their anonymity. The past few years have provided dramatic examples of the way in
3 which foreign democracy movements have been able to use social networks like Facebook and
4 microblogging platforms like Twitter to further their fight for basic human rights. And only recently,
5 we have been reminded of the serious consequences that face dissenters whose identities are
6 discovered by foreign authorities. Human Rights USA, *US Citizen Sues Web Hosting Company for*
7 *Identifying Him to Thai Government*, [http://humanrightsusa.org/index.php?option=com_content&](http://humanrightsusa.org/index.php?option=com_content&task=view&id=227&Itemid=189)
8 [task=view&id=227&Itemid=189](http://humanrightsusa.org/index.php?option=com_content&task=view&id=227&Itemid=189) (Thai emigre detained, interrogated and charged, and his Thailand-
9 resident family threatened, after Canadian ISP provided his identifying information to Thai authorities
10 pursuing violations of Thai lèse majesté laws forbidding even truthful criticism of the king).

11 It is all too easy to bring a bogus intellectual property claim and hence out a critic, who can
12 then be subjected to extra-judicial self-help in a jurisdiction with no First Amendment and, indeed,
13 no tradition of the rule of law. Here, there is evidence in the record that the Doe whom Magistrate
14 Judge Lloyd has ordered identified faces severe consequences if he is publicly named as a defendant
15 in this case after being identified pursuant to subpoena. Skywalker Affidavit ¶ 4, DN 15.

16 On the other side of the balance, the Court should consider the strength of the plaintiff's case,
17 its interest in redressing the alleged violations, and its need for immediate identification of defendant.
18 The Court can consider not only the strength of the plaintiff's evidence but also the nature of the
19 allegations, the likelihood of significant damage to the plaintiff, and the extent to which the plaintiff's
20 own actions are responsible for the problems of which he complains. Here, because Doe has waived
21 formal service and is responding to written discovery, it is unclear why plaintiff needs to know his
22 identity at this time. Moreover, Doe appears to have a strong fair use defense for his posting of the
23 Breath Water Sound manual—to illustrate his commentary about it, Request for Judicial Notice at
24 325, Exhibit E10. *See also* DN 27 at 5-6. There is also serious reason to question whether plaintiff
25 is entitled to any relief based on its infringement allegation. There can be no claim for statutory
26 damages or attorney fees, because plaintiff did not even apply to register the copyright until several
27 years after it was first published, and two months after the infringement ceased. Complaint ¶¶ 49-50;

1 Skywalker Affidavit ¶ 10; 17 U.S.C. § 412. Moreover, when the violation ended months before suit
 2 was brought, there is reason to question whether an injunction would be proper. Indeed, unless
 3 plaintiff can show that it faces ongoing injury or a reasonable likelihood of future injury, it lacks
 4 standing to seek injunctive relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). And the
 5 claims for compensatory damages appear to be weak at best, in light of the fact that the manual was
 6 not sold, but rather is used in a course that is given without charge. Skywalker Affidavit ¶ 11.
 7 Indeed, given the circumstances of this case, it is even possible that Doe might prevail in the equitable
 8 defense of copyright misuse. *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1115 (9th Cir. 2010);
 9 *Assessment Technologies of WI v. WIREdata, Inc.*, 361 F.3d 434, 437 (7th Cir. 2004).

10 Considering both sides of the equitable balance, the balance of hardships tips decidedly in
 11 Doe's favor, and consequently the Court should not enforce the subpoena until it concludes that
 12 plaintiff is very likely to succeed on the merits.

13 CONCLUSION

14 Doe's objection to Judge Lloyd's order should be sustained.^{5/}

15
 16 ^{5/} 28 U.S.C. § 636, Rule 72 of the Federal Rules of Civil Procedure, and Local Rule 72-2 provide
 17 for review based on a standard of "clear error" or "contrary to law." Because Doe's objections
 18 concern the application of the First Amendment, de novo review of the Magistrate's decision
 19 is required. *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984). Even if the ordinary "clear
 20 error" or "contrary to law" standard applies, see 28 U.S.C. § 636; Fed. R. Civ. P. 72(a); N.D.
 21 Cal. Local Rule 72-2, the issues before this Court involve questions of law. When courts
 22 review pure questions of law using a contrary to law standard, courts conduct a de novo review
 of such legal questions. *Medina-Morales v. Ashcroft*, 371 F.3d 520, 531 (9th Cir. 2004). *See*
Osband v. Woodford, 290 F.3d 1036, 1041 (9th Cir. 2002) (reviewing a Magistrate's order
 under the "contrary to law" standard and noting that questions of law are reviewed de novo
 under this standard); *Haines v. Liggett Group*, 975 F.2d 81, 91 (3d Cir. 1992) (same); *see also*
United States v. Curtis, 237 F.3d 598, 607 (6th Cir. 2001) (for review of a Magistrate's orders,
 mixed questions of fact and law are treated as questions of law and reviewed de novo).

23 Local Rule 72-2 appears to provide that Judge Lloyd's ruling could become final if the Court
 24 does not take any action on the objection within fourteen days. If the objections are "deemed
 25 denied" pursuant to that provision, amici reserve for appeal the possible argument that the
 26 local rule is contrary to Federal Rule 72(a), which provides that upon the filing of timely
 27 objections, the district judge "must consider" those objections and "must . . . set aside any part
 of the order that is clearly erroneous or is contrary to law." Moreover, because Judge Lloyd
 is not an Article III judge, it is open to question whether he can make a final determination of
 the application of the First Amendment to the enforceability of the subpoena. *See Stern v.*
Marshall, 131 S. Ct. 2594, 180 L.Ed.2d 475 (2011).

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Respectfully submitted,

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