

Case No. 16-2188

United States Court of Appeals

for the

Sixth Circuit

SIGNATURE MANAGEMENT TEAM, LLC,
Plaintiff-Appellant

– v. –

JOHN DOE
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
The Honorable Judith E. Levy
Case No. 4:13-cv-14005

BRIEF OF DEFENDANT-APPELLEE DOE

JOSHUA KOLTUN
Attorney
One Sansome Street
Suite 3500, No. 500
San Francisco, CA 94104
(415) 680-3410

Attorney for Defendant-Appellee John Doe

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29, Appellee Doe states as follows:

Doe is a private individual, not a subsidiary or affiliate of a publicly owned corporation. There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

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Doe’s Answering Contentions

The District Court’s decision not to name Doe in the Judgment is reviewed for abuse of discretion. Appellant’s Opening Brief, (“AOB”) at 13-14)

Agree. Appellee’s Brief (“AB”) at 21-25.

As an adjudicated copyright infringer, Doe should be identified in the Judgment. AOB at 14-36.

Since the District Court did not issue any judicial relief against Doe, it did not abuse its discretion in continuing to protect his anonymity in the Judgment. AB at 25-52.

The District Court disregarded the presumption of openness in judicial proceedings and erroneously imposed upon TEAM the burden of showing that unsealing Doe's identity was necessary. AOB at 14-18.

The District Court did not reverse the burdens; the Court's application of the *Art of Living* balancing test fully satisfied the balancing required for ordering the sealing of information in judicial proceedings. AB at 45-48.

Under Copyright law, Doe has no right to remain anonymous. AOB at 19-24.

A District Court that determines that the defendant has infringed plaintiff's copyright in the past is not required to strip the defendant speaker of his anonymity AB at 32-36, 42-44.

Injunctions must enter in the name of the enjoined party. AOB at 24-27.

The Court issued no injunction, so such a rule would be irrelevant. But there is no such rule. A District Court has the equitable discretion to craft injunctive relief in a manner that preserves a defendant's anonymity. AB at 20-21, 32-36, 42-44.

Although Team should not have been put to the burden, abundant evidence demonstrated the need to identify Doe in the Judgment. AOB 27-34.

TEAM's evidence does not raise a genuine issue of fact as to whether the District Court abused its discretion in declining to identify Doe in the Judgment. AB at 48-52.

Doe admits he likely would not have infringed under his real name. AOB 27-28.

Doe admitted no such thing. AB at 49-49.

Doe's blog is devoted to the destruction of TEAM and its leaders. AOB at 28-30.

Doe's criticisms of TEAM and its leaders are fully protected by the First Amendment; TEAM has never contended otherwise. AB at 50-52.

Doe has no regard for the damage he caused. AOB at 30-31.

TEAM has not shown that it suffered any damage. AB at 51.

Doe has infringed on other copyrighted materials. AOB at 31-32.

TEAM never placed these "other materials" at issue in this litigation; if it had, Doe would have asserted fair use. AB at 51.

Doe deems himself the prevailing party. AOB at 33-34

Doe's counsel made good faith arguments that, for purposes of attorney fees, Doe is the prevailing party. AB at 51.

Doe did not immediately remove the Book. AOB at 32-33.

Doe promptly removed the Book [Work] upon learning of TEAM's claim and consulting counsel. AB at 51.

The District Court should not have relied upon Doe's promise not to infringe as a reason for not identifying Doe. AOB at 34-35.

The District Court did not rely upon a promise. It determined that TEAM had not raised a genuine factual issue as to whether Doe was "substantially likely" to repost the Work. AB at 49-50.

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Statement in Support of Oral Argument

As anonymous speech has become prevalent on the internet, District Courts are frequently called upon to balance the First Amendment rights of speakers to preserve their anonymity, against the claims of litigants seeking to discover the speakers' identity. There have, however, been very few federal appellate precedents dealing with this issue. The "paucity of appellate precedent is not surprising because discovery disputes are not generally appealable on an interlocutory basis and mandamus review is very limited." *In re Anonymous Online Speakers*, 661 F.3d 1168, 1175 (9th Cir. 2011).

The only case in this circuit bearing on a related issue is *NLRB v. Midland Daily News*, 151 F.3d 472, 474-75 (6th Cir. 1998), on which the District Court properly relied here. *Midland Daily News* did not involve anonymous speech on the internet, but rather an anonymous advertisement in a newspaper. The decision does not deal directly with the issue of balancing the rights of a plaintiff and an anonymous speaker defendant in civil litigation. It involved the refusal of a third-party witness (a newspaper) to comply with a government agency's administrative subpoena.

The few federal appellate precedents involving internet speech do not squarely rule on the situation that the District Court addressed here. *See, e.g. Anonymous Online Speakers*, 661 F.3d at 1175-77 (discussing in *dictum* range of

possible standards); *In re Times Picayune, L.L.C.*, 561 F. App'x 402, 402-03 (5th Cir. 2014) (addressing propriety of *in camera* discovery of identity of anonymous speaker that might show prosecutorial misconduct towards criminal defendant).

The facts of this case presented an unusual opportunity for the District Court to consider the full extent to which it might protect a defendant speaker's anonymity without prejudicing cognizable legal interests of the plaintiff. As discussed on the merits below, that opportunity is presented here because in this case the defendant voluntarily appeared, submitted to the Court's jurisdiction and defended the case on the merits. By contrast, many cases involving anonymity arise in peculiar procedural postures in which the District Court generally faces the yes-or-no option to either protect the speaker's identity, or disclose it to plaintiff so that it may pursue legal claims against the defendant. *See discussion infra at 41-42; see, e.g., Arista Records LLC v. Doe*, 604 F.3d 110, 118 (2d Cir. 2010) (prelitigation subpoena for identities of peer-to-peer music downloaders); *cf. Anonymous Online Speakers*, 661 F.3d at 1171 (anonymous speakers intervene at Court of Appeal, seeking *mandamus* to reverse District Court order to witness to disclose their identity).

Since this case presents the first opportunity for this Court to provide guidance to the District Courts on this increasingly important issue, Doe respectfully submits that oral argument would be helpful.

Statement of Issue for Review

Having *declined* to issue an injunction against future infringement, or any other relief, did the District Court abuse its discretion when it declined to disclose Doe's actual name in the Judgment, and thereby protected Doe's First Amendment right to criticize TEAM and other multilevel marketing schemes anonymously?

Statement of the Case

Defendant-Appellee Doe is the anonymous creator of a blog titled "Amthrax" ("Blog"). On that Blog he is an outspoken critic of multi-level marketing schemes, including the scheme(s) promoted by Plaintiff-Appellant Signature Management Team, LLC (commonly known, and referred to here, as "TEAM"). In a multi-level-marketing scheme, a company recruits individuals as independent distributors to market the company's product. The distributors are expected to market the product by recruit another level of individuals to market the product, which level is expected to recruit more levels, and so on.

Throughout this litigation, from its outset in the Northern District of California to the issuance of the Judgment by the District Court in the Eastern District of Michigan, an issue of paramount importance has been whether the Court would enable TEAM to strip Doe of his anonymity. As TEAM's counsel explained:

The only thing [Doe] cares about – and I'm going to put some words in his mouth here. He's admitted that he posted the work. He told us

he doesn't want to [do that] any more. We're not claiming damages. All we want is assurance that he's not going to do this any more. ... So the only thing that we're fighting about in this case is his identity.

Transcript, Hearing on January 30, 2015, RE 42, PgID 1231:23-1232:7.

Doe created the blog titled "Amthrax" ("Blog") in 2008. Complaint, RE 1, PgID# 2, ¶8. He explained to his readers that his purpose was to give "prospective and current distributors" of multi-level marketers "another perspective" as to whether these "opportunities" are likely to bring the distributor any financial security, so that the distributors can "make an informed decision on whether to join, continue, or leave the [multilevel marketing] business." Doe Declaration re Summary Judgment, RE 26, PgID# 362, 375, 458. Among other things, the Blog provides information concerning warnings given by the Federal Trade Commission to persons considering investing their time and energy in multilevel marketing schemes, and the Blog follows FTC actions concerning multilevel marketers. *Id.*, PgID# 362, 378-382.

Doe began to devote a substantial portion of his Blog to discussing TEAM, because TEAM provided a wealth of documentary evidence supporting Doe's critique of multi-level marketing. *Id.*, PgID# 362-367, 383-459. By showing how TEAM's assertions and rhetoric have constantly shifted over time, and by comparing various historical claims to the factual record, Doe aimed to expose

what he characterized as the hypocrisies, fallacies, and unsustainable hype surrounding multilevel marketing. *Id.*

The infringement at issue here took place in the context of Doe's efforts to document TEAM's shifting story. Over time, TEAM had, at first, promoted Amway (now its arch-enemy), then another multilevel marketer, Mona Vie, and then began promoting an in-house multilevel marketing scheme called LIFE. *Id.*

On January 18, 2013, as part of its documentation of the foregoing chronology, Doe posted a PDF copy of the Work at issue in this case. *Id.*, PgID# 367. The Work is the fourth edition of a book, dating from a time when TEAM was promoting Mona Vie. *Id.* In subsequent editions, TEAM promoted LIFE. *Id.* Doe had found the PDF copy by a Google search; it had been posted on the internet by TEAM's translator. *Id.*, PgID# 368.

At no point did TEAM (or anyone) ever contact Doe to ask him to cease and desist posting the Work, although his Blog listed an email at which he could be contacted. *Id.*

On February 5, 2013, TEAM purchased the copyright to the Work. Koltun Declaration Summary Judgment Motion, RE 27, PgID# 476, Exh. G (sealed). On February 8, 2013, TEAM served Automattic (the Blog's host) with a Digital Millennium Copyright Act (DMCA) notice to take down the Fourth Edition, and on February 11, 2013, with a DMCA subpoena (from the Northern District of

California) for any identifying information concerning Doe. Complaint, RE 1, PgID# 3.

Doe did not learn of the takedown notice and subpoena, or of TEAM's copyright claim, until on February 16, 2013, when he was informed by Automatic. Doe Declaration, RE 26, PgID# 368-69. While seeking an attorney to advise him of his rights, Doe removed the PDF copy on his own website and directed his readers, by hyperlink, to the copy of the book that had been posted on TEAM's translator's website. *Id.* On February 22, 2013, having engaged the undersigned counsel, he removed that hyperlink as well. *Id.* At around the same time, Doe destroyed any copies of the Work in his possession. Doe Declaration Response Proposed Destruction Order, RE 58, PgID# 1730.

Doe's counsel then informed TEAM that Doe had removed the Work and had no intention of reposting it. Koltun Decl. Motion Summary Judgment, RE 27, PgID# 476, 509-511. Doe's counsel offered to accept service of process for any copyright action TEAM cared to bring. *Id.* In the event TEAM brought such a proceeding, Doe would assert his First Amendment right to remain anonymous, and TEAM would argue against that privilege. *Id.* TEAM refused Doe's offer. *Id.*

Doe then moved to quash the DMCA subpoena for his identifying information, arguing that his willingness to accept service of process and submit to an adjudication by a District Court of TEAM's copyright claim obviated the need

for a prelitigation DMCA subpoena. Doe Motion to Quash RE 40-6, PgID# 1046-47. The Magistrate Judge disagreed, however, and issued an order that required Automattic to disclose any identifying information it possessed, subject to a protective order. Opinion, RE 40-8, PgID# 1126-28.

But the information TEAM obtained by the DMCA subpoena did not enable it to learn Doe's identity. Complaint, RE 1, PgID #5. For this reason, TEAM filed the instant copyright action in the Eastern District of Michigan. *Id.* TEAM asked Doe to voluntarily accept service of process, which Doe did. Waiver, RE 3, PgID# 12.

Doe responded to written discovery, providing some information, disclosing that other requested information did not exist, and objecting to other requests. Motion to Compel (Exhibits), RE 40, PgID# 1142-1170. Doe objected to identifying himself, and to providing information that would tend to identify him, on the grounds of his First Amendment privilege to speak anonymously. *See, e.g., id.*, PgID# 1147.

TEAM noticed Doe's deposition. Doe was willing to schedule the deposition, but would not agree in advance that he would identify himself in that deposition. Motion to Compel (Exhibit), RE 40-13, PgID# 1176-77. Doe was, however, willing to allow his deposition to be taken provisionally, with the deposition to continue if the Court overruled Doe's objections to identifying

himself. Koltun Declaration Motion Compel, RE 44, PgID# 1326-1327. TEAM refused to take Doe's deposition, even provisionally. *Id.*

Doe moved for summary judgment, on three grounds. Motion for Summary Judgment, RE 25, PgID# 317-359. The first two grounds raised affirmative defenses (fair use and copyright misuse) that are not at issue on this Appeal.

The third ground was that TEAM could not meet its burden of showing that it was entitled to injunctive relief, the only relief that it sought in this case. Here is how Doe framed the issue:

TEAM never attempted to ask Doe to remove his posting of the Fourth Edition, but instead used that posting to attempt to learn his identity. Promptly upon learning of TEAM's copyright claim, Doe removed his posting of the Work, and sought to have an adjudication of the parties' rights under the Copyright Act (which adjudication TEAM sought to avoid.). Has TEAM shown a "substantial likelihood" that Doe would infringe the Fourth Edition in the future, such as would justify this Court issuing an injunction against future infringement?

Id., PgID# 324.

TEAM sought relief from having to respond to the Summary Judgment motion. The Court ordered TEAM to file a declaration pursuant to Fed.R.Civ.P. 56(d). Order re Plaintiff's Affidavit, RE 34, PgID# 927-28. TEAM did so. Pineau Declaration, RE 35, PgID# 930-41.

TEAM contended that a pending motion, styled a partial judgment on the pleadings, disposed of Doe's right to anonymity. The Court disagreed, ruling that

the First Amendment privilege could only be properly framed if TEAM filed a motion to compel. Order Denying Motion for Partial Judgment, RE37, PgID# 957-59.

TEAM then filed a motion to compel discovery of Doe's identity (as well as discovery of certain other matters not at issue on this Appeal). Motion to Compel, RE 40, PgID# 978-1001.

The Court ruled that under Fed.R.Civ.P. 56(d), TEAM had the burden of showing that it "cannot present facts essential to its summary judgment response without additional discovery." Order, RE 48, PgID# 1413. The Court ruled that TEAM had failed to make that showing with respect to Doe's affirmative defenses. *Id.*, PgID# 1415-1422.

On the third issue – injunctive relief -- the Court ruled that TEAM had made a sufficient showing that it needed to "probe Defendant's relationships, if any, with co-infringers and business competitors." *Id.*, PgID# 1423-24. The Court was referring to TEAM's contention that it needed to investigate Doe's

employment and affiliations to determine, among other things, (1) if Doe operates the Blog for commercial purposes to either benefit a competitor of TEAM's, to harm the business of TEAM, or both; (2) if Doe is otherwise gainfully employed or, if not, whether the Blog, his use of the Book or his attacks on TEAM in some manner generate income; and (3) where Doe is employed and whether that employer is either directing Doe's activities on the Blog or is otherwise benefiting from the Blog, Doe's use of the Book and/or his attacks on TEAM.

Pineau Declaration, RE 35, PgID# 931-932. The “competitor” TEAM had in mind was Amway. Plaintiff Discovery Requests, RE 40-9, PgID# 1134.

With respect to TEAM’s conjecture, Doe had testified as follows:

My employer is not [a multilevel marketer] ... and by no stretch of the imagination can it now or at any time have been considered to be a competitor of TEAM. My employer does not in any way whatsoever benefit from the Blog, [nor was it aware of it until I was sued and informed it in a general sense that I have been blogging about multilevel marketing].

I myself derive no financial benefit, directly or indirectly from the Blog. As I openly discuss on the Blog, I was once an Amway distributor; but that was many years before I started the Blog. Since that time I have had absolutely no affiliation, financial or otherwise, with any [multilevel marketer]. On the contrary, I am somewhat embarrassed personally that I ever believed that I or anyone might be able to achieve financial security through [multilevel marketing] schemes. I began the Blog to urge other consumers to be more critical in thinking about [multilevel marketing] “opportunities.” The Blog is highly critical of the [multilevel marketing] industry generally, and Amway (Quixtar) in particular, hence the mocking name “Amthrax.”

Doe Decl. Motion to Compel, RE 45, PgID# 1338-1339; *see also* Doe Declaration re Reply Motion Summary Judgment; RE 55-3, PgID# 1661-62 (Blog post).

The Court then turned to question whether Doe had a First Amendment right to preserve his anonymity, at least at that stage in the proceeding. The Court noted that “[c]ourts have applied a variety of standards in determining whether to reveal the identity of an anonymous online speaker,” and that “a common feature among many of the standards is a balancing between the merits of the plaintiff’s claim or need for the information, compared with the rights of the defendant to speak

anonymously.” *Id.*, PgID# 1424-1425. In this connection, the Court noted, TEAM “has only justified a need for defendant’s identity and related information in order to discover information probative of the risk that defendant, or as yet unknown possible associates of defendant, would continue to infringe in the future.” *Id.* PgID# 1425.

The Court then turned to the two alternative balancing tests proposed by the parties. *Id.*, PgID# 1429.

TEAM had proposed that the appropriate balancing test was set forth in *Sony Music Entertainment v. Doe*, 326 F. Supp. 2d 556 (SDNY 2004). The Court rejected this test, explaining that the *Sony* music case involved multiple anonymous defendants who had all “illegally downloaded copyrighted music and then distributed it through file-sharing programs.” *Id.*, PgID# 1429. This was a form of speech that was deserving only ““limited” or “minimal” protection under the First Amendment, and which the Court did not find analogous to the situation before it. *Id.* PgID#1429, 1431.

Doe had argued that the appropriate test was set forth in *Art of Living Foundation v. Doe*, 2011 U.S. Dist LEXIS 129836 (N.D. Cal., Nov. 9, 2011). The Court agreed, noting that this case involved “similar” facts to those presented here. *Id.*, PgID# 1429-1430. Just as Doe on his Amthrax blog posted critical speech concerning TEAM, defendants in *Art of Living* “posted commentary critical of an

‘educational and humanitarian organization.’” *Id.*, PgID# 1430. The Court reasoned that Doe’s speech was entitled to full First Amendment protection, even if Doe’s speech were deemed to be “commercial,” because there was no contention that Doe’s speech was false or misleading. *Id.*, PgID# 1431-32 (citing *NLRB v. Midland Daily News*, 151 F.3d 472, 474-75) (6th Cir. 1998)).

Consequently, the Court adopted the *Art of Living* test, which the Court analogized to “the preliminary injunction inquiry.” *Id.* PgID# 1431. Under this test, plaintiff must *first* “produce competent evidence to support a finding of each fact that is essential to a given cause of action,” and *second*, “if the plaintiff meets this showing, the court must balance the harms that would result to each party from a ruling in the other party’s favor.” *Id.* at 1431.

Balancing the limited scope of TEAM’s need for discovery against Doe’s right to anonymity, the Court noted that “unmasking an anonymous speaker is in itself an irreparable harm,” *Id.*, PgID# 1437. The Court concluded that the competing needs of the parties could be reconciled by allowing TEAM to take the limited discovery to which it was entitled, subject to an attorneys-only protective order. *Id.*, PgID# 1437-1439.

The Court’s protective order set up a meet-and-confer process that would enable Doe to have an opportunity to argue for redactions to any information TEAM’s attorneys wished to file in the Court’s public docket. Protective Order,

RE 51, PgID# 1460-1461. Subject to that protection, Doe produced certain documents and TEAM took Doe's deposition. TEAM then filed its opposition to Doe's summary judgment motion. Response to Motion for Summary Judgment, RE 54, PgID [unavailable/sealed].¹

In support of his motion, Doe had testified: "I have no intention to repost the Fourth Edition (or hyperlink thereto) unless I obtain a final adjudication from this Court that clearly indicates that I may do so." Doe Decl., RE 26, PgID# 369, ¶11.

TEAM did not question Doe about that at his deposition. The evidence that TEAM submitted on that issue, and Doe's response, was as follows.

First, TEAM argued that "Doe is not just critical of TEAM" and its affiliated organization and leader, "he attacks them with hatred and vengeance." Response re Summary Judgment, RE 54, p. 4 [sealed]. TEAM submitted articles from the Blog that it characterized as improper "attacks." *Id.*, pp. 4-5, citing Exhs. O, P, & Q [sealed].

Second, TEAM argued that although Doe claimed to be against multilevel marketing schemes generally, "Doe is supportive of Amway, ... and was once a member. ...Doe admits that he '[doesn't] have a problem with people building a

¹ TEAM did *not* follow the process contemplated in the Protective Order, declining to engage in the meet-and-confer process designed to minimize sealed information by providing for redacted public copies. See Doe Response to Motion to Seal, Appellate Docket 26.

retail-focused Amway business,’ it just wasn’t for him.” *Id.* at 5, citing Exh. R [sealed].

As noted, the fact that Doe had once been a member of Amway is something he openly discusses on his Blog, not something TEAM had uncovered through discovery. The comment that TEAM purported to interpret as showing Doe’s “support” for Amway, was actually a criticism. Doe’s critique of multilevel marketers such as TEAM and Amway is that they are not *retail-focused*, but rather *recruit-focused*. In other words, multilevel marketers prosper by persuading naïve recruits (such as Doe himself at one time) that they can become financially secure by creating a personal pyramid of recruits-who-will-recruit-other-recruits. Reply Summary Judgment Motion, RE 55, PgID# 1640 n.10, 1658-1679.

Third, TEAM contended that “[b]ehind the scenes of the Blog is a regular and ongoing email discussion between Doe and a cadre of confidants, [that] acts in concert and rejects those who do not believe as they do. ... and welcomes the presence of former and current Amway members.” Response Summary Judgment, RE 54, p. 5, citing Exhs. B, S, T, U [sealed]. Doe responded that TEAM’s “evidence” amounted to nothing more than an indication that Doe had communicated with a few people who may have been associated with, or supportive of, Amway. Reply Summary Judgment Motion, RE 55, PgID# 1640 n.9, 1647-1648.

Summarizing the foregoing evidence, TEAM argued that it had shown that the “true purpose and [e]ffect of the Blog is not to educate people regarding the pitfalls of [multilevel marketing schemes], but to cause harm to TEAM” and its leaders and affiliated organization “and to benefit Amway.” Response Summary Judgment Motion, RE54 at 4-5 [sealed].

That is *all* the evidence TEAM found to support its contention that Doe had been acting at the behest of Amway in creating the Blog or in posting the Work. TEAM, having had an opportunity to depose Doe, did not contend that he had been untruthful on his Blog, or in his testimony, concerning his relationship with Amway or any other “competitor” -- or, for that matter, about anything at all.

The Court denied Doe’s summary judgment motion, rejecting Doe’s affirmative defenses. Order Denying Summary Judgment, RE 56, PgID# 1687-1698. On the issue of injunctive relief, however, the Court *accepted* Doe’s argument that TEAM had not shown a need for a permanent injunction, but denied summary judgment because a permanent injunction was not the only injunctive relief to which TEAM was potentially entitled. *Id.*, PgID# 1687 & n.1.

With respect to TEAM’s request for a permanent injunction, the Court noted that “there is no evidence that defendant has repeatedly ignored Plaintiff’s asserted rights, a factor that weighs heavily in finding a substantial likelihood of future

infringement,”² and that “plaintiff removed the document shortly after he was informed of [TEAM’s] takedown notice ... and avows that he has no intention to repost the Work [unless he obtains an adjudication from the Court that he may do so], *and plaintiffs have not presented evidence to the contrary.*” *Id.*, PgID# 1701 (emphasis added), PgID# 1704.

However, there was an issue neither party had briefed. Was TEAM entitled to an order under 17 U.S.C. § 503 for the destruction of “infringing articles” in defendant’s possession? The Court stated that “defendant apparently still possesses a full PDF copy of the Work,” and that the Court was

inclined to enter an order requiring [defendant] to destroy all copies in all media of the Work still in his possession and provide suitable confirmation to plaintiff that he has done so, under the name of John Doe. Further unmasking of defendant has not been shown to be necessary in light of defendant’s sworn testimony that he will not engage in future infringement with respect to the Work, and there being no evidence that any infringement has taken place during the lengthy time this case has been pending.

Id., PgID# 1702, 1705-1706. In denying TEAM’s request that Doe’s identity be revealed, the Court referenced its previous order on the Motion to Compel [RE 48].

² The reference to “asserted” refers to two separate issues. As the Court noted, Doe had “promptly” removed the Work upon learning of TEAM’s copyright claim. TEAM had also, in its response to the summary judgment motion, cited other purported acts of copyright infringement that it had never previously raised with Doe, let alone placed at issue in the litigation. *Id.*, RE 54, p. 7, Reply, RE55 PgID# 1639. The Court noted that “plaintiff has not asserted its rights with regard to other materials it has published that appear on defendant’s blog.” Order re Summary Judgment, RE 56, PgID# 1701.

The Court noted that, balancing the parties' interests at that stage in the litigation, the Court had permitted limited discovery only in order to enable TEAM to pursue "a theory that defendant had significant ties to business competitors." *Id.*

The Court proposed to enter summary judgment to plaintiff "with regard to its claim for copyright infringement and limited injunctive relief," subject to the parties filing supplemental responses under Fed.R.Civ.P. 56(f). *Id.*, PgID# 1706.

Doe filed a supplemental brief arguing that no destruction order was warranted, and consequently requesting reconsideration of the denial of summary judgment. Response to Court's Proposed Destruction Order, RE57, PgID# 1708-1728. Insofar as the Court had assumed (without evidence) that Doe personally possessed any copies of the Work, the Court was mistaken. Doe had destroyed any copies prior to the commencement of the lawsuit. *Id.*, PgID# 1714-1715. Insofar as Court might be proposing that Doe's *counsel* destroy copies in *his* possession, the order would be inappropriate. The only copies counsel had were used copies legitimately purchased on Amazon, and PDF copies legitimately made for purposes of use in the litigation; neither of these were "infringing articles." *Id.*, PgID# 1715-20.

TEAM styled its submission a Motion for Summary Judgment, requesting the Court to issue a permanent injunction against future infringement, and specifically requesting that it identify Doe by name. Motion for Summary

Judgment, RE 62, pp. 11-20 (sealed). TEAM recapitulated the arguments it had made previously, and made additional arguments, namely that (1) Doe had purportedly “admitted” that he would have been less likely to infringe the Work had he not been anonymous, (2) that Doe had not taken down the Work “immediately” upon learning of the DMCA subpoena, (3) that he had “attempted to circumvent” the DMCA notice by changing the hyperlink to TEAM’s translator’s website that posted the Work, (4) that Doe had “failed to track downloads of the Work from his blog,” and (5) that he lacked “remorse,” and on the contrary was “defiant, arrogant, and brash.” TEAM Motion for Summary Judgment, RE 62, p 18 [sealed].

The contention that Doe was “defiant, arrogant, and brash” was a reference to Doe’s *counsel’s* argument that he was entitled to retain copies of the Work in his possession. *Id.* The Court, however, *agreed* with Doe’s counsel that he was legally entitled to keep those copies, and clarified that it had never intended to suggest that anyone other than Doe personally would need to comply with the proposed destruction order. Order Denying Injunctive Relief, RE 63, PgID# 1823. Since Doe had “demonstrated compliance with the proposed injunctive order,” the Court ruled that Doe’s request for reconsideration of the denial of summary judgment was “moot.” *Id.* PgID# 1824.

The Court denied TEAM's request for a permanent injunction or to "unmask" Doe, explaining that it had already determined that to do so was unnecessary, and noting that TEAM "had provided no new argument to explain why it would be necessary to unmask Doe in order to ensure compliance with an order to destroy" copies of the Work in his possession. *Id.* "This is particularly so given that defendant has already declared to the Court that has complied with the proposed injunctive relief." The Court ruled that "Plaintiff's Motion for Summary Judgment is GRANTED," but that "Plaintiff's motion for further injunctive relief is DENIED." *Id.* PgID# 1825.

The Court approved the form of the separate judgment that issued the same day, which referred to Defendant only in the caption, as "John Doe," and which read, in its entirety:

For the reasons stated in the ordered entered today, it is ordered that judgment be entered in favor of the plaintiff. This matter is hereby terminated.

Judgment, RE 64, PgID# 1826. TEAM's appeal followed.

ARGUMENT

Summary of the Argument

The *only* relief sought by this appeal is that “Doe’s true identity be revealed in the Judgment.” AOB 11, 36. TEAM relies heavily on the argument that the District Court should have identified Doe “by his true name in the Judgment and injunction entered against him,” because, TEAM argues, the failure to do so rendered that injunction “unenforceable.” AOB 1, 24, 25, 27, 30, 33, 34, 36.

There is a glaring flaw in this argument. The District Court *did not issue an injunction*. The District Court’s failure to issue any injunctive relief whatsoever has not been challenged on this appeal, but rather ignored. This Court must assume for the purposes of this appeal that the District Court acted within its discretion in declining to issue injunctive relief.

It makes no sense to argue that disclosure of Doe’s identity is necessary to enforce an imaginary injunction. But even if the District Court *had* issued an injunction, TEAM’s “unenforceability” argument would nevertheless fail. For the Court, when it briefly contemplated issuing injunctive relief (a destruction order), explained that it was inclined to do so in a manner that continued to preserve Doe’s anonymity. That would have been completely within its discretion over case management, discovery and equitable relief. Significantly, since the Court had allowed TEAM’s attorneys to learn Doe’s identity, subject to a protective order,

the Court had enabled TEAM to serve Doe with any future proceedings it wished to commence in the District Court concerning any putative lack of compliance by Doe with any purported injunction.

In striking a balance that preserved Doe's anonymity without prejudicing any right TEAM might have to pursue its legal claims, the District Court relied upon the balancing test set forth in *Art of Living Foundation v. Doe*, 2011 U.S. Dist LEXIS 129836, and numerous other decisions. But TEAM ignores the District Court's well-considered legal reasoning, instead assuring this Court that the District Court "cited no authority at all for its aberrational decision." AOB at 18.

The *Art of Living* test is intended to ensure that the First Amendment right to anonymity is not needlessly impaired. The Supreme Court has recognized a First Amendment right to speak anonymously, because anonymity encourages uninhibited discussion. Stripping the speaker of his anonymity harms him irreparably, and has a chilling effect on others who may wish to similarly speak freely about the topic.

Whenever a litigant seeks to use the processes of civil discovery to learn the identity of an anonymous speaker, the court must carefully balance that irreparable harm and chilling effect against plaintiff's purported need for discovery at every stage of the proceeding. Assuming a need for discovery has been shown, the Court

consider whether it is possible to craft discovery and other judicial relief so as to protect defendant's anonymity without prejudicing defendant's legal interests.

That is precisely what the District Court did here. TEAM cannot show that it has been prejudiced in any way by the Court's decision to protect Doe's anonymity in the Judgment. Thus it follows that the District Court cannot have abused its discretion.

I. This Court Must Presume that the District Court Did Not Abuse Its Discretion in Declining to Issue an Injunction, Because TEAM Has Not Appealed that Decision

The *only* relief sought by this appeal is that "Doe's true identity be revealed in the Judgment." AOB 11, 36. Although TEAM repeatedly refers to the District Court's "injunction," (AOB 1, 24, 25, 27, 30, 33, 34, 36) the District Court emphatically did *not* issue such an injunction. The District Court's opinions on TEAM's motion to compel, Doe's summary judgment motion, and in denying TEAM's motion for "further injunctive relief," show that it carefully considered, and rejected, TEAM's request to issue an injunction.

But even if we assume *arguendo* that the District Court had intended to issue an injunction, or a destruction order, but had inadvertently failed to set forth that relief in the Judgment, the result is the same. As a matter of law, there is no injunction.

Any purported “injunction” by a Court that is not set forth in a separate Judgment under Rule 58, and moreover which does not comply with the specificity requirements of Rule 68, is a “nullity,” and the “failure to comply ... renders the order issued by the district court not an injunction and places [the defendant] under no obligations.” *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 318-20 (7th Cir. 1995). This is a substantive protection to defendant. *Id.* at 320.

TEAM in its appeal does not discuss, even obliquely or cursorily, the failure of the District Court to issue an injunction. *Barany-Snyder v. Weiner*, 539 F.3d 327, 331 (6th Cir. 2008) (cursorily arguments made on appeal are waived). TEAM has therefore waived any argument that the District Court abused its discretion in declining to issue an injunction against Doe.

II. The District Court’s Decision Not to Identify Doe in the Judgment Is Reviewed for Abuse of Discretion

Insofar as TEAM requested, as part of the Judgment, an injunction that identified Doe by his actual name, the only part of that request before the Court on this appeal is the request that Doe be publicly identified. That determination is reviewed for abuse of discretion.³

³ A district court decision to strip an anonymous speaker of his anonymity would be subject to more exacting scrutiny on appeal than a decision to preserve the speaker’s anonymity. This is because “in cases raising First Amendment issues ... an appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’” *Bose Corp. v. Consumers*

The District Court's decision to grant or deny an injunction will only be overturned if it is contrary to a rule of equity or an abuse of discretion. *See, e.g., Mason Cty. Med. Ass'n v. Knebel*, 563 F.2d 256, 260-61 (6th Cir. 1977); *Dig. Filing Sys., L.L.C. v. Aditya Int'l*, 323 F. App'x 407, 411-12 (6th Cir. 2009) (scope of copyright injunction); *First Tech. Safety Sys. v. Depinet*, 11 F.3d 641, 647 (6th Cir. 1993) (order re impounding copyright-infringing articles).

Any “issues involving what can broadly be labeled ‘supervision of litigation,’” are also reviewed for abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552, 558 n.1 (1988). This includes the management of discovery. *Thornton v. Graphic Communs. Conf.*, 566 F.3d 597, 617-18 (6th Cir. 2009).

A court's order to seal information in its records is reviewed for abuse of discretion, albeit discretion that is circumscribed by certain standards. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983). A court's determination to seal records does not receive the full deference normally accorded to district court findings involving the Court's first-hand observations. *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983); *accord Shane Grp., Inc. v. Blue Cross Blue Shield*, 825 F.3d 299, 306 (6th Cir. 2016). For this

Union, 466 U.S. 485, 499 (1984). But where the defendant's anonymity was protected by the District Court, the only issue is whether plaintiff's interests were prejudiced in the Court's management of the litigation. Since plaintiff's interests do not involve any constitutional dimension, exacting scrutiny is not required and the question is whether the District Court abused its discretion.

reason, a court order that perfunctorily rubber-stamps the stipulation of the parties to seal documents is not entitled to deference. *Shane*, 825 F.3d at 306-07; *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545-46 (7th Cir. 2002). By contrast, where the Court's sealing order shows that it is appropriately tailored to protect legitimate privacy or similar interests, that order will only be overturned for abuse of discretion. *Knoxville News-Sentinel*, 723 F.2d at 477, *Smith v. SEC*, 129 F.3d 356, 359 n.1 (6th Cir. 1997).

“Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment.” *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 821 (6th Cir. 2013). “Abuse of discretion exists only when a district court relies upon clearly erroneous factual findings, applies the law improperly, or uses an erroneous legal standard.” *DiLaura v. Twp. of Ann Arbor*, 471 F.3d 666, 671 (6th Cir. 2006); *accord Dig. Filing*, 323 F. App'x at 411-12.

The District Court's factual findings are only clearly erroneous if they “strike[the Court of Appeal] as wrong with the force of a five-week-old, unrefrigerated dead fish.” *United States v. Taylor*, 248 F.3d 506, 515 (6th Cir. 2001). “If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.” *Anderson v. Bessemer City*, 470 U.S. 564, 573-74, 105 S. Ct.

1504, 1511-12 (1985). This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts. *Id.*, accord *Dig. Filing.*, 323 F. App'x 416. Even where the District Court has made no express findings, if the District Court has provided “a sufficient amount of information” that the Court of Appeal may “glean the basis for the court's relevant findings in order that this court might make a valid determination of the propriety of those findings,” such findings will be upheld unless clearly erroneous. *Savic v. United States*, 918 F.2d 696, 700 (7th Cir. 1990).

A potentially complicating factor in this case is that relevant decisions of the District Court were made after motions for summary judgment and without a trial. But this complication is more apparent than real, where the issue is how the District Court should exercise its equitable discretion. To be sure, on a summary judgment motion the District Court does not render factual findings but only determinations as to whether there is a genuine and material issue for trial, and that determination is reviewed *de novo*. But the District Court’s determination involves the weighing a number of equitable factors. A disputed question of fact is thus only material if it is of such significance in the balancing of factors that the District Court abused its discretion in declining to issue an injunction. Moreover, even if a determination by the Court – for example, that defendant is not “substantially

likely” to infringe again -- can be characterized as improperly resolving a factual conflict, the error is harmless unless it amounts to a *clearly erroneous* finding. No purpose would be served by remanding, since the District Court is the factfinder on matters of equity in any event.

III. The District Court Appropriately Adopted a Balancing Test That Required It To Evaluate, On an Ongoing Basis, Whether Plaintiff Has Shown a Need To Discover an Anonymous Speaker’s Identity that Outweighs the Speaker’s Right to Remain Anonymous

A. Civil Discovery of an Anonymous Speaker’s Identity Will Have the Collateral Effect of Stripping the Speaker of his First Amendment Right to Anonymity; Thus a Court Must Determine Whether Doing So is Necessary to Protect Plaintiff’s Rights

The First Amendment guarantees the right to speak anonymously. *Buckley v. American Constitutional Law Found*, 525 U.S. 182, 197-99 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60, 80 (1960). A First Amendment issue is thus presented whenever a plaintiff sues an anonymous speaker, and seeks to use the discovery processes of litigation to learn the defendant’s identity. If the plaintiff is permitted to learn the speaker’s identity, the speaker will be irreparably stripped of his anonymity. First Amendment rights are not absolute, so when the right to speak anonymously conflicts with a plaintiff’s right to a legal remedy, the court must balance the competing rights.

On the First Amendment side of the balance, the court must recognize (as it did here) that the collateral injury to the defendant is an “irreparable harm.” *Art of*

Living, 2011 U.S. Dist. LEXIS 129836 at 26, citing *Perry v. Schwarzenegger*, 591 F.3d 1147, 1158 (9th Cir. 2010), Order re Motion to Compel, RE 48, PgID# 1437.

It is irreparable not only in the sense that it is irreversible but also in the sense that it affects all the speech in which the speaker has anonymously engaged, not only that portion of the speech which is being challenged in the lawsuit. It is “self-evident” that stripping an anonymous speaker of his anonymity will have a chilling effect not only on his own speech but on other participants in public discourse as well. *Art of Living, supra*, at 25-28 (citing *Perry*, 591 F.3d at 1158, 1163; *McIntyre*, 514 U.S. at 342); accord *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 111 (Ariz. Ct. App. 2007).

B. The Threshold Issue, Whether Plaintiff Has Presented a Prima Facie Claim, Is Necessary (But Not Sufficient) to Protect the First Amendment Right to Anonymity.

Here, the Court adopted the *Art of Living* test, which is equivalent to the test that has been adopted in numerous other decisions. See, e.g., *Highfields Capital Mgmt LP v Doe*, 385 F. Supp. 2d 969, 980, 969, 972 (N.D. Cal. 2005); *Indep. Newspapers, Inc. v. Brodie*, 407 Md. 415, 454-455 (Md. 2009); *Mobilisa, Inc. v. Doe*, 217 Ariz. at 111; *Mortgage Specialists v. Implode-Explode Heavy Indus.*, 160 N.H. 227, 239 (2010); *Ind. Newspapers Inc. v. Junior Achievement of Cent. Ind., Inc.*,

963 N.E.2d 534, 552 (Ind. Ct. App. 2012); *Dendrite v. Doe*, 775 A.2d 756, 760-761 (N.J. App. 2001).⁴

The *Art of Living* and similar decisions set as a threshold requirement that plaintiff must present a *prima facie* case. If a plaintiff cannot show that he has a *prima facie* claim, generally it follows that he has no cognizable interest in knowing the anonymous defendant's identity.

However, it may potentially be unfair to require the presentation of *prima facie* elements where the defendant is presumably the only one with access to relevant information. For example, as one court has noted that, in a "public figure" defamation case, the plaintiff will have the burden of showing "actual malice," but may be unable to discharge its burden in this regard without taking discovery of defendant. *Doe v. Cahill*, 884 A.2d 451, 464 (Del. 2005). As we discuss in section III.C.1, this circumstance warrants disclosure of defendant's identity only if (1) plaintiff can present a *prima facie* case on all the other elements **and** (2) defendant insists on requiring the plaintiff to show "actual malice."

⁴ Some of these decisions involved Doe defendants who had no notice of the lawsuit or subpoena, and so imposed additional requirements to ensure that defendants were given notice and an opportunity to be heard. That issue was not present in the *Art of Living*, nor in this case, because the Doe defendant had been made aware of the lawsuit and had voluntarily appeared and defended on the merits.

In *Cahill*, as in the vast majority of these decisions, the anonymity issue was resolved at this preliminary stage because the plaintiff was unable to meet the threshold requirement of presenting a *prima facie* case on at least one element in plaintiff's control. Typically, an allegedly defamatory statement was determined to be a constitutionally-protected opinion rather than an actionable assertion of fact. See, e.g., *id.*, 884 A.2d at 467; *Highfields Capital*, 385 F. Supp. 2d at 971.

C. Where Plaintiff Can Present a Prima Facie Case, the District Court Must Continue to Evaluate Whether Plaintiff Has Shown a Need to Discover the Defendant's Identity that Outweighs the Defendant's Right to Anonymity

If the plaintiff presents a *prima facie* case, however, that does not logically resolve the question whether plaintiff's need to learn defendant's identity outweighs the defendant's right to maintain his anonymity. The Court must determine, on an ongoing basis, as part of its management of discovery and the litigation, whether the plaintiff's need has outweighed defendant's First Amendment right. That includes the question whether discovery or judicial relief can be crafted in such a way as to minimize or eliminate any conflict between these two interests. The second-prong balancing test "resemble[s] the preliminary injunction inquiry, which requires the court to 'balance the competing claims of injury and ... consider the effect on each party of the granting or withholding of the requested relief.'" *Art of Living*, 2011 U.S. Dist. LEXIS 129836, 12-13 (quoting

Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 24 (2008)); accord Order re Motion to Compel, RE 48, PgID# 1431.

Without a balancing step, the [trial] court would not be able to consider factors such as the type of speech involved, the speaker's expectation of privacy, the potential consequence of a discovery order to the speaker and others similarly situated, the need for the identity of the speaker to advance the requesting party's position, and the availability of alternative discovery methods. Requiring the court to consider and weigh these factors, and a myriad of other potential factors, would provide the court with the flexibility needed to ensure a proper balance is reached between the parties' competing interests on a case-by-case basis.

Mobilisa, 217 Ariz. at 111.

1. Even Where Plaintiff Presents a Prima Facie Case, There May be No Disputed Issue that Creates a Need for Plaintiff to Learn Doe's Identity

Even though the plaintiff has presented a *prima facie* case, there are situations in which, as a matter of law, plaintiff has not shown any need to learn the identity of defendant, because he identity is not relevant to any disputed material issue in the case.

Consider the following. An anonymous speaker is alleged to have defamed the plaintiff, but there is no genuine dispute of fact that the speech at issue took place prior to the relevant statute of limitations. Thus, although plaintiff has made out a *prima facie* claim, it has no right to judicial relief against the defendant. Without the “second prong” balancing test of *Art of Living*, the plaintiff could learn the identity of a defendant even though it had no legally cognizable claim. Thus it

makes more sense to say that a plaintiff must be able to survive summary judgment – a concept that would include negating any affirmative defense as to which the defendant can present a *prima facie* case.

But even where plaintiff can survive summary judgment in this strict sense, that would not necessarily show that Defendant has any right to learn Doe's identity. The question should be whether there is any *disputed* issue of fact as to which Doe's identity is relevant.

Consider the hypothetical situation posed by the court in *Cahill*, discussed above in section III.B. Assume the public figure plaintiff presents a *prima facie* case of defamation on all elements except actual malice. That is the equivalent to showing, under Rule 56(d), that certain information in the defendant's control is "essential" to plaintiff's claim.

To be sure, it would be unjust to require plaintiff to present evidence of defendant's actual malice and at the same time deny him the opportunity to take discovery of defendant. But the defendant may prefer to *waive* the element of actual malice rather than disclose his identity. Defendant may be quite confident that he can prevail on the issue of *falsity*. In that case plaintiff will not be prejudiced if he is forced to proceed to trial without learning defendant's identity.

Indeed, that is precisely what the court ruled in later proceedings in the *Art of Living* case. The only claim in the case to survive dispositive motions was a

trade secret claim. Defendant did not dispute that he had published the alleged trade secret, but he denied that it *was* a trade secret. Plaintiff had presented *prima facie* evidence that it was a protectible trade secret, so the matter was set for trial. But the District Court allowed Doe to go to trial anonymously. Plaintiff had not shown that it would be prejudiced, because defendant's identity had no relevance to any disputed issue of fact. *Art of Living*, 2012 U.S. Dist. LEXIS 61582 (N.D. Cal. May 1, 2012) (denying anti-SLAPP motion on trade secret claim); *id.* 2012 U.S. Dist. LEXIS 159619 (N.D. Cal. May 9, 2012) (denying discovery of identity, closing discovery, setting trial).⁵

2. *The District Court Must Also Consider Whether Discovery Can be Conducted in a Manner that Preserves Doe's Anonymity Without Prejudicing Plaintiff's Rights*

Moreover, even if Doe's identity is relevant to some material disputed issue in the case, the District Court may very well be able to manage discovery so that it may both protect both Doe's anonymity and avoid prejudice to plaintiff. For

⁵In *Cahill*, the court adopted a "summary judgment" standard, and stated that any further balancing test was superfluous. *Id.*, 884 A.2d at 461. The statement was *dictum* because plaintiff in that case could not survive the threshold showing of a *prima facie* claim. *Id.* at 467. Moreover, the comment makes sense when one considers the prelitigation posture of that case. Defendant had not accepted service, but rather had specially appeared to oppose discovery of his identity. *Id.* at 454. Cases where defendant refuses to accept service are easily distinguishable from cases such as this one, in which defendant accepts service, appears in the action, and defends on the merits. *See discussion infra at 40-42.*

example, as the court pointed out in *Art of Living*, a plaintiff's need for discovery might be accommodated by allowing the taking of defendant's deposition telephonically or in writing. *Art of Living*, 2011 U.S. Dist. LEXIS 129836, 29 & n. 7; accord *Mobilisa*, 217 Ariz. at 111 (court must consider "the availability of alternative discovery methods.")

It is essential that the District Court carefully consider restricting discovery (or access to discovery) because to treat the matter as an ordinary discovery dispute under Rule 26 "fails to give sufficient weight to the First Amendment interests at stake." *Perry*, 591 F.3d at 1164. The District Court must determine whether plaintiff's "interest in obtaining the disclosures . . . is sufficient to justify the deterrent effect . . . on the free exercise . . . of [the] constitutionally protected right." *Id.*

3. *A Speaker's Right to Protect His Anonymity Is Not Necessarily Extinguished Upon a Finding that Some Portion of His Speech Was Actionable*

Nor does the balancing of rights necessarily shift in favor of plaintiff upon a judicial determination that some portion of the defendants' speech was legally actionable. Consider the following hypothetical. Defendant anonymously criticizes Plaintiff. Plaintiff sues for defamation, alleging that statements A through Z are defamatory. Defendant removes statement Z, but retains statements A through Y. Defendant defends the entire case on the ground that none of the

twenty-six statements were false. The jury determines that the only statement that was false and defamatory was statement Z.

It does not necessarily follow that the defendant must be stripped of his anonymity. On the First Amendment side of the ledger, defendant has made twenty-five criticisms of plaintiff, all of which are fully protected by the First Amendment. To reveal his identity will still irreparably harm defendant, and still have a chilling effect on public discourse. *Art of Living*, 2011 U.S. Dist. LEXIS 129836 at 26.⁶

On plaintiff's side of the ledger, its putative need to learn defendant's identity turns on two questions. **First**, to what judicial relief, if any, is Plaintiff entitled? **Second**, can that relief be crafted in such a way that it does not prejudice defendant's anonymity?

A determination by the jury that statement Z is defamatory would not necessarily mean that plaintiff would obtain either monetary damages or any form of judicial relief. *See, e.g., Coastal Abstract v. First Am. Title Ins. Co.*, 173 F.3d 725, 732-33 (9th Cir. 1999) (damage must be caused by actionable statement in isolation from constitutionally protected statements); *Tory v. Cochran*, 544 U.S.

⁶ In *Art of Living*, the plaintiff had sued over a number of allegedly defamatory statements, and also had alleged copyright infringement and trade secret misappropriation, but the defamation claims were dismissed on an earlier dispositive motion. *Art of Living Found. v. Does*, 2011 U.S. Dist. LEXIS 63507, at *26 (N.D. Cal. June 15, 2011).

734, 738 (2005) (injunction against future infringement would be a highly disfavored prior restraint). If plaintiff obtains no relief, it will not be prejudiced if Doe continues to remain anonymous.

But assume that the jury awards a thousand dollars in damages. Plaintiff would argue that he needs to know Defendant's identity to enforce the judgment. But Defendant protests -- he is willing to pay off the judgment on the spot with a cashier's check. Surely the District Court has the discretion to permit him to do so, and to declare the judgment satisfied. *See* Rule 60(b)(5) (court may relieve a party from final judgment if it has been satisfied). Alternatively, the Court could allow the defendant to pay within some reasonable time period, while preserving his anonymity.

This hypothetical is analogous to the facts of this case. The Amthrax Blog contains numerous criticisms of TEAM that TEAM characterizes as "attacks." The only difference is that TEAM never even *contended* that these attacks were actionable, and thus they must be presumed to be constitutionally protected speech -- the equivalent of statements A to Y. *See discussion in section IV.C.*

Here, the equivalent of Statement Z is that Doe infringed TEAM's copyright in the Work in January and February 2013. TEAM contends that "the District Court conclusively negated the 'First Amendment' basis for anonymity when it

rejected Doe’s fair use defenses.” AOB at 18 (citing *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 626 (9th Cir. 2003)).

But TEAM is confusing two separate issues.

The first issue is whether the particular challenged *publication* is protected by the First Amendment. If not, it may be actionable. In the copyright context that First Amendment defense is generally presented as a “fair use” defense, as TEAM correctly notes. Doe lost that defense and does not contest the issue on appeal.

But that is a separate issue from whether the *speaker* who committed the act of infringement has a right to preserve his anonymity.⁷ The adjudication that the defendant committed an act of infringement in the past does not automatically require the Court to issue *any* injunctive relief whatsoever. Thus it is not required to issue the specific relief of stripping the defendant of his anonymity.

To be adjudicated a “copyright infringer” is not like being adjudicated a felon, which might (under state law) carry with it the automatic consequence that one cannot vote, or a child molester, which may carry the automatic legal consequence that he is forbidden to live within a certain distance of an elementary school.

⁷ The District Court pointed out TEAM’s conflation of these two separate issues (First Amendment *defense* to infringement vs. First Amendment *privilege* not to disclose one’s identity) at an earlier stage in the proceedings. Order Denying Motion for Partial Judgment, RE37, PgID# 957-959.

Under the *Art of Living* rule, the balancing that must take place at this stage in the proceeding is no different from that which must take place at any other stage in the proceeding. The Court must consider what judicial relief to award, and then, in awarding that relief, determine whether the relief granted to plaintiff requires stripping defendant of his anonymity to be effective.

4. *A Plaintiff Should Not Be Able to Irreparably Strip a Speaker of His Anonymity Merely By Conjecturing the Possible Existence of Facts That Might Render His Identity Relevant to a Legal Claim*

Now consider another situation that is highly relevant to this appeal. Plaintiff alleges a set of facts which, *if true*, might support a legal claim, but which, *if not true*, do not.

The following fact pattern is actually quite common. A restaurant garners quite a few anonymous negative reviews on an internet review site, such as Yelp. If the restaurant sued Doe commenters for defamation, the case would be dismissed on the ground that the statements were constitutionally protected opinion. So instead the restaurant sues Doe “competitors” for unfair competition. The restaurant alleges, on information and belief, that the reviews were not genuine reviews written by actual patrons of the restaurant but rather were fake reviews planted by its competitors.

Should the court allow discovery of the identity of the reviewers? If, in fact, the restaurant’s “belief” is correct, it might have a valid legal claim. But *if not*, the

restaurant will have hijacked the court's discovery process to learn the identity of actual patrons who had every right to maintain their anonymity, and may not wish to be harassed into taking down the negative reviews.

One legitimate response by a court in this situation would be to deny plaintiff the requested discovery on the ground that its "belief" that the reviews are "fake" is mere speculation. *See, e.g., Midland Daily News*, 151 F.3d at 474-75 (District Court properly quashed subpoena to learn identity of anonymous speaker where allegation that discovery might uncover wrongdoing was speculative); *Sarkar v. Doe*, 2016 Mich. App. LEXIS 2242, at *44-46 (Dec. 6, 2016) (declining to permit discovery of the identities of anonymous internet commenters, where plaintiff believed commenters to be the same persons as had circulated a defamatory flyer); *Muslim Cmty. Ass'n v. Pittsfield Twp.*, 2014 U.S. Dist. LEXIS 184684, at *13-16 (E.D. Mich. July 2, 2014) (speculative contention that subpoena would disclose relevant information outweighed by chilling effect that disclosure of anonymous speech would have on target of subpoena and others who wish to join public discourse); *see also Crawford-El v. Britton*, 523 U.S. 574, 598-99, (1998) ("Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery[, or] even [to] bar discovery altogether on certain subjects."); *Perry*, 591 F.3d at 1164 (ordinary Rule 26

analysis is insufficient to provide the heightened protection required by First Amendment).

Alternatively, if the Court finds that plaintiff has a substantial basis for its “belief,” the Court has discretion to require that any discovery take place subject to an attorneys-only protective order. *In re Times Picayune, L.L.C.*, 561 F. App'x 402, 402-03 (5th Cir. 2014) (where “reasonable possibility” that anonymous comments about criminal defendants had been made by prosecutors, raising an inference of prosecutorial misconduct, District Court did not err in requiring *in camera* disclosure of identities of commenters).

Indeed, it would be unfair – and would invite abuse -- *not to at least* impose such an attorneys-only restriction. Otherwise there is an an easy path to evade the First Amendment protection of anonymity. For a plaintiff can *always* claim that its anonymous critic is actually a competitor masquerading as a critic. That, of course, is precisely the theory that TEAM alleged here, and as we can see, the theory did not pan out. It was thus entirely appropriate for the Court to require that any such discovery be taken on an attorneys-only basis, and to maintain the protection when Doe turned out not to be a competitor at all.

5. *The District Court Correctly Rejected the Sony Music Rule Advocated by TEAM*

The District Court did not err in rejecting the *Sony Music* test proposed by TEAM in favor of the *Art of Living* test. *Sony Music* and its progeny uniformly share both a peculiar fact pattern and a peculiar procedural posture.⁸

Factually, the cases all involve the same peculiar (albeit unfortunately widespread) phenomenon of “Peer-to-Peer” (P2P) file sharing amongst defendants. P2P technology enables a community of users to share their favorite music (or movies, or pornography) through a decentralized network of their computers. *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919-921 (2005) (explaining P2P technology).

As the court in *Sony Music* itself explained, P2P file-sharing has only minimal First Amendment value:

In contrast to many cases involving First Amendment rights on the Internet, a person who engages in P2P file sharing is not engaging in true expression. Such an individual is not seeking to communicate a thought or convey an idea. Instead, the individual's real purpose is to obtain music for free.

⁸ See AOB at 23-24 (citing *Arista Records LLC v. Doe*, 604 F.3d 110, 118 (2d Cir. 2010); *First Time Videos, LLC v. Doe*, 276 F.R.D. 241, 248 (N.D. Ill. 2011); *Arista Records LLC v. Doe*, 551 F. Supp. 2d 1, 3 (D.D.C. 2008); *Vision Films, Inc. v. Doe*, No. 3:13-CV-128, 2013 U.S. Dist. LEXIS 158228, at *1 (E.D. Tenn. Nov. 5, 2013); *Hard Drive Prods. v. Does 1 - 1,495*, 892 F. Supp. 2d 334 (D.D.C. 2012); *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332, 349 (D.D.C. 2011).

Sony Music, 326 F. Supp. 2d at 564.

The District Court thus quite properly rejected *Sony Music*, reasoning that “nature of the speech” for which Doe asserted First Amendment rights here was similar to that in *Art of Living*. *Id.*, PgID# 1430-31. Doe here had not merely engaged in P2P file-sharing, but rather “commentary and criticism,” which (as with the commentary in *Art of Living*), was entitled to a “high level of First Amendment protection,” as compared to the “minimal form of self-expression” involved in P2P file-sharing. in *Sony Music*. *Id.*, PgID# 1432. The District Court correctly noted that Doe’s commentary and criticism would still be entitled to a high degree of First Amendment protection, even if such speech were “commercial,” so long as the speech were not false or misleading, relying upon this Court’s decision in *Midland Daily News*, 151 F.3d at 474-75. PgID# 1432.

Doe’s right to anonymously criticize TEAM was entitled to at least as much First Amendment protection as the indisputedly commercial advertisements at issue in *Midland Daily News*. The contention that Doe’s speech was “commercial” was based entirely on *speculation* by TEAM that Doe was acting at the behest of a competitor (specifically Amway) – a theory that it was unable to support after taking discovery on the subject. Furthermore, even if TEAM’s factual theory had been true, that theory was legally insufficient to convert Doe’s criticisms into “commercial speech.” Under the First Amendment “commercial speech” is speech

that “propose[s] a commercial transaction.” *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983). TEAM never showed that Doe’s Blog was proposing any commercial transactions.

There is also a procedural reason why the *Art of Living* test is applicable and *Sony Music* is not. *Sony Music* and its progeny were all cases in which discovery of defendants’ identities was essential, because plaintiff had presented a *prima facie* case, and defendants, by their anonymity, had prevented the plaintiff from being able to serve them and commence the litigation. *Sony Music*, 326 F.Supp.2d at 566. Here, by contrast, Doe voluntarily appeared in the action and submitted to the Court’s adjudication of his rights and responsibilities – as had the defendants in *Art of Living*. The *Art of Living* decision distinguished *Sony Music* on this very point:

In this sense, the instant case differs significantly from those in which discovery as to an anonymous defendant's identity was necessary in order to effect service of process....In fact, this case appears to be unique among the relevant body of case law in that [Doe] has not only appeared through counsel and filed numerous dispositive motions, but also propounded and responded to interrogatories and requests for production. [Doe’s] engagement in the litigation, albeit under a pseudonym, diminishes Plaintiff's need to obtain his true name at this time.

Art of Living, 2011 U.S. Dist. LEXIS 129836, 29-30.⁹ Where the defendant has appeared and is litigating the case on the merits, it has put the Court in a position where it can evaluate, on an ongoing basis, at each stage in the litigation, whether it can protect Doe's anonymity without prejudicing plaintiff's cognizable interests.¹⁰

IV. *The District Court Did Not Abuse Its Discretion in Denying TEAM's Request to Strip Doe of His Anonymity*

A. *The Copyright Act Confers Discretion on the District Court to Craft Relief as It Deems Reasonable*

The District Court denied TEAM's request for an injunction, or for a destruction order. Since that decision has not been appealed, it must be presumed to have been within the District Court's discretion. It would follow that the District Court did not abuse its discretion in TEAM's subsidiary request to identify Doe in that injunction.

⁹ The District Court here incorrectly characterized the posture of the case in *Art of Living* as involving a prelitigation request to learn the identity of Doe to enable service. Order re Motion to Compel, RE 48, PgID# 1435. In fact it was identical to the situation presented here on the motion to compel, as shown by the quotation in the text above.

¹⁰ There is, moreover, no reason to think the District Court would have resolved this case any differently if it had applied the *Sony Music* test. The *Sony Music* test would have required it to balance whether plaintiff had shown a "central need for the subpoenaed information to advance the claim" against the defendant's "expectation of privacy." *Sony Music Entm't Inc. v. Doe*, 326 F. Supp. 2d at 565.

Moreover, even if the District Court had decided to issue injunctive relief, it would have been fully within its discretion to issue such relief while at the same time declining to strip Doe of his anonymity. *See* Order re Doe Summary Judgment, RE 54, PgID# 1705-1706 (Court proposes issuing limited injunctive relief while preserving Doe’s anonymity).

“The Copyright Act provides that courts ‘may’ grant injunctive relief ‘on such terms *as it may deem reasonable* to prevent or restrain infringement of a copyright.’” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392-93, (2006) (citing 17 U.S.C. § 502(a); emphasis added here). That determination is to be made according to “traditional equitable considerations,” not some mechanical rule. *Id.* at 381. Under traditional equitable principles, an injunction is an extraordinary remedy “to be ordered only after taking into account all of the circumstances that bear on the need for prospective relief,” and that a court “should be particularly cautious when contemplating relief that implicates public interests.” *Salazar v. Buono*, 559 U.S. 700, 714-15 (2010). A District Court is entirely within its discretion to deny a requested injunction where the District Court concludes that the defendant had acted in good faith and that plaintiff had failed to show that it will suffer irreparable harm from failing to issue it. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61-62, (1975). Injunctive relief is “designed to deter, not to punish.” *Id.*

In the copyright context, as elsewhere, the District Court “enjoy[s] broad discretion to fashion remedies balancing divergent interests.” *Sony/ATV Publ’g, LLC v. Marcos*, 651 F. App’x 482, 488 (6th Cir. 2016). It will abuse that discretion, however, if it issues injunctive relief that is “more burdensome than necessary to provide a plaintiff complete relief.” *Id.* at 487.

Although a district court’s equitable remedy may be “novel, that in itself should not weigh against its adoption [, since a] court of equity is free to fashion whatever remedies will adequately protect the rights of the parties before it.” *Joel v. Various John Does*, 499 F. Supp. 791, 791-92 (E.D. Wis. 1980).¹¹

Here, the District Court allowed TEAM’s attorneys to know Doe’s identity, thus the Court would not have abused its discretion in preserving Doe’s anonymity, even if it had decided to issue injunctive relief against Doe.

¹¹ The cases relied upon by TEAM do not hold that a district court cannot preserve a defendant’s anonymity when issuing injunctive relief. These cases generally involve preservice situations such as in the *Sony Music* decision. *See discussion supra at 40-42*. On the contrary the cases relied upon highlight the considerable flexibility a district court may have to fashion appropriate injunctive relief even when confronted with an anonymous defendant. *See AOB at 24* (citing *Joel*, 499 F. Supp. at 791-92; *Microsoft Corp. v. Doe*, 2015 U.S. Dist. LEXIS 109729, at *4 (E.D. Va. Aug. 17, 2015) (District Court decision issuing injunction), *id at 2015 U.S. Dist. LEXIS 110145*, at *4-8 (E.D. Va. July 20, 2015) (magistrate decision regarding effectuating service of process on anonymous defendant); *Dama S.P.A. v. Doe*, 113 F. Supp. 3d 686, 690 (S.D.N.Y. 2015).

B. The District Court Did Not Reverse the Parties' Burdens in Protecting Doe's Anonymity

As TEAM correctly notes, there is a presumption against the sealing of judicial records. The proponent of closure bears the burden of showing that “disclosure will work a clearly defined and serious injury.” AOB at 15 (citing *Shane*, 825 F.3d at 307; *In re Cendant Corp.*, 260 F.3d 183, 194 (3rd Cir. 2001)). TEAM is also correct that when a court fails to “set forth specific findings and conclusions which justify nondisclosure,” that failure is grounds to vacate a sealing order. AOB at 14 (citing *Shane*, 825 F.3d at 306).

Technically speaking, the issue of sealing is not before this Court. The Judgement is not sealed.¹²

But in any event, the District Court met the standard for sealing Doe's identity. TEAM's contentions to the contrary are without merit. AOB 14-16. Specifically, TEAM claims that the District Court improperly shifted the burden to TEAM to show that unsealing of Doe's identity was necessary, and claims that the Court “cited no authority at all for its aberrational decision.” AOB at 18.

¹²TEAM should not be heard to complain that the District Court's Protective Order caused over-sealing – that is to say the sealing of anything more than Doe's identity or identifying information. The Protective Order required TEAM to file documents *provisionally* under seal and then to meet and confer with Doe, to ensure that any identifying information had been redacted, before filing documents in the public docket. TEAM instead filed documents under seal and declined to meet and confer on such redactions. Appellate Docket 26.

TEAM is wrong. At the point at which the Court declined to disclose Doe's identity in the Judgment, Doe had *already carried* his burden to show the need for sealing. The Court had ruled on the motion to compel and issued its protective order, after engaging in the balancing required by the *Art of Living* test. The Court's determination that Doe's right to anonymity outweighed TEAM's need to learn his identity necessarily justified sealing Court documents that identify Doe. The "clearly defined and serious injury" here is the irreparable harm to Doe, and the chilling effect on public discourse, that would be caused if Doe were stripped of his anonymity. Order re Motion to Compel, RE 48, PgID# 1430-1438.

As TEAM's own authorities show, this is precisely the sort of privacy interest for which sealing is appropriate. *Shane*, 825 F.3d at 308 (recognized privilege); *Knoxville News-Sentinel*, 723 F.2d at 477 (privacy). This was not a case involving a stipulated protective/sealing order, in which the sealing was justified only by boilerplate "[b]road allegations of harm, bereft of specific examples or articulated reasoning," let alone the sort of class-action settlement that typically raises concerns about collusion. Compare *In re Cendant Corp.*, 260 F.3d at 194. In those cases a perfunctory sealing order may merit extra scrutiny. *Id.* On the contrary, the issue of Doe's right to preserve his anonymity was hotly contested by the parties. In ruling in favor of protecting Doe's anonymity, the District Court

did not abuse its discretion. *See Knoxville News-Sentinel*, 723 F.2d at 477, *Smith v. SEC*, 129 F.3d at 359 n.1.¹³

The ruling at issue on this appeal is simply a further application of the *Art of Living* balancing test as applied at a later stage in the proceeding. As the District Court explained, it had only allowed TEAM to learn Doe's identity on an attorneys-only basis so that it could explore the "theory" that Doe was acting at the behest of Amway and thus was likely to infringe again. Order Denying Summary Judgment, RE 56, PgID# 1705. Since TEAM had failed to raise a genuine issue as to whether Doe would infringe again, the Court denied TEAM's request for an injunction. *Id.*, 1705-06; Order re TEAM Motion Injunctive Relief, RE 63, PgID# 1824-25. Having failed to show that it had any cognizable legal interest that would be prejudiced if the Court continued to protect Doe's anonymity, the Court denied TEAM's request to disclose Doe's identity in the Judgment. *Id.*

Here, significantly, although TEAM's attorneys *did* discover Doe's identity, TEAM has never even *contended* that Doe's identity is relevant information having a bearing on the only question at hand -- whether Doe was "substantially

¹³TEAM also cites cases in which the Court determined whether to permit or not permit a Doe plaintiff to proceed anonymously. AOB 19. As one of TEAM's authorities explained, the standard for allowing a Doe *plaintiff* to proceed anonymously is very different from the standard for allowing a Doe *defendant* to protect his anonymity. *See Doe v. Deschamps*, 64 F.R.D. 652, 653 n.1 (D. Mont. 1974). That is because the plaintiff has chosen to be a plaintiff, in order to obtain some judicial relief, whereas the defendant has not chosen to be a defendant.

likely to infringe again.” The *only* reason that TEAM supplied Doe’s actual name in a court document, was that it hoped to persuade the Court to issue an injunction that named Doe. Response to Motion Summary Judgment, RE54, Pg 2 [sealed]). As TEAM correctly points out, the District Court had indicated that “should plaintiff ultimately prevail in this matter, Doe’s identity will be revealed in the Court’s judgment and grant of relief.” Order re Motion to Compel, RE 48, PgID 1437. But there *was no grant of relief*, and so the Court quite properly did not insert Doe’s name into the Judgment.

C. TEAM Submitted No Competent Evidence That Supports the Conclusion That the Court Abused Its Discretion In Declining to Publicly Identify Doe

TEAM correctly states that, in order to issue a permanent injunction, the District Court must find, among other things, a “substantial likelihood of future infringement” by the defendant, and argues that by “entering an injunction for TEAM, the District Court necessarily concluded that these standards were met.” AOB at 24-25.

But of course, the District Court entered no such injunction. The evidence and arguments submitted by TEAM to show that the District Court abused its discretion in this respect are *precisely the same evidence* and arguments that the District Court considered and rejected in determining whether to issue an injunction. AOB 37-34.

The evidence and arguments do not show that the existence of any material issue of fact as to whether the Court abused its discretion. On the contrary, these arguments highlight that the Court's determination to continue to preserve Doe's anonymity was entirely appropriate.

The evidence submitted by TEAM often bears little relationship to the characterization of that evidence in TEAM's opening brief. Doe did not, for example, "admit that he would have been less likely to commit the infringement" if he had not been anonymous. AOB at 27-28. He said that he "doesn't know what he would have done" in that hypothetical situation. *Id.* TEAM uses the formulation that "Doe does not deny X," which might suggest that he was cross-examined on the subject at his deposition, but the cited evidence shows nothing of the kind. AOB at 28, 29, 30.

But even if TEAM had actually submitted competent evidence that corresponded to its characterizations of the evidence, such evidence would not be sufficient to conclude that the Court abused its discretion in declining to strip Doe of his anonymity.

TEAM argues that it was improper for the District Court to "rely upon Doe's promise" not to infringe again. AOB 34. But this mischaracterizes the Court's ruling. The Court noted that "there is no evidence that defendant has repeatedly ignored Plaintiff's asserted rights, a factor that weighs heavily in finding a

substantial likelihood of future infringement,” and that “plaintiff removed the document shortly after he was informed of [TEAM’s] takedown notice ... and avows that he has no intention to repost the Work [unless he obtains an adjudication from the Court that he may do so], ***and plaintiffs have not presented evidence to the contrary.***” Order re Summary Judgment, RE 56, PgID# 1701 (emphasis added), PgID# 1704.

The Court was thus not relying on a promise, but rather pointing to the evidence (and a lack of evidence) in the record. The record showed that Doe had acted in good faith in promptly seeking an adjudication of his fair use defense. Indeed, Doe had volunteered to accept service and obtain such an adjudication immediately upon learning of the claim in 2013; it was TEAM that refused. There was no evidence that raised a genuine issue of fact as to whether Doe was likely to repost the work in the future. *Rondeau*, 422 U.S. at 61-62 (District Court in evaluating appropriateness of injunctive relief should evaluate defendant’s good faith).

The crux of TEAM’s evidence is that Doe has “animus” toward TEAM; he is not just “critical” of TEAM and its leaders but “attacks them with hatred and vengeance, and seeks to negatively impact their business.” AOB at 28. The “true purpose and effect of the Blog is not to educate people regarding the pitfalls of [multilevel marketing schemes], but to cause harm to TEAM and its leaders.”

AOB at 29. Doe’s “express purpose for the Blog...is to ‘[help people either (1) get out of the business the business or (2) not get started in the business to begin with AOB at 30 (citing RE 54 Exh E [sealed] (page from Amthrax Blog)].

This contention fails as a matter of law. All TEAM has shown is that that Doe has sought to dissuade people from joining TEAM or other multilevel marketers. At no point has TEAM ever contended that such criticisms contain any false or misleading statements. Thus, although TEAM may consider these criticisms to be “attacks,” the District Court correctly ruled that they were fully protected by the First Amendment. Order re Motion to Compel, RE 48, PgID# 1432 (citing *Midland Daily News*, 151 F.3d at 474-75).¹⁴ Thus the District Court’s

¹⁴ The remainder of TEAM’s evidence is similarly insubstantial and raises no issue that the Court abused its discretion.

TEAM sought neither statutory nor actual damages for Doe’s brief act of infringement. It should not be heard, then, to complain that Doe lacks “remorse” for the “damage” he caused. AOB at 30-31. Doe does not believe he caused any damage to TEAM except insofar as his criticisms may have been persuasive to some readers. That kind of damage is fully protected by the constitution.

TEAM’s contention that Doe has infringed other copyrighted materials was properly rejected by the Court, because TEAM had not placed those materials at issue in the case. Order re Summary Judgment, RE 56, PgID# 1701

TEAM’s contention that did not “immediately” remove the book was properly rejected by the District Court, which considered Doe to have removed the book “shortly after he was informed of the takedown notice.” *Id.*,

TEAM’s contention that “Doe deems himself to be the prevailing party” is premised entirely on a legal argument Doe’s counsel made on a motion for attorney fees. Doe Motion Attorney Fees, RE 65, PgID# 1850. This is an argument counsel made in good faith, and, indeed, continues to believe was correct. But it in no way indicates a propensity on Doe’s part to repost the Work.

decision to continue to protect Doe's First Amendment right to anonymity, was fully justified. To have stripped Doe of his anonymity would have chilled public discourse concerning the business practices of TEAM and other multilevel marketers, which is precisely why TEAM sought to achieve that result. The Court did not abuse its discretion in denying TEAM that relief.

Conclusion

For the foregoing reasons, the decision of the District Court to enter Judgment against Doe without disclosing his identity must be upheld.

December 27, 2016

Respectfully submitted,

By: _____/s/_____
Joshua Koltun
Counsel for Appellee-Defendant Doe

Certification of Compliance with Word Limits

Pursuant to FRAP. 32(a)(7), I certify that this brief complies with the type-volume limitation of FRAP. 32(a)(7)(B) because this brief contains 12697 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii); and was prepared in a proportionally spaced typeface using Microsoft Word, in 14 point Times New Roman font.

By: _____/s/_____
Joshua Koltun
Counsel for Appellee-Defendant Doe

Certification of Service

I hereby certify that on December 27, 2016, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing and an electronic copy thereof to counsel of record.

By: _____/s/_____
Joshua Koltun
Counsel for Defendant-Appellee Doe

Designation of Relevant District Court Documents

RE 1 Complaint (PgID# 1-10)

RE 3 Waiver of Service (PgID# 12)

RE 10 Plaintiff's Motion for Partial Judgment on the Pleadings (including Exhibits)
(PgID# 51-187)

RE 13 Defendant's Response to Motion for Partial Judgment on the Pleadings (including Exhibits) (PgID# 191-274)

RE 25 Defendant's Motion for Summary Judgment (PgID# 317-360)

RE 26 Doe Declaration in Support of Summary Judgment Motion (including Exhibits)
(PgID# 361-472)

RE 27 Koltun Declaration in Support of Summary Judgment Motion (including Exhibits)
(PgID# 473-514) – note that some Exhibits are sealed (PgID# unavailable).

RE 34 Order re Plaintiff's Rule 56(d) Affidavit (PgID# 927-929)

RE 35 Pineau Declaration (PgID# 930-942).

RE 37 Opinion and Order Denying Plaintiff's Motion for Partial Judgment on the Pleadings (PgID# 950-974)

RE 40 Plaintiff's Motion to Compel Discovery (including Exhibits) (PgID# 978-1216)

RE 42 Hearing Tr. On Plaintiff's Motion for Partial Summary Judgment (PgID# 1218-1291)

RE 43 Defendant's Response to Plaintiff's Motion to Compel (PgID# 1292-1323)

RE 44 Declaration of Koltun in Response to Motion to Compel (including Exhibits)
(PgID# 1324-1336)

RE 45 Declaration of Doe in Response to Motion to Compel (including Exhibits)(PgID#1337-1353).

RE 46 MacFarland Declaration in Response to Motion to Compel (PageID# 1359-1368).

RE 47 Plaintiff's Reply in Support of its Motion to Compel (PgID# 1369-1410)

RE 48 Order Granting In Part and Denying In Part Plaintiff's Motion to Compel (PgID#1411-1442)

RE 51 Protective Order (PgID# 1458-1461)

RE 54 Plaintiff's Sealed Response to Defendant's Motion for Summary Judgment (including Exhibits) (PgID# not available)

RE 55 Defendant's Reply in Support of Motion for Summary Judgment (including Exhibits) (PgID# 1631-1679)

RE 56 Order Denying Defendant's Motion for Summary Judgment (PgID# 1680-1707)

RE 57 Defendant's Motion for Reconsideration and Response to Proposed Order (PgID# 1708-1728)

RE 58 Doe Declaration in Response to Proposed Order (including Exhibits)(PgID#1729-1736)

RE 59 Koltun Declaration in Response to Proposed Order (including Exhibits) (PgID#1737-1740)

RE 62 Plaintiff's Sealed Motion in Response to Motion for Reconsideration and Order on Motion for Summary Judgment (PgID# not available)

RE 63 Order Denying Defendant's Motion for Reconsideration and Granting In Part and Denying In Part Plaintiff's Motion for Summary Judgment and Injunctive Relief (PgID# 1822-1825)

RE 64 Judgment (ID# 1826)

RE 65 Defendant's Motion for Attorney Fees (PgID# 1827-1859).