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

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

13 Plaintiff,)

14 v.)

15 DOES 1-10, inclusive,)

16 Defendants.)

Case No.: CV 10-5022 LHK HRL

**REPLY MEMORANDUM IN
SUPPORT OF SPECIAL MOTION TO
STRIKE**

) Date: May 12, 2011
) Time: 1:30 am
) Judge: Hon. Lucy H. Koh
) Courtroom: 4

) Filed Herewith:

) Reply in Support of Mot. Dismiss
) Koltun Decl.
) 2nd Request for Judicial Notice

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Introduction

As explained on Reply in support of the Rule 12(b)(6) motion, Defendants' contentions regarding "of and concerning," constitutionally protected "opinion, actual malice, and the Free Exercise privilege as to the defamation and trade libel claims may be considered on that motion. To the extent, however, that this Court determines that they are not properly before the Court on the 12(b)(6) motion, this Court may consider such claims on this Special Motion to Strike. Moreover, as explained below, Plaintiff has failed to show the existence of a triable issue of fact on the defamation, trade libel, or trade secret claims. Since this is true without regard to any evidence Plaintiff proposes to elicit through discovery, this Motion to Strike should be granted forthwith.

I. Plaintiff Does Not Dispute that Defendants Have Met Their Burden of Showing that the Statements at Issue Concern Issues of Public Interest; Since the Stated Purpose of the Disclosure of "Trade Secrets" Was In Furtherance of Discussion of the Same Issues, the Burden Shifts to Defendants

Defendants argued in support of the Motion to Strike that the question whether AoL is a cult an insular and excessively controlling organization, potentially harmful to its members, is an "issue of public interest," and thus that they had satisfied their initial burden under the first prong of C.C.P. section 425.16. MTS, section IA. Plaintiff does not dispute that Defendants have met that burden as to the Defamatory Statements.¹

Plaintiff does dispute, however, that Defendants have met this first prong with respect to the trade secret claims, but they concede that the test is whether "the disclosure of trade secrets furthered the defendant's other protected speech." Opp.MTS at 19:23-25; *see City of Cotati v. Cashman*, 29 Cal. 4th 69, 78 (2002).

Skywalker easily meets Plaintiff's test. Plaintiff contends that his disclosure does not meet that standard, because he "did not publish any additional speech when they disclosed Plaintiff's trade secrets. ... rather the disclosures consisted only of Plaintiff's trade secrets without additional content." *Id.*:19:27-20:2. But Plaintiff ignores the statement that Skywalker made that accompanied the

¹Indeed, shortly after the Motion to Strike was filed the Supreme Court held that comments about "scandals involving the Catholic clergy," including crude comments which, as the Court delicately put it, "may fall short of refined social or political commentary," concern "matters of public import." *Snyder v. Phelps*, 131 S. Ct. 1207, 1216-17 (2011).

1 disclosure of the trade secrets. See MTS at 6 & n.4; S.W. Decl., ¶ 9 RJN, ¶ 5 & Exh E10. That
 2 explanation shows that the stated purpose of the disclosure was the same as all the other Statements –
 3 the disclosure was made as part of the larger effort to show the world that AoL is a cult. Specifically,
 4 the stated purpose was to debunk the notion that Shankar’s “secret” mystical knowledge was so
 5 powerful that it “can be dangerous to people who are not yet ready to assimilate it” and thus has to be
 6 tightly controlled through proper AoL channels, whereas in fact, according to Skywalker, the secrets
 7 are “ramblings” that are so absurd that no one will believe it without some preliminary
 8 brainwashing.” Decl.SW, ¶ 9; RJN, ¶ 5, & Exh. E10, *compare* Complaint at ¶ 95 (disclosure of the
 9 “trade secret” would “tarnish Plaintiff’s teachings ...[and] cause students not to comprehend
 10 Plaintiff’s teachings or for the teachings to result in difficulties for the students”).

11 The burden thus shifts to Plaintiff to demonstrate that the defamation, trade libel, and trade
 12 secret claims are legally sufficient and supported by a prima facie showing of facts supported by
 13 admissible evidence that is not defeated as a matter of law by Defendant’s evidence. *Tuchscher*
 14 *Development Enterprises, Inc. v. San Diego Unified Port Dist.* 106 Cal.App.4th 1219, 1235 (2003).

15 **II. Plaintiff Has Not Shown that the Statements are False**

16 California law requires the Plaintiff to show that defamatory statements are false. *Savage v.*
 17 *Pacific Gas & Electric Co.*, 21 Cal. App. 4th 434, 445 (1993).² The element of falsity incorporates
 18 the requirement that the statements not be constitutionally protected opinion. *Id.* Moreover, it is not
 19 enough for plaintiff to show literal or technical falsity, so long as “the substance, the gist, the sting of
 20 the libelous charge” must be false. *Reader's Digest Assn. v. Superior Court*, 37 Cal. 3d 244, 262
 21 (1984). Where, as here, the statements involve an issue of public concern, the requirement that
 22 Plaintiff prove falsity is imposed by the First Amendment. *Philadelphia Newspapers v Hepps*, 475
 23 US 767, 777 (1986).

24 In opposition to the special motion to strike, Plaintiff has filed a slew of declarations,
 25 purportedly as evidence of the falsity of the Statements. All of these declarations, however, follow the
 26 same form, and all of them suffer from the evidentiary defects and testimonial gaps. As explained

27 _____
 28 ² “Trade libel” is a species of injurious falsehood which, like defamation, requires the publication of a
 false statement. *Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543, 549 (1985).

1 below, none of these declarations creates a triable issue of fact as to the falsity of any of the
2 Statements.

3 ***Statements Addressed Out of Context.*** The declarations, without exception, discuss the
4 Statements in the following form: “I have reviewed the following statement, which I understand is at
5 issue in this litigation,” a Statement is then quoted, and then the declarant declares the statement to be
6 false, often adding additional, purportedly contrary, assertions. There is no indication in the
7 declaration that the declarant has reviewed the Statement in the context in which it appeared in the
8 Blog. The assertions that follow the declaration that the statement are “false” are usually premised on
9 the declarants own (purported) interpretation of the meaning of the Statement. A plaintiff cannot
10 show falsity where the assertion depends on a misinterpretation of the meaning of Defendant’s
11 statement. *Blatty v. New York Times*, 42 Cal.3d 1033, 1046 (1986).³

12 Moreover, to the extent that the Statement often is simply the author’s opinion based on other
13 facts outlined elsewhere in the Blog, the declarant fails to address those underlying facts. In such a
14 case, a failure to deny those underling facts is necessary in order to establish falsity. *See, e.g.,*
15 *Standing Comt. v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995). A conclusory assertion that the
16 Statement is “false,” without stating concrete facts that contradict those underlying facts, is not
17 competent to show that the underlying facts are untrue. *See Davis v. Chicago*, 841 F.2d 186, 189 (7th
18 Cir. 1988)(conclusory statements are not admissible evidence).

19 ***Testimony Limited to United States.*** Without exception, the declarations (contrary to the
20 usage of the Complaint) define the term “Art of Living” to mean “the Art of Living Foundation, a
21 Goleta, California- based non-profit corporation.” For clarity we will refer to this organization herein

22 _____
23 ³ By same token, the assertion of falsity often also depends on the declarant’s assertion that he
24 “understand[s] the ...statement to refer to the Art of Living Foundation, [and] Ravi Shankar [and]
25 students and members of this organization.” Insofar as that statement may be premised on an
26 erroneous conclusion of law i.e. that a Statement about Shankar would reflect badly on AOLFUS and
27 therefore is “of and concerning” AOLFUS contains an erroneous legal premise and thus is
28 inadmissible as well. See ReplyMTD at 8. Needless to say, no quantity of declarations can transform
an unreasonable interpretation of a statement into a reasonable one. Plaintiff has submitted five
identical declarations of AoL students which simply state that they have reviewed “the Blogs” and
“understood the Blogs, and the various statements on the Blogs, as referring to the Art of Living
Foundation, the U.S. organization.” These Declarations make no specific reference to the Statements
that are actually at issue in the case, and thus do not constitute relevant evidence of any kind. *See*
Decls. of Desai, N.Shankar, Srinivasan, Udiavar, Bharathulwar.

1 as “AOLFUS.” Generally speaking the declarants state that they are current or former officers or
 2 directors of AOLFUS. See all Decls., ¶ 1. Since the term “Art of Living” is a defined term of art,
 3 references to “Art of Living” only purport to speak to matters concerning AOLFUS, and no declarant
 4 purports to have any personal knowledge regarding events or circumstances outside the United States.

5 ***No Personal Knowledge At All.*** Indeed, for the most part the declarants do not in any
 6 admissible sense purport to have any relevant personal knowledge at all. Although all of the
 7 declarations state “I have personal knowledge of the matters stated herein,” such a conclusory
 8 statement is insufficient by itself to establish that the declarant had the requisite personal knowledge
 9 to competently testify to particular facts. *United States ex rel. Conveyor Rental & Sales Co. v. Aetna*
 10 *Cas. & Sur. Co.*, 981 F.2d 448, 455 (9th Cir. 1992).

11 For the most part, the only other foundation for the testimony is phrased in the following form,
 12 or words very similar: “***In my experience with Art of Living, I have never learned of any incidents*** in
 13 which teachers took sexual advantage of their students.” See, e.g., Osborne Decl., ¶ 5 (emphasis
 14 added). Often the statement is followed with a statement in the following form, or words very similar:
 15 “***As the former*** President of Art of Living, ***I would have expected to learn about any such***
 16 ***misconduct.***” *Id* (emphasis added).

17 Such a statement is not admissible evidence to show that the misconduct did not occur (in this
 18 example: (here, “teachers take advantage of their status. ... for sex”), because it is not based on
 19 personal knowledge. A witness may testify that some event did not occur, but only if the witness
 20 testifies that he was in a position to have witnessed it by his own senses if it had occurred. *Shawmut*
 21 *Bank, N.A. v. Kress Assocs.*, 33 F.3d 1477, 1500-1501 (9th Cir. 1994); see also *United States v.*
 22 *Borelli*, 336 F.2d 376, 392 (2d Cir. 1964)(testimony about impression of what “must have been” is
 23 inadmissible where not derived from sensory experience rather than hearsay or speculation). Thus, for
 24 example, testimony that “I was standing on the corner of Turk and Taylor when a woman pulled out a
 25 gun and began firing, and she did not state that she was a police officer,” is admissible on the issue of
 26 whether the officer identified herself. By contrast, testimony that “I am the Chief of Police, and I
 27 expect my undercover officers to shout ‘*Police!*’ when they draw their weapons, and I would expect to
 28 hear about it any of them ever failed to do so, and I have never heard of such misconduct,” is not

1 admissible evidence that no undercover officer has ever failed to identify herself when drawing a
2 weapon.⁴

3 Given the foregoing testimonial gaps and evidentiary defects, Plaintiff has failed to show the
4 falsity of the Statements. Consider the following example. Osborne testifies that Statement F (“*The*
5 *‘dollar a day’ program was started in the US. The money never went to that cause*”) is false, because:

6 The Dollar a Day program is a charitable program, which seeks to assist children in the
7 poor regions surrounding Bangalore, India. Art of Living collects money in support of
8 the Dollar-a-Day program. Art of Living uses the money it collects for the Dollar-a-
9 Day Program to support the charitable objective.

10 Osborn Decl., ¶ 6. As explained on the Motion to Dismiss, however, reading the statement in
11 context, it cannot be read as accusing AOLFUS of wrongdoing. Rather, it indicates that a person in
12 India was tricking “westerners” into believing that particular dollars they donated were going to
13 particular children’s whose pictures they received, whereas in fact there was not necessarily any
14 connection between a particular donation and a particular child. See MTD at 10. Significantly,
15 Osborne’s testimony does not, in fact, actually contradict Statement F – he does not say that particular
16 dollars donated went to the particular children depicted in the pictures. Moreover, he does not
17 actually purport to have any personal knowledge, or even an opinion as to what actually happens in
18 Bangalore, India to the money AOLFUS “collects in support of the charitable objectives.” In any
19 event, any knowledge he would have would be hearsay. Indeed, AOLFUS tells the Internal Revenue
20 Service that the dollar a day program consists of grants made to nonprofit organizations in India, and
21 that AOLFUS’s knowledge of what happens to those grants is based on “narrative reports, accounting
22 for funds spent, project reporting information, and pictures monitoring grant activities [received] from
23 recipients.” 2d. RJN, ¶ 2, Exh. B, p. 2, 21, 24.

24 Indeed, there is nothing in any of the testimony of any of Plaintiff’s witnesses that shows that
25 they are competent to testify as to what happens to any of the money donated by or through AOLFUS
26 once it leaves the United States and goes to its grant recipients in India, Iraq and Switzerland. *Id.*, p.
27 21. And there is certainly no testimony that directly contradicts the underlying facts that Klim

28 ⁴ It is interesting that none of the declarants testifies that Art of Living Foundation has a policy against sexual harassment or any procedure for reporting or investigating misconduct, although the existence of such a policy would not cure the evidentiary defects discussed herein.

1 outlined as raising the suspicion that a disappointing proportion of funds actually went to the vaunted
 2 “service” projects – namely, that that he keeps seeing the same pictures over and over but has never
 3 seen a financial report showing where the money went. *See* MTD at 16.⁵

4 **III. Plaintiff Has Not Shown That It Has Suffered any Actual Damages**

5 As Plaintiff concedes, on the trade libel claim it is required to show that it has suffered special
 6 damages. *Opp.MTS*, 19:3. The distinction between the damages that can be recovered on a trade
 7 libel claim and a defamation claim is “negligible,” however, where the plaintiff is a corporation, since
 8 a corporation suffers no hurt feelings or emotional distress and thus “may only recover actual damages
 9 in the form of lost profits.” *Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, 1156 (D.C. Cir.
 10 1985). There is really no distinction between a corporations’ “interest in its reputation (which would
 11 be vindicated by a defamation action showing lost profits) and its pecuniary interest in its products
 12 (which would be vindicated by an injurious falsehood action requiring pecuniary harm).” *Id.* In any
 13 event, where, as here, the statements at issue relate to matters of public concern, Plaintiff is limited to
 14 recovering its actual losses, unless it can establish that the statements at issue were made with “actual
 15 malice.” *Gertz v. Robert Welch., Inc.*, 418 U.S. 342, 349-50 (1974) (private figure must show actual
 16 malice to recover presumed damages); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 763
 17 (1985)(*Gertz* rule on presumed damages is good law at least as to matters of public concern).⁶

18 _____
 19 ⁵ *See also* Rosenfeld Decl., Exh. G, p 6 (complaining about the murkiness surrounding the legal and
 20 charitable status of, and interconnections between, various AOL chapters and related AOL entities);
 RJN at Exh. E8 [rjn 286] response to Klim posted by chairman of AOL Netherlands: “its none of your
 business to ask for the finances.”)

21 ⁶ Defendants have shown that that Plaintiff, the larger AOL movement, and Ravi Shankar are public
 22 figures, at least limited public figures on the issues issues of public concern discussed in the blogs.
 23 *See* MTD at _____. Plaintiff’s conclusory declarations that it media access is “limited,” that it “seeks to
 24 establish a larger media presence,” and has not used “the media” to respond to the Statements, in no
 25 way negates Defendants’ showing. *Opp.MTS* at 17:14-23. The issue is whether
 Plaintiff/AOL/Shankar has thrust itself before the public as a putatively humanitarian organization
 promoting a therapeutic technique of benefit to all humanity, not whether the organization is satisfied
 with the level of media attention it has received.

26 Moreover, the public/private figure distinction of *Gertz* itself relied upon the media landscape
 27 that existed at the time. The Court began with the premise that “the first remedy of any victim of
 28 defamation is self-help,” and that public figures enjoy significantly greater access to the channels of
 effective communication than private figures. *Gertz*, 418 U.S. at 344 (1974). But the present case
 involves a different media environment, in which the defendant is not a large media company against
 which only the most public of figures might hope to avail itself of the remedy of self help. On the
 contrary, in the present internet environment, Plaintiff is at the very worst on the equal footing

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

16 **IV. Plaintiff has Failed to Show That Any Defendant Disclosed a Protectable Trade Secret**

17 **A. The Only Evidence That Any Defendant Has Disclosed the any Documents is**
 18 **Skywalker's Declaration; If, as Plaintiff Requests, that Declaration is Excluded in**
 19 **Its Entirety, the Trade Secret Claim Must be Stricken.**

20 Plaintiff has submitted no evidence to show that any Defendant has disclosed its trade secrets.
 21 The only evidence on the subject is Skywalker's Declaration, who admits that he briefly posted certain
 22 documents on his BAOL Blog. SW Decl., ¶ 9. Opp.MTS at 5:9-8-10 (relying solely on Skywalker
 23 Declaration to show that Skywalker "(possibly with other Defendants)" posted Plaintiffs' trade
 24 secrets.) Plaintiff has objected to Skywalker's declaration in its entirety, and asked the Court to

25 contemplated of a public figure and media company in *Gertz*. Where, as here, the defendants have
 26 disseminated their message over the internet and Plaintiff and its supporters have an equal opportunity
 27 to do the same, where indeed, the defendant's internet forum (a blog) itself invites comments and
 28 postings by opponents and expressly links to opposing websites, plaintiffs should be held to the *Gertz*
 actual malice standard. This is true *a fortiori*, where, as here, the plaintiff actually has a very
 substantial presence both on the internet and in "old" media. *See also McNair v. Worldwide Church*
of God, 197 Cal. App. 3d 363, 377 (1987)(extending *Gertz* actual malice requirement to defamation
 allegedly committed by religious minister in discussion of religious matters).

1 exclude it in its entirety. Opp.MTQ at 6:10-18. If the Court excludes the Skywalker Declaration, it
 2 should strike the Trade Secret claim. In any event, it should strike the trade secret claim as to all other
 3 Doe Defendants, as there is no evidence, or even any suggestion of any reason to believe, that other
 4 Defendants disclosed Plaintiff's trade secrets.

5 **B. Plaintiff has Failed to Define the Trade Secret with the Required Particularity**

6 Plaintiff has served their disclosure of trade secret under C.C.P. section 2019.210, whereby
 7 Plaintiff defines the trade secrets as *being* four documents, which are apparently the Manuals and
 8 Principles referred to in the Complaint. See Complaint, ¶ 39-40; Decl. Dhall, Exhs. A-D; Koltun
 9 Declaration, ¶ 1 & Exh. A. Significantly, these documents *do not* correspond exactly, and in some
 10 cases do not correspond *at all* to the documents that Skywalker testified that he (briefly) posted on the
 11 BAOL Blog. Plaintiff does not address the discrepancy between the documents Skywalker disclosed
 12 and the documents it claims are its trade secrets.

13 Significantly, Plaintiff does not specify *anything in particular* within the over 200 pages filed
 14 as attachments to the 2019.210 designation. In other words, in each case *the entire work* is defined as
 15 a trade secret. But C.C.P § 2019.210 requires the trade secret to be pled with "sufficient particularity
 16 to separate [the secret] from matters of general knowledge in the trade or of special knowledge of
 17 those persons who are skilled in the trade, and to permit the defendant to ascertain at least the
 18 boundaries within which the secret lies." *Diodes, Inc. v. Franzen*, 260 Cal. App. 2d 244, 253 (1968).
 19 The requirement of defining one's trade secret with particularity cannot be met by being over-
 20 inclusive. On the contrary, as one Court has explained:

21 [Plaintiff] is not entitled to include broad, "catch-all" language as a tactic to preserve
 22 an unrestricted, unilateral right to subsequently amend its trade secret statement. If
 23 [Plaintiff] does not know what its own trade secrets are, it has no basis for suggesting
 24 defendants misappropriated them. Nor is [Plaintiff] entitled to hide its trade secrets in
 25 "plain sight" by including surplusage and voluminous attachments in its trade secret
 26 statement.

27 *Perlan Therapeutics, Inc. v. Superior Court*, 178 Cal. App. 4th 1333, 1350 (2009).

28 That, of course, is precisely what Plaintiff has done here. No effort has been made to separate
 out that which is generally known in the Yoga community, including information that has been
 published on Plaintiff's own websites or in the "scientific" materials that have been published

1 concerning Sudarshan Kriya, or in accounts of Plaintiff's classes that have been published in the
 2 popular press. *See, e.g.*, Koltun Decl., ¶ 2 Exh. B (Yoga Journal article). Nor indeed has any effort
 3 been made to sort out that which is utterly innocuous from that which can genuinely be claimed to
 4 have some independent economic value.

5 Plaintiff relies on *Religious Technology Center v. Netcom Online Comm. Ser.*, 923 F. Supp.
 6 1231 (N.D. Cal. 1995) for the proposition that "religious and spiritual texts" may be protected as trade
 7 secrets. Opp.MTS at 20:17-23. In that case the Court recognized that in principle, the "techniques for
 8 spiritually improving oneself" could in principle be a trade secret, but the burden is on the plaintiff to
 9 define the "secret aspect of those techniques ... with particularity." *Id.* at 1252. A major reason for
 10 this requirement is that it enables the defendant to demonstrate what portions of the supposed secret
 11 have lost their secrecy and become known. *Id.* There, as here, however, the Church of Scientology
 12 claimed "the entire works themselves" as the trade secret. *Id.* The Court ruled that the Church had
 13 failed to define the trade secret with particularity and denied relief on the trade secret claim. *Id.*

14 On a motion for summary judgment, the Plaintiff may only seek to support such trade secret
 15 claims as have been defined with such reasonable particularity in the section 2019.210 disclosure.
 16 *Pixion, Inc. v. Placeware, Inc.* 421 F. Supp. 2d 1233, 1242 (N.D. Cal. 2005). It is the burden of the
 17 plaintiff to "identify the trade secrets and carry the burden of showing that they exist." *Imax Corp. v.*
 18 *Cinema Techs.*, 152 F.3d 1161, 1164 (9th Cir. Cal. 1998).

19 Thus where, as here, Plaintiff fails to define the trade secret with particularity, defendant is
 20 entitled to summary judgment. *Id.* at 1168. As in *Religious Technology Center*, plaintiff is not
 21 permitted to overdesignate its "trade secret" and thus seek to impose an impossible burden on
 22 Defendants to prove there is no "trade secret" needle with that haystack.

23 **C. Defendant Has Failed to Show That It Took Adequate Measures to Protect the**
 24 **Secrecy of the Manuals and Principles**

25 The declaration Plaintiff has submitted in support of its trade secret claims – as with all such
 26 declarations -- uses the term "Art of Living" to refer to AOLFUS and does not purport to have any
 27 knowledge outside of AOLFUS. Certainly they do not affirmatively indicate that there is any central
 28 authority ensuring the confidentiality policies regarding documents throughout the world – which

1 Skywalker specifically denies. *See* Decl. SW, ¶ 6. There is no dispute, moreover, that the Trade
 2 Secrets at issue are used within the international Art of Living Foundation and its various national
 3 chapters around the world. Indeed, the takedown notice that is referred to in the Complaint, ¶ 71 and
 4 which is incorporated by reference, emanated from one of AoL’s entities in India. SW Decl., ¶ 10 &
 5 Exh. F. And, as noted, the documents disclosed by Skywalker are different in many respects from the
 6 documents alleged to be trade secrets. For this reason alone, Plaintiff has failed to show that adequate
 7 (i.e. worldwide, effective) measures have been taken.⁷

8 In any event, even in describing the confidentiality policies within AOL/FUS, Plaintiff’s
 9 “evidence” is wholly conclusory and inadequate to show that Plaintiff took reasonable measures to
 10 protect the secrecy of materials. The testimony variously states that persons obtaining access to the
 11 Manuals and Principles “agree to maintain confidentiality,” or “are instructed that the information
 12 they receive must be kept in strict confidence,” or that they must “agree not to disclose” such
 13 information and/or “requires its student-teachers to keep those materials confidential.” Dhall Decl., ¶¶
 14 32-36. Whether these agreements and/or requirements and/or instructions are conveyed in writing or
 15 orally, and/or whether student-teachers actually assent to such agreements; and if so, how, is not
 16 stated. Nor is there any testimony concerning how these policies are enforced, and is utterly silent as
 17 to when any relevant policies began. [Note that the “CONFIDENTIAL” Designation on Dhall Exhs
 18 A-D were added by Counsel in accordance with the Protective Order in this action.]

19 Significantly, Plaintiff does not submit the language of these policies or agreements, so it is
 20 impossible for the Court to determine whether the wording of these policies/agreements is susceptible
 21 to a less restrictive interpretation than that given to it by the witness. The language is important
 22 because the First Amendment counsels against interpreting an agreement as restricting information
 23 when it is susceptible to another interpretation. *Wildmon v. Berwick Universal Pictures*, 803 F. Supp.

24 _____
 25 ⁷ *Cypress Semiconductor Corp. v. Superior Court*, 163 Cal.App.4th 575, 588 (2008) does not stand for
 26 the proposition, as Plaintiff suggests, that so long as Plaintiff has taken reasonable steps to protect its
 27 trade secret, it remains a trade secret even after a third party wrongfully disclosed it to the public.
 28 That discussion Plaintiff cites relates to the running of the statute of limitations, not the issue of
 whether trade secret status can be lost because of the acts of a third party. The rule is that a “if the
 allegedly proprietary information ... was already public knowledge when [Defendant] posted [it] to
 his Web site, [Defendant] could not be liable for misappropriation by republishing it.” *DVD Copy
 Control Assn., Inc. v. Bunner*, 116 Cal. App. 4th 241, 252 (2004)

1 1167, 1178 (N.D. Miss.) *aff'd*, 979 F.2d 209 (5th Cir. 1992).⁸

2 ***D. Plaintiff Has Failed To Show That The Manuals and Principles Have Any***
 3 ***Independent Economic Value By Virtue of the Secrecy.***

4 To be a trade secret, the information must “[d]erive[] independent economic value, actual or
 5 potential, from not being generally known to the public.” Cal. Civ. Code §3426.1(d)(1). Assuming,
 6 arguendo, that the Manuals and Principles were really maintained as a secret, Plaintiff has to show not
 7 only that the Trade Secrets had some value, but that the value derives from the information not being
 8 known. *Buffets, Inc. v. Klinke*, 73 F.3d 965, 969 (9th Cir. 1996). This Plaintiff has failed to do.

9 The closest Plaintiff comes to attempting to establish this element is the following conclusory
 10 statement:

11 Art of Living distinguishes its courses from other [organization’s breathing, yoga, and
 12 meditation] courses by requiring the specialized training of its teachers. The training of
 Art of Living’s teachers results in a direct financial benefit to Art of Living in the form
 of course fees.”

13 Dhall Decl., ¶¶ 20-22. Mr. Dhall does not purport to have any knowledge of other organization’s
 14 courses, nor does he specify in any way what it is in the “specialized training” that differentiates the
 15 course from other courses. Significantly, the declaration is broadly worded so that “specialized
 16 training” may refer to the fact that the training is properly transmitted under the religious authority of
 17 the Guru. *See* Dhall Decl., ¶ 35 (secrecy “preserve[s] a) the well-being of their students and b) the
 18 preservation of the integrity of Art of Living’s teachings.”), Exh. D, p. 2 & 3 (describing transmission
 19 of knowledge under aegis of Guru in tradition of other Masters); Complaint, ¶ 95 (secrecy designed to
 20 prevent “tarnishing” of Plaintiff’s teachings, “caus[ing] students not to comprehend Plaintiff’s
 21 teachings or “result[ing] in difficulties for the students”). In other words, the “specialized training”
 22 may be precisely that which that the Ninth Circuit Court of appeals has determined **cannot** be the
 23 basis of claiming a protectable trade secret – training to prevent “the unsupervised, premature
 24 exposure of an adherent to these materials will produce a spiritually harmful effect.” *Religious*

25
 26 ⁸ Indeed any such policy or agreement is contrary to public policy. Plaintiff’s attempt to distinguish
 27 *Bindrim v. Mitchell* is not well taken. *Id.* 44 Cal.App. 3d 61, 69 (1979), see Opp.MTS at 24:16-20,
 28 That case did not involve “professional medical services” except in the loosest possible sense – it
 involved nude encounter sessions. Plaintiff cannot distinguish itself on that basis, given the
 “scientific” claims it puts forth as to therapeutic benefits of Sudarshan Kriya. *See* RJN, ¶ 9 & Exhs. I.

1 *Technology Center v. Wollersheim*, 796 F.2d 1076, 1077, 1091 (9th Cir. 1986). This Court should
 2 avoid adjudicating any issues concerning the putative value of such training, because to do so would
 3 requires an adjudication of claims concerning the integrity or validity of the transmission of religious
 4 knowledge, faith or power. *Maktab Tarighe Oveysi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244,
 5 1250 (9th Cir. Cal. 1999).

6 Moreover, let us assume for the moment that it were somehow permissible for this court to
 7 “filter out” such religious matters of faith . Applying such a secular filter reveals the Manuals and
 8 Principles seem to be an utterly innocuous collection of trite advice. They are similar to the cooking
 9 manuals in *Buffets, Inc.*, , which “contain little more than such food service truisms as ‘when tasting
 10 foods, never use a cooking utensils [sic]” and “follow each recipe exactly.” *Id.*, 73 F.3d 965, 969.
 11 “The alleged secrets here at issue were found to be so obvious that very little effort would be required
 12 to ‘discover’” them.” *Id.* at 968 (upholding grant of summary judgment); *accord Yield Dynamics, Inc.*
 13 *v. TEA Systems Corp.*, 154 Cal. App. 4th 547, 564-565 (2007) (information must be sufficiently
 14 valuable to afford an actual or potential economic advantage over others; the information must not be
 15 trivial). Plaintiffs have failed to show that the Manuals and Principles have independent economic
 16 value derived from secrecy.

17 **V. *Plaintiff is Not Entitled to a Continuance to Conduct Discovery, Since the Discovery It***
 18 ***Seeks Would Not Change the Outcome***

19 Plaintiff contends that the Motion to Strike should be denied, at least temporarily, under Rule
 20 56 (d), so that it can seek information “essential” to its claims. Plaintiff contends that it is entitled to
 21 learn the identities of each Doe Defendant and to take discovery of each of them as to their “state of
 22 mind.” Opp.MTS at 7:7-14.

23 This information is, at most, relevant only to the question of actual malice and to each
 24 Defendant’s liability under Section 230 of the Communication Decency Act. But before reaching
 25 those issues this Court may well decide that none of the Statements are actionable, on the grounds that
 26 Plaintiff has failed to show that each of the statements meets all of the following criteria: it is (i) “of
 27 and concerning” AOLFUS, (ii) a verifiable assertion of fact, (iii) unprivileged on Free Exercise
 28 grounds, and (iv) false. In that event the discovery would not be “essential” and Plaintiff would not

1 be entitled to forestall the granting of the motion to strike. *Tatum v. City & County of San Francisco*,
 2 441 F.3d 1090, 1100 (9th Cir. 2006)(non-movant cannot obtain continuance unless it identifies
 3 specific facts that discovery would reveal and explained why discovery of such facts would preclude
 4 summary judgment); *California ex rel. California Dep't of Toxic Substances Control v. Campbell*, 138
 5 F.3d 772, 779 n. 8(9th Cir. 1998) (nonmovant must set forth in affidavit specific facts, not conclusory
 6 statements, showing how the information they hope to obtain from discovery would be “essential” to
 7 defeating summary judgment.) ; *see also Paterno v. Superior Court*, 163 Cal. App. 4th 1342, 1351
 8 (2008)(on special motion to strike, Plaintiff cannot obtain discovery of actual malice without first
 9 making prima facie showing of falsity and lack of privilege). The same is true if Plaintiff is unable to
 10 establish that Skywalker disclosed any documents that constitute protectable trade secrets. *See also*
 11 *D.A.R.E. AMERICA v. Rolling Stone Magazine*, 101 F. Supp. 2d 1270, 1278 (C.D. Cal.
 12 2000)(“summary judgment is a favored remedy in defamation and invasion-of-privacy cases due to
 13 the chilling effect of protracted litigation on First Amendment rights”).

14 Moreover, even if any claims survive against Skywalker and/or any of the pseudonymous
 15 authors of the Statements, there may be one or more Defendants that are entitled to prevail on this
 16 Motion to Strike. As explained on the Motion to Quash, all Doe Defendants have countervailing First
 17 Amendment rights to protect their anonymity. Thus if the Court were to grant the Motion to Strike
 18 only as to certain statements and not as to others, there may well be Defendants as to whom Plaintiff
 19 is not entitled to discovery. Certainly Plaintiff should not be allowed to take strip persons of their
 20 First Amendment right to anonymity based on conclusory pleadings in which every act was done by
 21 “Defendants,” or which claim, “on information and belief,” that all of the Defendants “is in some way
 22 liable and responsible to Plaintiff based on the facts herein alleged.” Complaint, ¶ 6, 15. This is
 23 particularly true since in order to show that it is entitled to take discovery of an anonymous speaker,
 24 Plaintiff must show that it has suffered “real harm,” which, as explained above in section III, Plaintiff
 25 has failed to do here.” *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969, 970-971 (N.D. Cal.
 26 2005)⁹

27 _____
 28 ⁹ Plaintiff’s claim that CDA section 230 does not apply to the trade secret claim is mysterious.
 OppMTS at 24:5-6. As Plaintiff rightly states, *Perfect 10, Inc. v. CC Bill LLC*, 481 F.3d 751, 767-68

1 It is not possible to consider all possible permutations regarding discovery in advance of this
 2 Court's ruling on the merits of the issues presented here. However, Defendants respectfully urge that
 3 in the event that that Plaintiff has produced a *prima facie* showing of the other elements of this claim,
 4 and that Plaintiff is entitled to a continuance to take discovery of one or more Doe Defendants on the
 5 issue of actual malice, the Court should exercise its discretion to control discovery in the case and
 6 permit Defendants to take discovery first on the falsity issue, and permit (any remaining) Doe
 7 Defendant to renew the motion for summary judgment, prior to allowing discovery on the issue of
 8 actual malice. *See Weyrich v. New Republic, Inc.*, 235 F.3d 617, 628 (D.C. Cir. 2001); MTQ at 7.

9 It is particularly appropriate for the court to bifurcate discovery here, where the First
 10 Amendment rights of anonymous speech and religious association are so clearly implicated. In this
 11 respect it is highly significant that Subpoena that Plaintiff obtained the permission of this Court to
 12 serve ***did not seek the identity of the authors of Statements F, G, H, L, N, O, or Q*** (i.e.,
 13 anwer@freefall, anyone using the "Anonymous" moniker, Ronin or Former AoL Patient). *See Decl.*
 14 Kronenberger in Supp. Mot. Expedited Discovery (Docket 6). The strong inference is that Plaintiff
 15 filed the Complaint for the sole purpose of using this Court's subpoena powers to learn the identity of
 16 certain persons, not for the purpose of actually pursuing its claims on the Statements identified in the
 17 Complaint.

18 Moreover this Court should resist the request to allow discovery of Defendants' identities,
 19 where Plaintiff's request is premised on an erroneous understanding as to what constitutes actual
 20 malice. "Actual malice" (or "constitutional" malice) is a term of art which requires that the defendant
 21 must have made the false publication with a 'high degree of awareness of . . . probable falsity,' or must
 22 have 'entertained serious doubts as to the truth of his publication' *Solano v. Playgirl, Inc.*, 292 F.3d
 23 1078, 1084-1085 (9th Cir. 2002). Contrary to the repeated assertion of Plaintiff, constitutional/actual
 24 malice cannot be equated to the common law usage of the term "malice" to mean hatred or ill will.
 25 *See id.* (constitutional malice requirement is not satisfied by showing "ill will or 'malice' in the
 26 ordinary sense of the term"); *see also D.A.R.E. America v. Rolling Stone Magazine*, 101 F. Supp. 2d

27
 28 (9th Cir. 2007) held that the exception in section 230 for "intellectual property" only applies to federal
 intellectual property laws. Opp.MTS at 25:10. Plaintiff's trade secret claim is a state law claim.

1 1270, 1286 (C.D. Cal. 2000)(Plaintiffs argument that "the motive to write a story with a particular
 2 slant is circumstantial evidence which, combined with other evidence, may amount to [actual] malice"
 3 is incorrect.); *compare* Opp.MTD at 10:24-28. ¹⁰ Contrary to Plaintiff's argument, actual malice
 4 cannot be shown here on the grounds that the "allegations [in the Statements] are so serious that they
 5 are inherently improbable." Opp.MTS 18:3-6, 9-12. There is absolutely nothing "improbable" about
 6 financial, sexual or other misconduct in a humanitarian, educational, religious or spiritual
 7 organization. Indeed, and sadly, such misconduct is commonplace. Thus this case is nothing like
 8 *Nguyen-Lam v. Cao*, which involved the inherently improbable allegation that a person who had fled
 9 Vietnam as a refugee after the Communist takeover of that country was a Communist. *Id.*, 171
 10 Cal.App. 4th 858, 869. Where plaintiff's request to defer deciding a motion to strike so it can seek
 11 discovery on the actual malice issue is premised on erroneous theories as to what constitutes actual
 12 malice, the request should be denied. *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1111 (ND.Cal. 1999).

13 Thus the motion to strike should be granted forthwith.

14 Dated: April 6, 2011

_____/s_____
 Joshua Koltun
 Attorney for Defendants Klim and Skywalker

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26 ¹⁰ *Kelly v. Gen. Tel. Co.*, 136 Cal.App.3d 278, 285 (1982), relied upon by Plaintiff, is not to the
 27 contrary. That case is discussing a qualified privilege under Civ.Code 47(3), which codifies a
 28 common law privilege, and which incorporates an exception to that privilege where common law
 malice (hatred or ill will) is shown. The discussion there has nothing to do with the "actual malice"
 requirement imposed by the First Amendment.