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9
 10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN FRANCISCO DIVISION

13 CASE NO.: 4:20-mc-80214-VC

14 IN RE DMCA § 512(h)
 15 SUBPOENA TO TWITTER, INC.

16 **PETITIONER BAYSIDE ADVISORY
 17 LLC'S OPPOSITION TO TWITTER'S
 18 MOTION FOR DE NOVO
 19 DETERMINATION OF DISPOSITIVE
 20 MATTER REFERRED TO MAGISTRATE
 21 JUDGE**

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 Hearing Date: May 12, 2022
 Time: 1:00 p.m.
 Judge: Hon. Vince Chhabria
 Courtroom 4, 17th Floor

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1 **I. INTRODUCTION**

2 Judge Ryu was correct to deny Twitter’s motion to quash (“MTQ”) and grant Bayside’s
3 motion to compel (“MTC”). Article I of the Constitution requires Congress to protect copyrights
4 by appropriate legislative action. U.S. Const. Art. 1, § 8, cl. 8. In 1998, confronting the growth of
5 the Internet, Congress enacted the Digital Millennium Copyright Act “to facilitate cooperation
6 among Internet service providers and copyright owners to detect and deal with copyright
7 infringements that take place in the digital networked environment.” *Ellison v. Robertson*, 357
8 F.3d 1072, 1076 (9th Cir. 2004) (quoting S. Rep. 105–190, at 20 (1998)). Copyright infringers
9 like @CallMeMoneyBags (“MoneyBags”) may not hide behind anonymity to shield their
10 infringements. And, social media companies like Twitter may not benefit from the liability
11 exemptions of the DMCA and then refuse to comply with a DMCA subpoena by claiming that
12 the infringer’s use was fair. Granting Twitter’s motion to quash would nullify Bayside’s
13 constitutional and statutory rights by effectively denying it any remedy for copyright
14 infringement.

15 As required by Section 512(h) of the DMCA, Bayside seeks to identify an infringer for
16 the limited purpose of enforcing its copyrights. In this pretrial phase, after Twitter received a
17 Notice of Claimed Infringement from Bayside, then took down the infringing photographs, and
18 received no “put-back” request from MoneyBags, Twitter’s only obligation was to comply with
19 the lawfully issued 512(h) subpoena. Twitter took it upon itself to file the motion to quash but
20 has failed conclusively to carry its burden of persuasion to demonstrate why it shouldn’t have to
21 comply with the lawfully issued subpoena. But Twitter merely speculates as to why the Court
22 should deny a copyright owner the right to identify an infringer in order to bring suit. Twitter
23 hasn’t even heard from MoneyBags asking for it to maintain its anonymity. Instead Twitter has
24 assumed the role of the protector of the alleged infringer, while not accepting any liability for
25 refusing to comply. The Ninth Circuit instructs courts to provide plaintiffs like Bayside with the
26 ability to identify unknown defendants in protecting its copyrights. (Dkt. 9 at 4). *Gillespie v.*
27 *Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980).

28 Twitter now seeks through this Motion to deny Bayside its right to identify and sue the

1 infringer even though (a) Twitter does not have standing to assert MoneyBags’ rights; (b)
 2 Bayside’s 512(h) subpoena to Twitter (the “Subpoena”) does not suppress free speech; (c)
 3 Bayside has shown good cause to obtain MoneyBags’ identity, including establishing a prima
 4 facie case of infringement; (d) Section 512(h) does not authorize a court to consider fair use in
 5 enforcing the Subpoena; (e) even if it did, Judge Ryu was correct that MoneyBags’ use of the
 6 infringing photographs was not fair use; (f) the test in *Highfields* does not apply to copyright
 7 cases, and even if it does, Judge Ryu was correct that MoneyBags’ right to remain anonymous
 8 must give way to Bayside’s right to use the judicial process to pursue a meritorious copyright
 9 infringement claim; and (g) Twitter’s motion to quash was untimely.

10 Importantly, Twitter presents no evidence to support any of its assertions, instead relying
 11 on pure speculation as to MoneyBags and the copyright owner. Judge Ryu correctly attempted to
 12 obtain such evidence directly from MoneyBags, allowing it an additional 30 days to specially
 13 appear anonymously, but MoneyBags, according to Twitter, refused. Without MoneyBags’ in-
 14 camera appearance before Judge Ryu, Judge Ryu (and now this Court) could only have denied
 15 Twitter’s motion to quash. Bayside only seeks a remedy to vindicate its copyrights against the
 16 alleged infringer. The process to identify the alleged infringer by subpoena is clearly delineated
 17 in 512(h), and Bayside’s subpoena does not infringe on MoneyBags’ First Amendment rights.
 18 Thus, Twitter’s objections to Magistrate Judge Ryu’s sound decision should be overruled.

19 **II. RELEVANT PROCEDURAL BACKGROUND**

20 In addition to the facts set forth in the Court’s decision (Dkt. 21), Bayside notes the
 21 following facts relevant to Twitter’s objections to the Judge’s Ryu’s decision (Dkt. 9; 17):
 22 Bayside is a communications and strategic advisory firm that, among other things, acquires and
 23 licenses photographs for commercial exploitation. MoneyBags never filed a counter-notice under
 24 Section 512(g). After Twitter removed the Photographs, the text and the hashtags of the tweets
 25 remained publicly accessible. Upon receipt of the Subpoena, Twitter sent notice and a copy of it
 26 to MoneyBags. The Subpoena compliance date was December 18, 2020. Twitter failed to
 27 comply, instead objecting on December 14, 2020. Twitter filed its MTQ without notice on
 28 January 23, 2021, making it untimely. (Dkt. 9 at 2-4).

1 **III. ARGUMENT**

2 **A. Twitter Does Not Have Standing to Bring The Motion.**

3 Contrary to its assertions, Twitter does not have standing to assert its users' First
 4 Amendment rights. Indeed, Twitter admits that no authority supports its position (Mot. at 5) and
 5 cites no copyright case where the service provider had standing to assert its user's rights. "In the
 6 ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a
 7 claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410
 8 (1991). "The purpose of this requirement is twofold: (1) to avoid adjudicating rights a third-party
 9 may not wish to assert; and (2) to ensure effective advocacy." *Viceroy Gold Corp. v. Aubry*, 75
 10 F.3d 482, 488 (9th Cir. 1996) (citing *Singleton v. Wulff*, 428 U.S. 106, 113–14 (1976)). There are
 11 certain, limited exceptions to this rule. "We have recognized the right of litigants to bring actions
 12 on behalf of third parties, provided three important criteria are satisfied: The litigant must have
 13 suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the
 14 outcome of the issue in dispute; the litigant must have a close relation to the third party; and
 15 there must exist some hindrance to the third party's ability to protect his or her own interests."
 16 *Powers*, 499 U.S. at 410-11 (internal citation omitted); accord *McCollum v. Cal. Dept. of Corr.*
 17 *and Rehab.*, 647 F.3d 870, 879 (9th Cir. 2011).¹ Failure of a litigant to demonstrate all of these
 18 factors precludes Twitter from acting on behalf of MoneyBags. *Legare v. Cal. Dep't of Corr.*
 19 *and Rehab.*, 2020 WL 5257603, at *4 (E.D. Cal. 2020); *SurvJustice Inc. v. DeVos*, 2018 WL
 20 4770741, at *8 (N.D. Cal. Oct. 1, 2018). Twitter has proven none of these.

21 First, Twitter has failed to establish how *it* would be injured from the disclosure of
 22 MoneyBags' identity. To establish injury in fact, Twitter must show that *it* suffered an invasion
 23 of a "legally protected interest" that is "concrete and particularized," "actual or imminent, not
 24 conjectural or hypothetical," *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016), "personal" to
 25 Twitter and "distinct and palpable," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), and "specific
 26 _____

27 ¹ Twitter does not allege an injury in fact sufficient to make out a case or controversy under
 28 Article III. See *Fleck and Assocs., Inc. v. Phoenix, City of, an Ariz. Mun. Corp.*, 471 F.3d 1100,
 1105 (9th Cir. 2006) (plaintiff's attempt "to champion the liberty interests of its customers"
 insufficient to establish a cognizable personal injury).

1 [and] objective,” *Laird v. Tatum*, 408 U.S. 1, 14 (1972); *see also McGowan v. State of Md.*, 366
 2 U.S. 420, 429 (1961) (declining standing to third parties who alleged “only economic injury to
 3 themselves” and did not allege any infringement to their own First Amendment rights: “the
 4 general rule is that a litigant may only assert his own constitutional rights or immunities”
 5 (internal citation omitted)). “For an injury to be ‘particularized,’ it ‘must affect the plaintiff in a
 6 personal and individual way.’” *Spokeo*, 578 U.S. at 339 (internal citation omitted). “A ‘concrete’
 7 injury must be ‘de facto’; that is, it must actually exist.” *Id.* To the extent that Twitter claims that
 8 it is injured by MoneyBags’ inability to post infringing material, that does not constitute an
 9 injury in fact because it “no more directly and tangibly benefits [it] than it does the public at
 10 large.” *Dubin v. Sup. Ct. of Haw.*, 2021 WL 4496946, at *10 (D. Haw. Sep. 30, 2021) (quoting
 11 *Lance v. Coffman*, 549 U.S. 437, 439 (2007)).

12 Twitter makes no showing of an injury in fact, nor could it, considering that Twitter’s
 13 own privacy policy and terms of service advise all users not to post unauthorized copyrighted
 14 works and that Twitter may disclose their personal data to comply “with a law, regulation, legal
 15 process or governmental request.” (<https://twitter.com/en/privacy> § 3.3; <https://twitter.com/en/tos>
 16 §§ 3-4). Twitter therefore cannot argue that it suffers some injury by complying with the law
 17 (Section 512(h) of the Copyright Act) in accordance with its disclosed policies, especially where
 18 any user concerned that his identity might be disclosed by Twitter would not use the platform in
 19 the first place. *See McCollum*, 647 F.3d at 879 (denying standing where McCollum asserted not
 20 his own rights but the First Amendment rights of others); *Coal. Of Clergy Lawyers and*
 21 *Professors v. Bush*, 310 F.3d 1153, 1163 (9th Cir. 2002) (denying standing where “the Coalition
 22 makes no allegation of personal injury to its members”). Twitter has also presented no evidence
 23 that MoneyBags is a U.S. citizen or otherwise entitled to protection under the First Amendment,
 24 which is fatal to Twitter’s third party standing. *Agency for Int’l Dev. v. Alliance For Open*
 25 *Society Int’l, Inc.*, 140 S.Ct. 2082, 2086-87 (2020); *Drummond Co., Inc. v. Collingsworth*, 2013
 26 WL 6074157, *16 (N.D. Cal. Nov. 18, 2013).

27 Second, Twitter has not shown that it has a “close relationship” with MoneyBags. That
 28 relationship must be “special, on-going” and not “intermittent.” *Voigt v. Savell*, 70 F.3d 1552,

1 1565 (9th Cir. 1995). Examples of such close relationships are (1) a physician and her patients
 2 where the patients faced criminal charges for receiving the physician’s care; (2) the NAACP and
 3 its members’ rights not to reveal their affiliation with the Association; (3) children’s right to
 4 assert the equal protection rights of their mothers. *See id.*; *see also Shabazz v. Giurbino*, 2017
 5 WL 2671082, at *6 (E.D. Cal. June 21, 2017) (denying standing where no close association
 6 proved—“No matter how friendly and sympathetic the litigant is to the cause of the individuals
 7 he seeks to represent, a plaintiff without a significant relationship is less likely to know the best
 8 interests of the individual.”). On the contrary, Twitter and MoneyBags’ interests are not aligned
 9 at all—MoneyBags faces a copyright infringement lawsuit related to the Photographs, while
 10 Twitter cannot because of the Section 512 safe harbor. Additionally, MoneyBags agreed to
 11 Twitter’s terms of service and privacy policy, which specifically alerted MoneyBags that it was
 12 not permitted to post unauthorized copyrighted works and that Twitter would disclose
 13 MoneyBags’ identity in compliance with any law. (<https://twitter.com/en/privacy> § 3.3;
 14 <https://twitter.com/en/tos> §§ 3-4).

15 Third, Twitter has not shown that MoneyBags is hindered from asserting its own rights in
 16 this proceeding. Such hinderance must be a “genuine obstacle” preventing MoneyBags from
 17 asserting its own rights. *Singleton*, 428 U.S. at 116. While Twitter asserts a parade of horrors of
 18 litigation, including expense, Twitter fails to establish that any of those obstacles is genuine and
 19 actually applies to MoneyBags, including whether MoneyBags could afford to litigate (or why, if
 20 Twitter was so concerned, it did not offer to pay MoneyBags’ litigation expenses). The facts are
 21 that MoneyBags has had numerous opportunities to participate in this matter, including
 22 anonymously, but declined to do so in each instance: (1) MoneyBags could have filed a counter-
 23 notice to put the Photographs back up on Twitter (Section 512(g)) in response to Bayside’s
 24 512(c) takedown notice, but did not; (2) Twitter sent notice and a copy of Bayside’s 512(h)
 25 subpoena to MoneyBags a month before filing its MTQ (Dkt. 5-2 at 3), but MoneyBags did not
 26 appear; and (3) Judge Ryu ordered Twitter to serve a copy of her November 4, 2021 order,
 27 advising MoneyBags that it could specially appear anonymously to provide the Court evidence
 28 regarding fair use. (Dkt. 19 at 3-4). Twitter did so, but MoneyBags did not appear. *See*

1 *McCollum*, 647 F.3d at 879 (third standing requirement not met where rights holders were able
 2 to assert their own rights). “A simple lack of motivation does not constitute a ‘genuine obstacle’
 3 to asserting an interest”—and MoneyBags’ decision to not appear plainly demonstrates only that.
 4 *Viceroy Gold*, 75 F.3d at 489 (plaintiff denied standing to assert rights of its employees); *see also*
 5 *Alhawarin v. McCament*, 2018 WL 6265081, *7 (C.D. Cal Mar. 29, 2018) (“Plaintiff fails to
 6 demonstrate that the Third Parties are hindered in their ability to protect their own interests. ...
 7 Plaintiff argues that it is ‘unlikely’ that the Third Parties would seek to vindicate their rights due
 8 to ‘high costs and low benefits.’ [] [I]t is conclusory as worded [and] is also different in kind
 9 than the type of impediments generally recognized as giving rise to third party standing, such as
 10 death.”); *Shabazz*, 2017 WL 2671082, at *6 (“In order to bring a claim for a third party, Plaintiff
 11 must show that the individual is unable to litigate his own claims due to mental incapacity, lack
 12 of court access, or other similar disability”); *Green Tree Servicing, LLC v. Collegium Fund*
 13 *LLC*, 2016 WL 5429652, at *4 (D. Nev. Sep. 27, 2016) (“[I]t may be that in fact the holders of
 14 those rights either do not wish to assert them, or will be able to enjoy them regardless of whether
 15 the in-court litigant is successful or not” and “third parties themselves usually will be the best
 16 proponents of their own rights.” (quoting *Singleton*, 428 U.S. at 113-14)).

17 Twitter misleadingly cites *In re Grand Jury Subpoena, No. 16-03-217* in arguing that it
 18 has the right to defend the First Amendment rights of its users, but omits the critical language in
 19 the court’s opinion that proves it position wrong: “The government does not contest that
 20 Glassdoor has third-party standing to assert the rights of its users, but we ... are satisfied here
 21 because *Glassdoor has established* an injury in fact of its own, it has a sufficiently close
 22 relationship to its users, and its users would face ‘genuine obstacles’ to the assertion of their own
 23 putative right to anonymity.” 875 F.3d 1179, 1183 n.2 (9th Cir. 2017) (emphasis added).
 24 Notwithstanding that the facts were significantly different (the government sought to unmask
 25 anonymous speakers in order to identify potential witnesses) and Glassdoor’s motion to quash
 26 was ultimately denied anyway, Twitter has failed to establish any of the three elements necessary
 27 for it to have third party standing.

28 Indeed, this court has denied standing to a litigant in a similar situation. In *Sines v.*

1 *Kessler*, an anonymous user moved to quash a subpoena served on the social media platform
 2 Discord, arguing she had standing to represent not only herself but also forty-eight other Discord
 3 users because the subpoena violated First Amendment rights to anonymous speech and
 4 association. 2018 WL 3730434, at *4 (N.D. Cal. Aug 6, 2018). The user believed that disclosure
 5 of her identity “can and will result in serious harm to [her] personal and professional [life].” *Id.*
 6 While the court allowed the user to assert her own First Amendment rights in opposition to the
 7 subpoena, the court denied her standing to assert the rights of others. “Here, Doe does not argue
 8 that she has a close relationship with the other Discord users, nor does she claim that they are
 9 unable to protect their own interests.” *Id.* at *10. The user argued that standing should be relaxed
 10 because of the First Amendment issues at stake and cited an out-of-circuit case that relaxed
 11 standing requirements in the context of the First Amendment when church members moved to
 12 challenge city officials’ threats to prosecute them. This court rejected that argument: “Standing
 13 to claim injury from threats of prosecution under a criminal statute is not analogous to standing
 14 to move to quash a subpoena.” *Id.* (citing *Chevron Corp. v. Donziger*, 2013 WL 4536808, at *5
 15 (N.D. Cal. Aug. 22, 2013) (“But, a facial challenge to the chilling effect of a statute brought by a
 16 third party is not analogous to the Doe movants’ motion to quash Chevron’s subpoenas.”)).²
 17 Additionally, this court has found that there is no recognized privacy interest in IP logs or
 18 account information of users of service providers. *Chevron*, 2013 WL 4536808, at *9 (“[T]he
 19 Doe movants accepted the terms of Google’s and Yahoo!’s privacy policies, which indicated that
 20 the ISPs collect identifying information and log IP addresses and share information in response
 21 to a subpoena, court order, or legal process.”).

22 **B. The Subpoena Does Not Suppress Free Speech.**

23 Twitter’s argument that the Subpoena is designed to suppress speech is without merit.
 24

25 ² Amici cite *Eisentstadt v. Baird* (distributors of contraceptives had standing to litigate the rights
 26 of the potential recipients) for the proposition that the Supreme Court recognizes third-party
 27 standing under the First Amendment. (Dkt. 29-1 at 15). That statement is not accurate. While the
 28 Supreme Court has allowed third-party standing to challenge a *statute* that allegedly chills free
 speech, *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984), the
 Court made clear that beyond specific examples (none applicable here), it has “not looked
 favorably upon third-party standing.” *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004).

1 The First Amendment does not afford protection for copyright infringement. *Harper & Row,*
 2 *Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985). Nor does the First Amendment
 3 protect the identity of a copyright infringer. *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 118 (2d
 4 Cir. 2010) (“[T]o the extent that anonymity is used to mask copyright infringement or to
 5 facilitate such infringement by other persons, it is unprotected by the First Amendment.”). Thus,
 6 a Section 512(h) subpoena “places no limits on protected activity; it governs unprotected
 7 copyright piracy, and § 512(h) reaches only the identity of the subscriber (already known to the
 8 service provider), not any underlying expression.” *In re Verizon Internet Servs., Inc.*, 257 F.
 9 Supp. 2d 244, 262 (D.D.C. 2003), *rev’d on other grounds*, 351 F.3d 1229 (D.C. Cir. 2003).

10 In addition to fair use, “copyright’s idea/expression dichotomy strikes a definitional
 11 balance between the First Amendment and the Copyright Act by permitting free communication
 12 of facts while still protecting an author’s expression.” *Harper*, 417 U.S. at 556 (internal citation
 13 omitted). MoneyBags’ tweets consisted of both (a) text critical of individuals involved in private
 14 equity and (b) the copyrighted Photographs. After Bayside’s 512(c) takedown, MoneyBags’
 15 critical text remained in the tweets. And since MoneyBags could have expressed its criticisms
 16 without copying protected expression, it has no free speech right to use copyrighted photographs
 17 to convey its message. *Walt Disney Prod. v. Air Pirates*, 581 F.2d 751, 759 (9th Cir. 1978)
 18 (dismissing First Amendment challenge because defendants could have expressed their ideas
 19 without copying plaintiff’s protected expression). This is confirmed by the fact that after Twitter
 20 removed the Photographs from the Tweets, MoneyBags’ criticism remained. Indeed, Twitter
 21 offers no justification as to why MoneyBags needed to copy *these Photographs* in order to
 22 express its criticisms of individuals in private equity.

23 Additionally, Twitter’s argument that “critical speech will be chilled” if the user is
 24 unmasked falls flat. Indeed, Money Bags continued to actively tweet and the account continued
 25 to gain followers between March 5, 2021 (the last docket entry before Judge Ryu’s ruling) and
 26 October 11, 2021, well after the 512(h) subpoena process was underway. (Declaration of Robert
 27 Allen [“Allen Decl.”] ¶ 3, Ex. A).

1 **C. Bayside Has Shown Good Cause to Obtain the Subpoenaed Information.**

2 Copyright owners have “a constitutional right to file a lawsuit and engage in discovery to
3 determine whether there was infringement.” *Benedict v. Hewlett-Packard Co.*, 2014 WL 234218,
4 at *10 n.4 (N.D. Cal. Jan. 21, 2014) (internal citation omitted). In order to enable an owner to
5 identify and pursue an alleged infringer, courts in every circuit use the *Sony* factors to determine
6 whether there is good cause to allow the disclosure of an anonymous copyright infringer’s
7 identity, not only for 512(h) subpoenas, but also for requests for early discovery in a Doe
8 complaint. *Sony Music Entm’t Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 567 (S.D.N.Y. 2004).³
9 The Ninth Circuit has also cited *Sony* favorably in determining when to identify an anonymous
10 infringer. *In re Anonymous Online Speakers*, 661 F.3d 1168, 1175 (9th Cir. 2011). Where the
11 *Sony* factors weigh in favor of the plaintiff, courts order the disclosure of the alleged infringer’s
12 identity. (*See* n.3 above).

13 Twitter flip-flops in its speculation of Bayside’s intentions, first arguing, without
14 evidence, that “Bayside seeks to file a copyright infringement case for the sole purpose of
15 silencing” critical commentary (Dkt. 13 at 8), and now arguing, without any evidence, that
16 Bayside has no intention of filing an infringement claim at all, the recognition of which Twitter
17 claims is “critical” to its MTQ. (Mot. at 1-2; 10). Twitter ignores that (a) Bayside registered the
18 Photographs with the Copyright Office, which is a prerequisite to filing suit, 17 U.S.C. § 411(a),
19 but which is not required to send a 512(c) takedown or obtain a 512(h) subpoena; and (b) Section
20 512(h) has built-in safeguards and disincentives to protect against baseless or abusive subpoenas,
21 thereby preventing any intrusion on MoneyBags’ First Amendment rights (Dkt. 9 at 6). Twitter
22

23
24 ³ *See, e.g.*: 1st Cir., *London-Sire Records, Inc. v. Doe 1*, 542 F.Supp.2d 153, 164 (D. Mass.
25 2008); 2d Cir., *Arista*, 604 F.3d at 119; 3d Cir., *First Senior Fin. Grp. LLC v. Watchdog*, 2012
26 WL 12903829, *1 n.1 (E.D. Penn. Nov. 8, 2012); 4th Cir., *Venice PI, LLC v. Does 1-9*, 2017 WL
27 3611853, *2 (D.N.C. Aug. 18, 2017); 5th Cir., *Ensor v. Does 1-15*, 2019 WL 4648486, *2-*3
28 (W.D. Tex. Sep. 23, 2019); 6th Cir., *Strike 3 Holdings, LLC v. Doe*, 2021 WL 4391206, *1 (E.D.
Mich. Sep. 23, 2021); 7th Cir., *Malibu Media, LLC v. Doe*, 2019 WL 7876473, *1 (M.D. Ill. Jan.
2, 2019); 8th Cir., *Paisley Park Enters., Inc. v. Ziani*, 2018 WL 6567828, *3 (D. Minn. Dec. 13,
2018); 9th Cir., *Strike 3 Holdings, LLC v. Doe*, 2021 WL 5911671, *1-*2 (E.D. Cal. Nov. 11,
2021); 10th Cir., *Voltage Pictures, LLC v. Does 1-22*, 2013 WL 4028587, *3-*4 (D. Colo. Aug.
7, 2013); 11th Cir., *M.C. v. Geiger*, 2018 WL 7256344, *1 (M.D. Fla. Nov. 21, 2018); D.C. Cir.,
Call of the Wild Movie, LLC v. Does 1-1,062, 770 F. Supp. 2d 332, 348 (D.D.C. 2011).

1 also presents no knowledge or evidence about MoneyBags, its motives, justification for using the
 2 Photographs, how MoneyBags' use of the Photographs would affect potential markets (including
 3 licensing markets) for the Photographs, or what, if any, burden MoneyBags would face if its
 4 identity as an alleged copyright infringer was revealed.

5 **D. Whether an Alleged Infringer's Use of a Work Constitutes Fair Use Is**
 6 **Irrelevant to a 512(h) Subpoena and Cannot Be Considered By the Court**

7 Section 512(h) makes irrelevant whether an alleged infringer's use of a work constitutes
 8 fair use and precludes a court from considering fair use in enforcing a 512(h) subpoena. First, the
 9 DMCA allows a copyright owner to obtain a subpoena to the service provider "for identification
 10 of an *alleged infringer*" 17 U.S.C. § 512(h)(1) (emphasis added). The sole purpose of a fair
 11 use analysis is to determine whether an alleged infringer, in his use of a copyrighted work, is
 12 actually not an infringer under the law. "[A]nyone who ... makes a fair use of the work is not an
 13 infringer of the copyright with respect to such use." *Sony Corp. of Am. v. Universal City Studios,*
 14 *Inc.*, 464 U.S. 417, 433 (1984). But 512(h) does not limit the service provider to identify only
 15 actual infringers. It requires the service provider to identify an *alleged infringer*, which a
 16 copyright owner has already identified in both its 512(c) takedown notice and in its 512(h)
 17 subpoena request.

18 Second, upon receipt of the subpoena, "the service provider shall expeditiously disclose
 19 to the copyright owner ... the information required by the subpoena, *notwithstanding any other*
 20 *provision of law*" 17 U.S.C. § 512(h)(5) (emphasis added). The Ninth Circuit in *Lenz v.*
 21 *Universal Music Corp.* considered an issue of first impression of whether Section
 22 512(c)(3)(A)(v) "requires copyright holders to consider whether the potentially infringing
 23 material is a fair use of a copyright under 17 U.S.C. § 107 before issuing a takedown
 24 notification." 815 F.3d 1145, 1151 (9th Cir. 2016). Applying the "[c]anons of statutory
 25 construction [] that if the language of a statute is clear, we look no further than that language in
 26 determining the statute's meaning," the court held that the phrase "by the law" in Section 512(c)
 27 "unambiguously contemplates fair use." *Id.* The court then thoroughly analyzed Section 107 to
 28 support its conclusion. *Id.* at 1152–53. Consequently, the use in 512(h)(5) of the phrase

1 “notwithstanding any other provision of law” can only mean that fair use under Section 107 is a
 2 provision of law to be disregarded when considering the enforcement of a 512(h) subpoena. This
 3 is further supported by Section 512(h)(6), which provides that the remedies for noncompliance
 4 with a 512(h) subpoena are governed “to the greatest extent practicable” by the Federal Rules of
 5 Civil Procedure governing the enforcement of a subpoena duces tecum “[u]nless otherwise
 6 provided by this section” 17 U.S.C. § 512(h)(6) (emphasis added). Since Section 512(h)(5)
 7 requires a service provider to provide information about the alleged infringer, regardless of fair
 8 use, enforcing a 512(h) subpoena under 512(h)(6) through a motion to quash or other remedy
 9 under the Federal Rules must similarly disregard fair use.

10 **E. Even if the Court Considers Fair Use, Judge Ryu Was Correct that**
 11 **MoneyBags’ Use of the Photographs Was Not Fair Use**

12 As discussed at length in Bayside’s Opposition to the MTQ (Dkt. 9 at 14–22) and in its
 13 Reply to the MTC (Dkt. 17 at 2–4), MoneyBags’ use of the Photographs was not fair use.⁴

14 **Purpose and Character of the Use.** Twitter argues, contrary to the facts and the law,
 15 that the “Tweets, standing alone, are plainly non-commercial uses of candid photographs,
 16 transformed by the accompaniment of ridicule and mockery.” (Mot. at 7). First, Twitter
 17 continues to refer to the Photographs as “candid,” even though they are not.⁵ Regardless of
 18 whether a photograph is “candid,” “photographs are ‘generally viewed as creative aesthetic
 19 expressions of a scene or image’ and have long received thick copyright protection[,] ... even
 20 though photographs capture images of reality.” *Andy Warhol Found. for Visual Arts, Inc. v.*
 21 *Goldsmith*, 11 F.4th 26, 53 (2d Cir. 2021) (quoting *Brammer v. Violent Hues Prods., LLC*, 922

22 _____
 23 ⁴ While Twitter concedes that “the burden of proving fair use is always on the putative
 24 infringer,” Twitter objects that it should not have those burdens in the MTQ because (1) this is
 25 not a copyright action and (2) the alleged infringer is not a party. Both arguments are
 26 disingenuous. On behalf of MoneyBags, Twitter is the proponent of the fair use defense in its
 27 MTQ, and “the Supreme Court and our circuit have unequivocally placed the burden of proof on
 28 the proponent of the affirmative defense of fair use.” *Dr. Seuss Enters., L.P. v. ComicMix LLC*,
 983 F.3d 443, 459 (9th Cir. 2020).

⁵ See Dkt. 9 at 20. Twitter’s Reply falsely claims that “Bayside concedes that candid photographs
 do not warrant copyright protection such that their use is generally considered fair.” (Dkt. 13 at
 4). On the contrary, Bayside provided definitional evidence that the Photographs were not candid
 and cited many cases to support that all photographs are “sufficiently creative to make the
 second fair use factor weigh in favor of photographer-plaintiffs.” (Dkt. 9 at 20).

1 F.3d 255, 267 (4th Cir. 2019) (in turn quoting *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164,
2 1177 (9th Cir. 2012))).

3 Second, Twitter continues to claim that the use of photographs on a commercial, social
4 media platform that is accessible to billions of people on the Internet is “plainly non-
5 commercial” simply because there is “no indication” that MoneyBags “is getting paid.” (Dkt. 5
6 at 11). But it is the infringer’s burden, not Bayside’s, to prove MoneyBags’ compensation or lack
7 thereof, and Twitter (on behalf of MoneyBags) concedes that it does not know, *id.*, thereby
8 failing to meet its burden. More importantly, Twitter fails to address the correct legal standard:
9 “whether the user stands to profit from the exploitation of the copyrighted material without
10 paying the customary price.” *Harper*, 471 U.S. at 562. Twitter’s sole focus on monetary gain
11 missed the mark on the issue of commerciality and thus has failed to meet its burden. *Worldwide*
12 *Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1117–18 (9th Cir. 2000). Indeed,
13 “[g]enerating traffic to one’s website or conveying one’s message effectively using copyrighted
14 material is within the type of ‘profit’ contemplated by *Worldwide Church.*” *Northland Family*
15 *Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962, 979 (C.D. Cal. 2012).

16 Third, Twitter falsely claims that the photographs were “transformed by the
17 accompaniment of ridicule and mockery.” But Twitter does not dispute that none of the tweets
18 comment on or criticize the Photographs themselves (or the owner, author, or subject of the
19 Photographs). Absent alterations, criticism of, or commentary *on the Photographs themselves*,
20 their use cannot be transformative. *Monge*, 688 F.3d at 1175 (“Campbell makes clear that the
21 ‘heart’ of a claim for transformative use is ‘the use of some elements of a prior author’s
22 composition to create a new one *that, at least in part, comments on that author’s works.*”
23 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994) (emphasis added)).⁶ Nor
24 has Twitter addressed that the minimal text in the tweets are insufficient, even if they were
25 critical of the Photographs themselves, to constitute a transformative use. *Elvis Presley Enters. v.*

26 _____
27 ⁶ The one case Twitter cites, *Katz v. Google*, 802 F.3d 1178 (11th Cir. 2015), is inapposite, not
28 only because it is inconsistent with Ninth Circuit precedent but also because the *Katz* blogger
criticized *Katz*, *who was the subject in the photographs and their owner*. Additionally, the *Katz*
photographs were “candid,” benefiting from “fortuitous timing,” unlike the Photographs.

1 *Passport Video*, 349 F.3d 622, 628-29 (9th Cir. 2003) (“There must be real, substantial
 2 condensation of the materials ... and not merely the facile use of scissors; or extracts of the
 3 essential parts, constituting the chief value of the original work.” (internal citations omitted));
 4 *accord Monge*, 688 F.3d at 1174; *Lucasfilm Ltd. v. Ren Ventures*, 2018 WL 5310831, at *4 (N.D.
 5 Cal. June 29, 2018); *Werner v. Red Blue Media, Inc.*, 2021 WL 3560588, at *4 (C.D. Cal. Aug.
 6 9, 2021) (“Stealing a copyrighted photograph to illustrate a news article, without adding new
 7 understanding or meaning to the work, does not transform its purpose”).

8 Additionally, Twitter wrongly conflates when the use of a copyrighted work may be
 9 considered transformative. In *Campbell*, the Supreme Court held that *parodying* a work can be
 10 transformative. 510 U.S. at 581. Twitter quotes *Campbell* to support its argument that the
 11 Photographs “were ‘copied’ here for purpose of discussion *See id.* at 583 (holding that
 12 ‘whether [] *parody* is in good taste or bad taste does not and should not matter to fair use’ and
 13 instead focusing on whether the alleged infringer ‘reasonably could be perceived as *commenting*
 14 *on the original or criticizing it, it [sic] some degree.*’)” (Mot. at 8) (emphasis added). Thus,
 15 MoneyBags needed to comment on or criticize the Photographs in order for the use to be fair,
 16 which MoneyBags did not do. Indeed, Twitter does not argue that any of the Tweets were
 17 parodies of the Photographs, instead claiming that MoneyBags posted the Photographs “for the
 18 purpose of criticizing or satirizing Sheth.” (Dkt. 5 at 12).

19 The distinction between parody and satire is important. “The [Supreme] Court pointed
 20 out the difference between parody (in which the copyrighted work is the target) and satire (in
 21 which the copyrighted work is merely a vehicle to poke fun at another target): ‘Parody needs to
 22 mimic an original to make its point, and so has some claim to use the creation of its victim’s (or
 23 collective victims’) imagination, whereas satire can stand on its own two feet and so requires
 24 justification for the very act of borrowing.’” *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*,
 25 109 F.3d 1394, 1400 (9th Cir. 1997) (quoting *Campbell*, 510 U.S. at 580–81); *see also Campbell*,
 26 510 U.S. at 597 (Kennedy, J., concurring) (“[P]arody may qualify as fair use only if it draws
 27 upon the original composition to make humorous or ironic commentary about that same
 28 composition.”). Twitter provides no justification as to why MoneyBags needed *these particular*

1 *Photographs* and not any others readily available for license in the marketplace in order to
 2 express its point of view.

3 Unlike parody, there is no transformation when an infringer uses a copyrighted work in
 4 satire. *Penguin Books*, 109 F.3d at 1401 (“Although *The Cat NOT in the Hat!* does broadly
 5 mimic Dr. Seuss’ characteristic style, it does not hold *his style* up to ridicule. The stanzas have
 6 ‘no critical bearing on the substance or style of *The Cat in the Hat*’ merely using elements and
 7 the title “‘to get attention’ or maybe even ‘to avoid the drudgery in working up something
 8 fresh.’”) (quoting *Campbell*, 510 U.S. at 578)). The Ninth Circuit recently reaffirmed this in *Dr.*
 9 *Seuss Enters., L.P. v. ComicMix LLC*, finding that the infringing work was not a parody and
 10 lacked “the benchmarks of transformative use”: “(1) ‘further purpose or different character’ in
 11 the defendant’s work, i.e., ‘the creation of new information, new aesthetic, new insights and
 12 understanding’; (2) ‘new expression, meaning, or message’ in the original work, i.e., the addition
 13 of ‘value to the original’; and (3) the use of quoted matter as ‘raw material,’ instead of
 14 repackaging it and ‘merely supersed[ing] the objects of the original creation.’” 983 F.3d at 453.

15 Two recent cases involving photographs confirm MoneyBags’ use was not
 16 transformative. In *Goldsmith*, the Second Circuit rejected that Warhol’s adding new expression
 17 to Goldsmith’s photograph made it transformative. 11 F.4th at 38–39. Indeed, “where a
 18 secondary work does not obviously comment on or relate back to the original or use the original
 19 for a purpose other than that for which it was created, the bare assertion of a ‘higher or different
 20 artistic use,’ is insufficient to render a work transformative.” *Id.* at 41 (internal citation omitted).
 21 The court found that both Warhol’s portrait and Goldsmith’s photograph had the identical
 22 purpose and function “not merely in the broad sense that they are created as works of visual art,
 23 but also in the narrow but essential sense that they are portraits of the same person.” *Id.* at 42.
 24 Additionally, the court found that Warhol’s appropriation was not reasonable. “While Warhol
 25 presumably required a photograph of Prince to create the Prince Series, AWF proffers no reason
 26 why he required *Goldsmith*’s photograph.” *Id.* at 47; *see also TCA Tele. Corp. v. McCollum*, 839
 27 F.3d 168, 181–82, 185 (2d Cir. 2016) (wholesale borrowing of copyrighted comedy routine not
 28 reasonable where “defendants offer[ed] no persuasive justification” for its use). Twitter’s lack of

1 any justification for MoneyBags’ copying *these particular Photographs* similarly makes
2 MoneyBags’ copying unreasonable.

3 Similarly, in *Brammer* the Fourth Circuit rejected that the use of a substantively unaltered
4 photograph in a new setting to convey new information was transformative. The defendant used
5 the photograph “expressly for its content”—to depict the subject of the photograph while
6 providing information to film festival attendees. The court reasoned that “such a use does not
7 necessarily create a new function or meaning that expands human thought; if this were so,
8 virtually all illustrative uses of photography would qualify as transformative.” 922 F.3d at 264.
9 The court also considered the fact that defendant’s “ability to accomplish its purpose of
10 communicating information about area tourist attractions would not be hindered if it had to
11 comply with *Brammer*’s copyright.” *Id.*

12 For all of the above reasons, Twitter has failed to meet its burden of demonstrating that
13 MoneyBags’ unaltered use of the Photographs was transformative or that the use was not
14 commercial. Accordingly, the first factor weighs heavily in favor of Bayside.

15 **Nature of the Work.** Although all of the fair use factors must be explored and weighed
16 together, *Campbell*, 510 U.S. at 578, neither Judge Ryu nor Twitter in the Motion address this
17 factor. Twitter argues that the Photographs are “candid,” even though they are not and, even if
18 they were, there is no legal basis to distinguish candid from non-candid photographs in a fair use
19 analysis. *Monge*, 688 F.3d at 1177; *Otto v. Hearst Commc’ns, Inc.*, 345 F. Supp. 3d 412, 430
20 (S.D.N.Y. 2018) (“Although photographs are often ‘factual or informational in nature,’ the art of
21 photography has generally been deemed sufficiently creative to make the second fair use factor
22 weigh in favor of photographer-plaintiffs.” (citation omitted)). Accordingly, Twitter has failed to
23 meet its burden in demonstrating that this fair use factor does not favor Bayside.

24 **Amount and Substantiality of the Portion Copied.** While Judge Ryu acknowledged
25 that this factor “asks whether ‘the quantity and value of the materials used ... are reasonable in
26 relation to the purpose of the copying,” (Dkt. 21 at 8), the Court did not address the fact that
27 MoneyBags used six Photographs, in full, to make the same point. This factor weighs against an
28 alleged infringer when he copies “more than is necessary for his intended use.” *Seltzer v. Green*

1 *Day, Inc.*, 725 F.3d 1170, 1178 (9th Cir. 2013). Further, “copying an entire work militates
 2 against a finding of fair use,” *Worldwide Church of God*, 227 F.3d at 1118, and Twitter provides
 3 no justification for MoneyBags’ “full copy display” of the Photographs. *See VHT, Inc. v. Zillow*
 4 *Grp.*, 918 F.3d 723, 744 (9th Cir. 2019) (finding third factor weighed against fair use where
 5 infringer copied the entirety of the owner’s photographs without justification). Additionally,
 6 courts have found against fair use when an alleged infringer uses multiple photographs when one
 7 would have sufficed to convey his message. *Monge*, 688 F.3d at 1179; *Mavrix Photographs LLC*
 8 *v. Sandra Rose LLC*, 2016 WL 6246408, at *3 (C.D. Cal. Apr. 6, 2016). Accordingly, Twitter
 9 has failed to meet its burden in demonstrating that this fair use factor does not favor Bayside.

10 **Effect on the Potential Market.** Judge Ryu was correct that the absence of any evidence
 11 from MoneyBags “about the relevant market or the lack of market harm from the publication of
 12 Bayside’s photos precludes a finding of fair use here.” (Dkt. 21 at 8-9). Twitter offered no
 13 evidence to support its naked assertion that the Photographs have no value and that there is no
 14 marketplace for them. *Campbell*, 510 U.S. at 594 (“a silent record on an important factor bearing
 15 on fair use disintitled the proponent of the defense”); *Monge*, 688 F.3d at 1181.

16 Citing *Leibovitz v. Paramount Pictures, Corp.*, Twitter argues, that Bayside’s “failure to
 17 introduce any evidence or even a theory of market impact results in the fourth factor being
 18 neutral in the court’s fair use analysis.” (Mot. at 9). First, that is not the law in the Ninth Circuit.
 19 *Penguin Books*, 109 F.3d at 1403 (“Since fair use is an affirmative defense, Penguin and Dove
 20 must bring forward favorable evidence about relevant markets. Given their failure to submit
 21 evidence on this point, instead confining ‘themselves to uncontroverted submissions that there
 22 was no likely effect on the market for the original,’ we conclude that ... a silent record on an
 23 important factor bearing on fair use disintitle[s] the proponent of the defense”). Second, Bayside
 24 did identify a market for the Photographs. “Bayside is a communications and strategic advisory
 25 firm that, among other things, advises and partners with creators, artists, and entrepreneurs to
 26 protect, promote, and champion creative expression. Bayside owns a catalog of photographs (the
 27 Photographs are only a small part of the catalog) to exploit for those purposes.” (Dkt. 17 at 2).
 28 Finally, this is also not the law in the Second Circuit. *Goldsmith*, 11 F.4th at 49 (affirming that

1 the burden of proof of this factor resides on the secondary user—“we have never held that the
 2 rightsholder bears the burden of showing actual market harm. Nor would we so hold. Fair use is
 3 an affirmative defense; as such, the ultimate burden of proving that the secondary use does not
 4 compete in the relevant market is appropriately borne by the party asserting the defense: the
 5 secondary user.”). Accordingly, as Judge Ryu confirmed, Twitter failed to meet its burden in
 6 demonstrating that this fair use factor does not favor Bayside.

7 **Balancing the Factors.** Since Twitter has failed to show that any of the factors favor fair
 8 use, Judge Ryu was correct in concluding that Twitter had failed to establish that MoneyBags’
 9 use of the Photographs was fair and properly denied Twitter’s MTQ and granted Baysides MTC.

10 **F. Highfields Does Not Apply, and Even If It Does, The Court Correctly**
 11 **Applied the Highfields Balancing Test.**

12 Twitter argues that, in addition to a fair use analysis, this Court must apply a “balancing
 13 of harms test” supposedly established in *Highfields Capital Management, L.P. v. Doe*, 385 F.
 14 Supp. 2d 969, 970 (N.D. Cal. 2005). (Mot. at 9). Twitter is wrong for two reasons. First, as
 15 discussed in Bayside’s opposition to Twitter’s MTQ, the *Highfields* district court decision did
 16 not adopt a separate “balancing of harms” test. Instead, the district court solely focused on
 17 whether plaintiff made a *prima facie* showing that subpoenaed party engaged in wrongful
 18 conduct. *Id.*; (Dkt. 9 at 11-12). While Magistrate Judge Brazil’s Report and Recommendation
 19 separately balanced harms, the Report failed to recognize that the fourth factor of the applicable
 20 *Seescandy* test did balance respective harms. *See Columbia Ins. Co. v. Seescandy.com*, 185
 21 F.R.D. 573, 578 (N.D. Cal. 1999).

22 Second, as stated above, Bayside has satisfied each of the *Sony Music* factors, as well as
 23 the *prima facie* wrongful conduct showing under *Highfields*.⁷ Twitter does not contend
 24 otherwise. Accordingly, there is no basis for the Court to apply a separate balancing of harms test

25 _____
 26 ⁷ Twitter’s argument that “fair use would preclude Bayside’s ability to establish a *prima facie*
 27 case of infringement” under *Sony* (Dkt. 13 at 2) is wrong. *Highfields* did not involve copyright
 28 infringement. And there are only two elements to a *prima facie* copyright infringement claim: (1)
 ownership and (2) copying. *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1178 (9th Cir.
 2011). Twitter disputes neither. Fair use is not an element; it is a *defense* to a copyright
 infringement claim.

1 involving a 512(h) subpoena. In fact, most district courts in the Ninth Circuit do not apply
 2 *Highfields* in cases involving copyright infringement. *See, e.g., In re DMCA Subpoena to Reddit,*
 3 *Inc.*, 441 F. Supp. 3d 875, 882 (N.D. Cal. 2020); *BWP Media USA, Inc. v. Crowdgather, Inc.*,
 4 2014 WL 12601054, *2 (C.D. Cal. July 28, 2014); *IO Grp. v. J.W.*, 2011 WL 237673, *2 (N.D.
 5 Cal. Jan. 24, 2011); *In re Subpoena Issued Pursuant To The DMCA To: 43SB.COM, LLC*, 2007
 6 WL 4335441, *4 (D. Idaho Dec. 7, 2007). Courts that have considered this balancing test have
 7 concluded that the copyright owner’s interest in pursuing litigation outweigh the alleged
 8 infringer’s right to remain anonymous. *See Baugher v. GoDaddy.com LLC*, 2021 WL 4942658,
 9 at *5 (D. Ariz. Oct. 22, 2021); *Signature Mgmt. Team, LLC v. Automattic, Inc.*, 941 F. Supp. 2d
 10 1145, 1158 (N.D. Cal. 2013).

11 Even if the Court conducts such a balance, Judge Ryu was correct that MoneyBags’
 12 failure to submit evidence demonstrating that revealing the identity of this infringer could cause
 13 harm or injury precludes the Court from concluding that such harm outweighs Bayside’s harm if
 14 it is unable to obtain MoneyBags’ identity. (Dkt. 21 at 9). Twitter’s arguments to the contrary are
 15 meritless. First, Twitter cites inapposite cases having nothing to do with copyright infringement
 16 to support its contention that the Court should have automatically found significant harm to
 17 MoneyBags: *Perry v. Schwarzenegger* (political speech);⁸ *In re PGS Home Co. Ltd.*
 18 (defamation); and *Music Grp. Macao Commercial Offshore Ltd. V. Does* (defamation).⁹

19 Second, Twitter falsely claims that Bayside never articulated any harm it would suffer
 20 should the subpoena be quashed. (Mot. at 10). As Bayside made clear, the “subpoenaed
 21 information is central to Bayside’s copyright infringement claims. As was the case in *Sony*
 22 *Music*, ‘[a]scertaining the identities and residences of the Doe defendants is critical to plaintiffs’
 23

24 ⁸ *Perry* involved the compelled disclosure of the proponents’ political supporters of a ballot
 25 proposition, and the court found that the proponents had made a “prima facie showing of
 26 arguable first amendment infringement.” 591 F.3d 1147, 1163 (9th Cir. 2010). Political speech is
 27 subject to the greatest First Amendment protection, *Online Speakers*, 661 F.3d at 1176, whereas
 28 copyright infringement is not protected by the First Amendment at all. *Harper*, 471 U.S. at 556.

⁹ Twitter also cites *Art of Living Found. v. Does 1-10*, 2011 WL 5444622 (N.D. Cal. Nov. 9,
 2011), which, although involving a copyright claim, “appears to be unique among the relevant
 body of case law” because the anonymous user not only appeared through counsel but was
 actively participating in discovery. *Id.* at *10.

1 ability to pursue litigation, for without this information, plaintiffs will be unable to serve
 2 process.” (Dkt. 9 at 10). Bayside has also explained, contrary to Twitter’s false claims, who
 3 Bayside is and why protecting its copyrights is important. (Dkt. 17 at 2). Further, “copyright
 4 infringement claims necessarily involve irreparable harm” to Bayside. *UMG Recordings, Inc. v.*
 5 *Does 1-4*, 2006 WL 1343597, at *1 (N.D. Cal. Apr. 19, 2006).

6 Third, MoneyBags’ Twitter activity disproves that the possible discloser of its identity
 7 chilled its speech in any way. Notwithstanding the distinct possibility that the Court would order
 8 Twitter to identify MoneyBags as an alleged copyright infringer, MoneyBags continued to tweet
 9 at a rapid pace, and became even more critical about the parties Twitter purports MoneyBags
 10 might have reason to fear. (Allen Decl., ¶3, Ex. A)

11 Fourth, Twitter claims the Order is silent on Bayside’s benefit from identifying
 12 MoneyBags. But Twitter has conceded that Bayside has met each of the *Sony Music* factors,
 13 including that: (1) Bayside has established a prima facie claim of infringement; (2) Bayside’s
 14 request is sufficiently specific; (3) Bayside has no alternative means for uncovering MoneyBags’
 15 identity; (4) Bayside’s ascertaining MoneyBags’ identity is critical to its ability to pursue
 16 litigation; and (5) MoneyBags had no expectation of privacy for copyright infringement in light
 17 of Twitter’s terms of use and privacy policy. Accordingly, the harm to Bayside if the MTQ were
 18 granted is indisputable. MoneyBags’ “right to remain anonymous must give way to [Bayside’s]
 19 right to use the judicial process to pursue what appear to be meritorious copyright infringement
 20 claims.” *Sony Music*, 326 F. Supp. 2d at 567; *see also Arista*, 604 F.3d at 119 (“We agree that
 21 [the *Sony Music* test] constitutes an appropriate general standard for determining whether a
 22 motion to quash, to preserve the objecting party’s anonymity, should be granted.”). Indeed,
 23 without the Court compelling Twitter to reveal the infringer’s identity, Bayside will have no way
 24 to pursue its copyright infringement claim.

25 **G. The MTQ Was Untimely and Made Without Notice.**

26 Twitter’s MTQ was untimely.¹⁰ “Courts generally agree that a motion to quash under
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28 ¹⁰ Twitter should be judicially estopped from bringing the Motion because it represented to the Court that “[if] Twitter’s First Amendment objection is overruled, Twitter will produce

1 Rule 45 is timely if made before the date specified for compliance with the subpoena.”
 2 *Handloser v. HCL Am., Inc.*, 2020 WL 4700989, at *4 (N.D. Cal. Aug. 13, 2020) (internal
 3 citation omitted). Twitter argues that even though it did not file its MTQ until over a month after
 4 the date of compliance, its timeliness is somehow excused by its timely filing of objections. (Dkt.
 5 13 at 9-10). Not so. A nonparty can *either* object to a subpoena (Rule 45(d)(2)(B)) *or* move to
 6 quash (Rule 45(d)(3)). *Id.* at 3 (“A non-party . . . may object to the subpoena before the time
 7 specified for compliance *Alternatively*, a non-party may move to quash”) (emphasis
 8 added). Once Twitter objected, it had no obligation to respond “unless and until” Bayside
 9 “obtained an order compelling” Twitter’s compliance. *Id.* But if Twitter wanted to move to
 10 quash, it needed to do so *before* the subpoena compliance date. *Emy Franco v. Alorica, Inc.*,
 11 2021 WL 6104816, at *3 (C.D. Cal. Nov. 5, 2021) (even though non-party served objections, it
 12 “must file a motion to quash the subpoena before the deposition date identified in the subpoena
 13 or the requested date for production of documents.”). Twitter offers to justification or excuse for
 14 its late filing.

15 Further, Twitter did not comply with L.R. 37-1 prior to filing the MTQ. While the parties
 16 were meeting and conferring about Bayside’s related motion to compel, at no time did Twitter
 17 mention that it was contemplating filing the MTQ, let alone meeting and conferring about it in
 18 accordance with this local rule. (*See* Dkt. 9 at 4-5).

19 **IV. CONCLUSION**

20 For the forgoing reasons, the court should deny the Motion and affirm Judge Ryu’s order,
 21 denying Twitter’s MTQ and granting Bayside’s MTC.

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 28 information responsive to the subpoena” (Dkt. 16 at 2). *Milton H Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 993 (9th Cir. 2012).

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