

1 ROBERT E. ALLEN (SBN 166589)
rallen@glaserweil.com
 2 LAWRENCE M. HADLEY (SBN 157728)
lhadley@glaserweil.com
 3 THOMAS P. BURKE JR. (SBN 288261)
tburke@glaserweil.com
 4 GLASER WEIL FINK HOWARD
 AVCHEN & SHAPIRO LLP
 5 10250 Constellation Boulevard, 19th Floor
 Los Angeles, California 90067
 6 Telephone: (310) 553-3000
 Facsimile: (310) 556-2920

7 Attorneys for Petitioner
 8 Bayside Advisory LLC

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

12 CASE NO.: 4:20-mc-80214-DMR

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

**PETITIONER BAYSIDE ADVISORY
 LLC'S OPPOSITION TO TWITTER'S
 MOTION TO QUASH**

*Declaration of Robert E. Allen and Proposed
 Order filed concurrently herewith*

Date: March 11, 2021
 Time: 1:00 p.m.
 Judge: Hon. Donna M. Ryu
 Courtroom 4, 3rd Floor

Glaser Weil

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. FACTUAL AND PROCEDURAL BACKGROUND 2

III. LEGAL STANDARD 4

IV. ARGUMENT 4

A. The Motion Is Untimely and Was Made Without Notice. 4

B. The First Amendment Does Not Protect Copyright Infringement Nor the Identity of Copyright Infringers..... 5

C. Bayside Has Established a Prima Facie Case of Infringement..... 7

D. Bayside Satisfies the *Sony Music* Factors. 8

E. Although Not Required, Bayside Also Satisfies the Balancing of Harms Test Erroneously Attributed to *Highfields*. 11

F. Use of the Photographs Did Not Constitute Fair Use. 14

1. Purpose and Character of the Use. 16

2. Nature of the Copyrighted Work..... 20

3. Amount and Substantiality of the Portion Copied. 20

4. Effect on the Potential Market for the Copyrighted Work. 21

5. Balance of the Four Factors 22

V. CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

1

2

3

4 *Arista Records, LLC v. Doe 3,*
604 F.3d 110 (2d Cir. 2010).....6, 10

5 *Art of Living Found. v. Does 1-10,*
2011 WL 5444622 (N.D. Cal. Nov. 9, 2011).....12

6

7 *Baraban v. Time Warner, Inc.,*
2000 WL 358375 (S.D.N.Y. Apr. 6, 2000).....20

8 *Barcroft Media, Ltd. v. Coed Media Grp., LLC,*
297 F. Supp. 3d 339 (S.D.N.Y. 2017)17

9

10 *BMP Media USA, Inc. v. Crowdgather, Inc.,*
2014 WL 12601054 (C.D. Cal. July 28, 2014)5, 10

11 *Brammer v. Violent Hues Prods., LLC,*
922 F.3d 255 (4th Cir. 2019).....18

12

13 *Burrow-Giles Lithographic Co. v. Sarony,*
111 U.S. 53 (1884)20

14 *Campbell v. Acuff-Rose Music, Inc.,*
510 U.S. 569 (1994) 16, 17, 21

15

16 *Columbia Ins. Co. v. seescandy.com,*
185 F.R.D. 573 (N.D. Cal. 1999)7, 11

17 *Cruz v. Cox Media Grp., LLC,*
444 F. Supp. 3d 457 (E.D.N.Y. 2020)17

18

19 *Dendrite Int’l, Inc. v. Does No. 3,*
42 N.J. Super. 134, 775 A.2d 756 (2001)11

20 *Dr. Seuss Enters., L.P. v. ComicMix LLC,*
983 F.3d 443 (9th Cir. 2020).....15

21

22 *Duncan v. Cohen,*
2008 WL 2891065 (N.D. Cal. July 22, 2008).....5

23 *Elvis Presley Enters. v. Passport Video,*
349 F.3d 622 (9th Cir. 2003).....17

24

25 *Ets-Hokin v. Skyy Spirits, Inc.,*
225 F.3d 1068 (9th Cir. 2000).....20

26 *Ferdman v. CBS Inter. Inc.,*
342 F. Supp. 3d 515 (S.D.N.Y. 2018)18

27

28 *Gillespie v. Civiletti,*
629 F.2d 637 (9th Cir. 1980).....4

1 *Handloser v. HCL Am., Inc.*,
 2020 WL 4700989 (N.D. Cal. Aug. 13, 2020).....5

2

3 *Harper & Row Publishers, Inc. v. Nation Enters.*,
 471 U.S. 539 (1985) 5, 15

4 *Highfields Capital Mgmt., L.P. v. Doe*,
 385 F. Supp. 2d 969 (N.D. Cal. 2005)..... 7, 11, 12, 13, 14

5

6 *In re Anonymous Online Speakers*,
 661 F.3d 1168 (9th Cir. 2011)..... 7, 10, 12, 15

7 *In re DMCA Subpoena to Reddit, Inc.*,
 441 F. Supp. 3d 875 (N.D. Cal. 2020)..... 14, 15, 19

8

9 *In re Subpoena Issued Pursuant To The Digital Millennium Copyright Act To:*
43SB.COM, LLC.,
 2007 WL 4335441 (D. Idaho Dec. 7, 2007)7

10

11 *In re Verizon Internet Servs., Inc.*,
 257 F. Supp. 2d 244 (D.D.C. 2003).....6, 7

12 *IO Group v. J.W.*,
 2011 WL 237673 (N.D. Cal. Jan. 24, 2011).....6

13

14 *Jarvis v. K2 Inc.*,
 2004 WL 7338345 (W.D. Wash Oct. 1, 2004)20

15 *Katz v. Google Inc.*,
 802 F.3d 1178 (11th Cir. 2015)..... 18, 19

16

17 *Leadsinger, Inc. v. BMG Music Publ’g*,
 512 F.3d 522 (9th Cir. 2008)..... 15

18 *Lucasfilm Ltd. v. Ren Ventures*,
 2018 WL 5310831 (N.D. Cal. June 29, 2018) 17

19

20 *Mavrix Photographs LLC v. Sandra Rose LLC*,
 2016 WL 6246408 (C.D. Cal. Apr. 6, 2016)21

21 *Monge v. Maya Magazines, Inc.*,
 688 F.3d 1164 (9th Cir. 2012).....17, 18, 20, 21, 22

22

23 *Music Group Macao Commercial Offshore Ltd. v. Does*,
 82 F. Supp. 3d 979 (N.D. Cal. 2015)..... 12

24 *Recording Industry Ass’n of Am., Inc. v. Verizon Internet Servs., Inc.*,
 351 F.3d 1229 (D.C. Cir. 2003)6

25

26 *Rich v. Butowsky*,
 2020 WL 5910069 (N.D. Cal. Oct. 6, 2020).....4

27 *SBO Pictures, Inc. v. Does 1-3036*,
 2011 WL 6002620 (N.D. Cal. Nov. 30, 2011)..... 11

28

1 *Schoonmaker v. City of Eureka*,
 2 2018 WL 5829851 (N.D. Cal. Nov. 7, 2018).....5

3 *Seltzer v. Green Day, Inc.*,
 4 725 F.3d 1170 (9th Cir. 2013)..... 16, 21

5 *Signature Mgmt. Team, LLC v. Automattic, Inc.*,
 6 941 F. Supp. 2d 1145 (N.D. Cal. 2013)..... 8, 9, 10, 12, 13, 14, 16

7 *Sony Music Entm’t Inc. v. Does 1-40*,
 8 326 F. Supp. 2d 556 (S.D.N.Y. 2004) 6, 8, 9, 10, 11

9 *UMG Recordings, Inc. v. Augusto*,
 10 628 F.3d 1175 (9th Cir. 2011).....7

11 *UMG Recordings, Inc. v. Does 1-4*,
 12 2006 WL 1343597 (N.D. Cal. Apr. 19, 2006) 10

13 *Weissmann v. Freeman*,
 14 868 F.2d 1313 (2d Cir. 1989)..... 19

15 *Worldwide Church of God v. Philadelphia Church of God, Inc.*,
 16 227 F.3d 1110 (9th Cir. 2000)..... 19, 22

17 **STATUTES**

18 17 U.S.C. § 106.....8

19 17 U.S.C. § 410(c)7

20 17 U.S.C. § 501(a)7

21 17 U.S.C. § 512..... 1, 2

22 17 U.S.C. § 512(c)(3)(A)(v)6

23 17 U.S.C. § 512(c)(3)(A)(vi)6

24 17 U.S.C. § 512(f).....6

25 17 U.S.C. § 512(h)3, 6

26 17 U.S.C. § 512(h)(1).....3

27 17 U.S.C. § 512(h)(2).....3

28 17 U.S.C. § 512(h)(2)(c)6

RULES

Fed. R. Civ. P. 45(d)(3).....4

Glaser Weil

1 **I. INTRODUCTION**

2 Twitter’s motion to quash (the “Motion”) is the second refusal of Twitter to comply with
3 the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512: The first was with respect to
4 a notice to take down copyrighted works that were infringed, pursuant to section 512(c); and the
5 second is with respect to a subpoena to identify the infringer of those works, pursuant to section
6 512(h).

7 Bayside Advisory LLC (“Bayside”) exclusively owns the copyrights to certain
8 photographs, which have been registered with the Copyright Office (the “Photographs”). A
9 Twitter user with the handle @CallMeMoneyBags (“MoneyBags”) posted in each of six separate
10 tweets one of the Photographs to his¹ Twitter account without Bayside’s permission toward the
11 end of October 2020. Pursuant to the DMCA, Bayside submitted a takedown notice to Twitter
12 for the six Photographs contained in the tweets. Instead of responding expeditiously to remove
13 the Photographs, and without legal basis, Twitter rejected Bayside’s notice and instead forced
14 Bayside’s counsel to register as a user with Twitter and then use Twitter’s form. Bayside then
15 submitted this form and Twitter eventually removed the Photographs from its platform *twelve*
16 *days* after it received Bayside’s notice. MoneyBags never filed a DMCA counter-notice.

17 Bayside then requested that this Court issue a subpoena under the DMCA to uncover the
18 identity of MoneyBags and protect its rights under the Copyright Act. Although the DMCA
19 required Twitter to “expeditiously disclose” MoneyBags’ identity, Twitter refused to do so,
20 instead objecting, primarily on the grounds that such information is protected by the First
21 Amendment. Though Twitter indicated that it notified him of the subpoena, MoneyBags has not
22 appeared in this action or otherwise contacted counsel for Bayside.

23 The Motion should be denied, both procedurally because it is untimely, and substantively
24 because Bayside has complied with the requirements of section 512(h) and has made a prima
25 facie showing that MoneyBags has engaged in copyright infringement, an activity not protected
26 by the First Amendment. Bayside has also satisfied the additional tests that some courts have

27 _____
28 ¹ Bayside uses masculine pronouns to refer to @CallMeMoneyBags since the account’s
biography currently reads “Call me Mr. Moneybags.”

1 required before ordering the disclosure of the identity of an anonymous copyright infringer. Nor
 2 is the copying of the Photographs protected by fair use. Indeed, if Twitter actually thought that
 3 was true, it never would have removed the Photographs from its service in the first place. Twitter
 4 should not be allowed to continue to disregard the DMCA because Twitter finds it inconvenient
 5 or contrary to its business model to do so.

6 **II. FACTUAL AND PROCEDURAL BACKGROUND**

7 The Twitter account @CallMeMoneyBags² has 399 followers and has tweeted 67 times.
 8 The overwhelming majority of the tweets are critical of the private equity industry and figures
 9 within it. Since October 19, MoneyBags has tweeted numerous times about various figures in the
 10 private equity industry. Six of those tweets each included a Photograph. While the text of these
 11 tweets mentions Brian Sheth (and hashtags of various members and entities of the private equity
 12 industry, including Robert Smith and Bob Brockman), the Photographs were not of any of those
 13 people or taken by them. Rather, the Photographs are each of a model posed in different settings
 14 (the facial identity of the model in two of the Photographs is unidentifiable). None of the people
 15 mentioned in the tweets own or control (and have never owned or controlled) the copyrights to
 16 the Photographs, nor own or control (and have never owned or controlled) any interest in
 17 Bayside. (Declaration of Robert E. Allen [“Allen Decl.”] ¶¶ 3-4, Ex. 1).

18 On October 29, 2020, Bayside submitted a DMCA takedown request to Twitter for the
 19 six Photographs contained in the tweets pursuant to 17 U.S.C. § 512(c) (the “DMCA Notice”).
 20 (Allen Decl. ¶ 5, Ex. 2). Bayside sent the DMCA Notice, which included all of the required
 21 elements set forth in section 512(c)(3), to Twitter’s designated agent pursuant to section
 22 512(c)(2) via Federal Express and email. (*Id.*) Instead of responding “expeditiously to remove, or
 23 disable access to, the material that is claimed to be infringing,” as required in section
 24 512(c)(1)(C), Twitter rejected on October 29, 2020 the DMCA Notice sent via email because it
 25 was sent as an email attachment and rejected the DMCA Notice sent via Federal Express on
 26 November 2, 2020 because Twitter alleged that it “didn’t have enough detail” about the
 27

28 ² Accessible at <https://twitter.com/callmemoneybags>.

1 Photographs (which was false), and instead provided its own “copyright complaint form” for
2 Bayside to fill out and submit. (*Id.* ¶¶ 6-7, Exs. 3-4). There is nothing in the DMCA that requires
3 a copyright complainant to use the service provider’s form in lieu of sending the notice via email
4 or mail to its designated agent in accordance with section 512(c)(2).

5 The “copyright complaint form” can only be filed by a Twitter subscriber, thereby
6 requiring Bayside’s counsel to register as a user with Twitter. Bayside then submitted Twitter’s
7 “copyright complaint form” on November 2, 2020, and Twitter removed the Photographs from
8 its platform *seven days* after the submission of the “copyright complaint form” and *twelve days*
9 after Twitter received the DMCA Notice. (*Id.* ¶ 8, Ex. 5) . MoneyBags never filed a counter-
10 notice under the DMCA.

11 The text and the hashtags of the tweets remain publicly accessible. Bayside obtained
12 registrations from the United States Copyright Office for the Photographs, effective November 2,
13 2020. On November 25, 2020, Bayside filed a request for the issuance of a subpoena under 17
14 U.S.C. § 512(h) to identify the infringer MoneyBags (the “Subpoena”). *See* Dkt. No. 1.

15 Section 512(h) allows “[a] copyright owner or a person authorized to act on the owner’s
16 behalf [to] request the clerk of any United States district court to issue a subpoena to a service
17 provider for identification of an alleged infringer in accordance with this subsection.” 17 U.S.C.
18 § 512(h)(1).

19 The Subpoena was issued on December 2 and served on Twitter on December 3, 2020.
20 Though the date for compliance on the subpoena was listed as December 4, 2020, a cover letter
21 accompanying the Subpoena provided Twitter up until December 18, 2020 to comply. In the
22 Motion, Twitter does not challenge that it had a reasonable amount of time to respond to the
23 Subpoena.

24 Upon receipt of the Subpoena, Twitter was required to “expeditiously disclose to the
25 copyright owner or person authorized by the copyright owner the information required by the
26 subpoena, notwithstanding any other provision of law and regardless of whether the service
27 provider responds to the notification.” 17 U.S.C. § 512(h)(2). Twitter failed to do so, instead
28 objecting on December 14, 2020 that a First Amendment analysis of the Subpoena was required.

1 In its objection letter, Twitter stated that it “has sent notice and a copy of your subpoena
2 to the email address associated with the accounts that were properly identified in your
3 subpoena”—i.e., MoneyBags. Throughout January 2021, the parties met and conferred regarding
4 Bayside filing a motion to compel Twitter to comply with the Subpoena. Despite Twitter’s
5 repeated insistence that Sheth either owned the Photographs or had an interest in Bayside,
6 Bayside made clear several times that such statements were false.³ Notwithstanding the fact that
7 the parties were meeting and conferring about Bayside’s motion to compel, Twitter filed this
8 Motion without notice on January 23, 2021. (Allen Decl. ¶ 11, Ex. 7).

9 **III. LEGAL STANDARD**

10 “On a Rule 45 motion to quash a subpoena, the moving party has the burden of
11 persuasion, but the party issuing the subpoena must demonstrate that the discovery sought is
12 relevant.” *Rich v. Butowsky*, 2020 WL 5910069, at *2 (N.D. Cal. Oct. 6, 2020) (Ryu, J.) (internal
13 citation omitted). Therefore, Twitter “bears the burden to demonstrate why discovery should not
14 be permitted.” *Id.* Additionally, “where the identity of alleged defendants will not be known
15 prior to the filing of a complaint[,] ... the plaintiff should be given an opportunity through
16 discovery to identify the unknown defendants, unless it is clear that discovery would not uncover
17 the identities, or that the complaint would be dismissed on other grounds.” *Gillespie v. Civiletti*,
18 629 F.2d 637, 642 (9th Cir. 1980).

19 **IV. ARGUMENT**

20 **A. The Motion Is Untimely and Was Made Without Notice.**

21 Twitter’s motion to quash is untimely. Under the Federal Rules, a court “must quash or
22 modify a subpoena that ... requires disclosure of privileged or other protected matter, if no
23 exception or waiver applies” only “[o]n timely motion.” Fed. R. Civ. P. 45(d)(3). “Courts
24

25 ³ Omitted from the correspondence attached to the Declaration of Hayden M. Schottlaender (Dkt.
26 No. 5-1) was counsel for Bayside’s letter of January 20, 2021 distinguishing the caselaw cited by
27 Twitter to that point and informing Twitter, among other things, that “the photos are exclusively
28 and solely owned and controlled by our client Bayside Advisory LLC, the photos are registered
with the United States Copyright Office reflecting that Bayside is the sole owner, **Mr. Sheth
never had any ownership or control interest in the photos and that Mr. Sheth does not own
or control any interest in Bayside.**” (Emphasis in original) (Allen Decl. ¶ 9, Ex. 6).

1 generally agree that a motion to quash under Rule 45 is timely if made before the date specified
 2 for compliance with the subpoena.” *Handloser v. HCL Am., Inc.*, 2020 WL 4700989, at *4 (N.D.
 3 Cal. Aug. 13, 2020) (internal citation omitted); *see also Schoonmaker v. City of Eureka*, 2018
 4 WL 5829851, at *1 (N.D. Cal. Nov. 7, 2018) (“Certainly [the interested parties] knew that absent
 5 a court order (either sustaining an objection or granting a motion to quash) timely compliance
 6 with the Rule 45 subpoena was mandatory.”).

7 The date for compliance with the Subpoena was December 18, 2020. Neither Twitter nor
 8 its counsel ever asked Bayside for an extension of time to file a motion to quash. Further,
 9 Bayside alerted Twitter in its January 20, 2021 letter that it was too late for Twitter to file a
 10 motion to quash, yet Twitter filed the Motion anyway. (Allen Decl. ¶ 9, Ex. 6). Since Twitter’s
 11 motion to quash was not filed until over a month after the date for compliance, it is untimely and
 12 should be denied on that basis alone.

13 Further, Twitter did not comply with Local Rule 37-1 prior to filing the Motion. While
 14 the parties were meeting and conferring about Bayside’s related motion to compel, at no time did
 15 Twitter mention that it was contemplating filing a motion to quash, let alone meet and confer
 16 about it in accordance with this local rule.

17 **B. The First Amendment Does Not Protect Copyright Infringement Nor the**
 18 **Identity of Copyright Infringers.**

19 Twitter’s argument that Bayside must first satisfy First Amendment standards before
 20 identifying a copyright infringer pursuant to a section 512(h) subpoena is without merit. The
 21 First Amendment does not afford protection for copyright infringement. *Harper & Row*
 22 *Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (“Copyright laws are not restrictions
 23 on freedom of speech as copyright protects only form of expression and not the ideas
 24 expressed.”); *accord BMP Media USA, Inc. v. Crowdgather, Inc.*, 2014 WL 12601054, at *1
 25 (C.D. Cal. July 28, 2014); *see also Duncan v. Cohen*, 2008 WL 2891065, at *2 (N.D. Cal. July
 26 22, 2008) (denying anti-SLAPP motion because a copyright infringement claim does not affect
 27 defendant’s freedom of speech). Second, the First Amendment does not protect the identity of a
 28 copyright infringer. *Crowdgather*, 2014 WL 12601054, at *1 (“As a corollary to *Harper’s*

1 holding, infringer identities are not protected from disclosure by the First Amendment.”); *accord*
 2 *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 118 (2d Cir. 2010) (“[T]o the extent that anonymity
 3 is used to mask copyright infringement or to facilitate such infringement by other persons, it is
 4 unprotected by the First Amendment.”); *Sony Music Entm’t Inc. v. Does 1-40*, 326 F. Supp. 2d
 5 556, 558 (S.D.N.Y. 2004); *IO Group v. J.W.*, 2011 WL 237673, at *2 (N.D. Cal. Jan. 24, 2011)
 6 (Ryu, J.).

7 Accordingly, a section 512(h) subpoena “places no limits on protected activity; it governs
 8 unprotected copyright piracy, and § 512(h) reaches only the identity of the subscriber (already
 9 known to the service provider), not any underlying expression.” *In re Verizon Internet Servs.*,
 10 *Inc.*, 257 F. Supp. 2d 244, 262 (D.D.C. 2003) (denying motion to quash 512(h) subpoena), *rev’d*
 11 *on other grounds*, *Recording Industry Ass’n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d
 12 1229 (D.C. Cir. 2003).

13 Further, section 512(h) has built-in safeguards and disincentives to protect against
 14 baseless or abusive subpoenas, thereby preventing the intrusion on MoneyBags’ First
 15 Amendment rights: (1) a copyright owner must have a “good faith belief” that the use of
 16 copyrighted material is not authorized before obtaining a section 512(h) subpoena. 17 U.S.C. §
 17 512(c)(3)(A)(v); (2) a copyright owner must submit a sworn declaration to the effect that the
 18 purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that
 19 such information will only be used for the purpose of protecting rights under the Copyright Act.
 20 *Id.* § 512(h)(2)(c); (3) the person seeking a section 512(h) subpoena must state, under penalty of
 21 perjury, that he is authorized to act on behalf of the copyright owner. *Id.* § 512(c)(3)(A)(vi); and
 22 (4) any person who “knowingly materially misrepresents” that activity is infringing “shall be
 23 liable for damages, including costs and attorneys’ fees, incurred by the alleged infringer” as a
 24 result of the misrepresentation. *Id.* § 512(f). “With all these protections, it is unlikely that
 25 § 512(h) will require disclosure, to any significant degree, of the identity of individuals engaged
 26 in protected anonymous speech, as opposed to those engaged in unprotected copyright
 27 infringement.” *Verizon*, 257 F. Supp. 2d at 263.

1 **C. Bayside Has Established a Prima Facie Case of Infringement.**

2 Courts in the Ninth Circuit have denied motions to quash a subpoena upon the showing
 3 of a prima facie case of copyright infringement and have granted motions to quash in its
 4 absence.⁴ *Compare In re Subpoena Issued Pursuant To The Digital Millennium Copyright Act*
 5 *To: 43SB.COM, LLC.*, 2007 WL 4335441, at *4 (D. Idaho Dec. 7, 2007) (denying motion to
 6 quash a section 512(h) subpoena where copyright owner demonstrated a prima facie case of
 7 copyright infringement—“the Court will not go into an in-depth analysis of the merits of a
 8 copyright infringement claim in determining whether to quash this subpoena.”); *IO Group*, 2011
 9 WL 237673, at *2 (denying motion to quash and allowing the disclosure of anonymous internet
 10 user identity in a copyright infringement action) *with Highfields Capital Mgmt., L.P. v. Doe*, 385
 11 F. Supp. 2d 969, 970 (N.D. Cal. 2005) (granting motion to quash a subpoena to identify an
 12 internet poster involving non-copyright claims [and thus not a section 512(h) subpoena] where
 13 plaintiff failed to show that “there is a real evidentiary basis for believing that the defendant has
 14 engaged in wrongful conduct that has caused real harm to the interests of the plaintiff.”); *see also*
 15 *Verizon*, 257 F. Supp. at 263 (a 512(h) subpoena establishes a prima facie case of copyright
 16 infringement).

17 To establish a prima facie case of copyright infringement, a party must show (1)
 18 ownership of a valid copyright and (2) violation by the alleged infringer of at least one of the
 19 exclusive rights granted to copyright owners by the Copyright Act. *See* 17 U.S.C. § 501(a);
 20 *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1178 (9th Cir. 2011). Bayside has satisfied
 21 both elements. First, Bayside has registered the Photographs with the Copyright Office: “In any
 22 judicial proceedings the certificate of a registration made before or within five years after first
 23 publication of the work shall constitute prima facie evidence of the validity of the copyright and
 24 of the facts stated in the certificate.” 17 U.S.C. § 410(c). The Photographs were first published in
 25 2017 and 2020 and registered in November 2020, well within the five-year grace period. The

26 _____
 27 ⁴ Many courts in the Ninth Circuit have applied the *lesser* good faith standard from *Columbia*
 28 *Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 578-79 (N.D. Cal. 1999). *See generally In re*
Anonymous Online Speakers, 661 F.3d 1168, 1175 (9th Cir. 2011) (*seescandy* represents the
 lowest bar).

1 registrations were granted an effective date of November 2, 2020 and list Bayside as the
2 copyright owner.

3 Second, MoneyBags reproduced and displayed the Photographs without authorization by
4 Bayside. 17 U.S.C. § 106 (listing the exclusive rights of copyright). Bayside’s DMCA Notice
5 confirmed, under penalty of perjury, that Twitter was reproducing and publicly displaying them,
6 and Twitter admits that it removed the Photographs from its platform, thereby confirming that it
7 was reproducing and displaying them. (Dkt. No. 5 at 11). Indeed, “the DMCA essentially
8 requires the party seeking a subpoena to plead a prima facie case of copyright infringement for a
9 subpoena to issue.” *Signature Mgmt. Team, LLC v. Automattic, Inc.*, 941 F. Supp. 2d 1145, 1157
10 (N.D. Cal. 2013). Bayside did so here and its requested subpoena issued. *See* Dkt. Nos. 1, 1-1.
11 Bayside, therefore, has established a prima facie case of copyright infringement against
12 MoneyBags.

13 **D. Bayside Satisfies the *Sony Music* Factors.**

14 In deciding whether to allow the disclosure of the identity of an accused anonymous
15 copyright infringer, many courts have required a copyright owner to demonstrate more than a
16 prima facie case of infringement by satisfying the factors set forth in *Sony Music*.⁵ *Sony Music*
17 involved an attempt by plaintiff record companies to uncover the identities of forty unidentified
18 “Doe” defendants who had been accused of copyright infringement through filesharing. *Sony*
19 *Music*, 326 F. Supp. 2d. at 558. Plaintiffs served a subpoena on a non-party internet service
20 provider, seeking to obtain defendants’ identities, and four defendants moved to quash the
21 subpoena. *Id.* In deciding the motion to quash, the *Sony Music* court first concluded that the
22 identity of a person who uses the internet to distribute copyrighted works without permission “is
23 not protected from disclosure by the First Amendment.” *Id.* The court then considered the
24 following factors to weigh the need to disclose the identifying information:

- 25 (1) a concrete showing of a prima facie claim of actionable harm;
26 (2) specificity of the discovery request;
27 (3) the absence of alternative means to obtain the subpoenaed information;

28 ⁵ Prior to the Motion, Twitter’s legal position was that the *Sony Music* test was the correct one to evaluate section 512(h) subpoenas. (Allen Decl. ¶ 11, Ex. 7 at 3).

1 (4) a central need for the subpoenaed information to advance the claim; and
 2 (5) the party’s expectation of privacy.

3 *Id.* at 564-65 (citations omitted).

4 First Factor—Prima Facie Claim. The *Sony Music* court considered the same two factors
 5 in establishing a prima facie case of copyright infringement as described in Section C above:
 6 ownership and copying. *Id.* at 565. As detailed above, Bayside has made a concrete showing of a
 7 prima facie claim. *Automattic*, 941 F. Supp. 2d at 1157 (“[T]he DMCA essentially requires the
 8 party seeking a subpoena to plead a prima facie case of copyright infringement for a subpoena to
 9 issue.”).

10 Second Factor—Specificity of the Request. The *Sony Music* court considered the
 11 plaintiff’s discovery request, which was the name, address, telephone number, email address, and
 12 Media Access Control address for each Doe defendant, “sufficiently specific to establish a
 13 reasonable likelihood that the discovery request would lead to identifying information that would
 14 make possible service upon particular defendants who could be sued in federal court.” *Sony*
 15 *Music*, 326 F. Supp. 2d at 566. Here, Bayside similarly only seeks “[a]ll identifying information,
 16 including but not limited to real names, IP addresses, MAC addresses, email addresses, and
 17 telephone numbers, associated with the Twitter account ‘@CallMeMoneyBags’ accessible at the
 18 URL ‘<https://twitter.com/callmemoneybags>.’” Bayside’s request is no broader than necessary to
 19 learn MoneyBags’ true identity, and, like in *Sony Music*, “[s]uch information will enable
 20 [Bayside] to serve process on [MoneyBags].” *Id.*

21 Third Factor—Alternative Means. The *Sony Music* court examined the application for
 22 expedited discovery and plaintiff’s opposition to quash for the steps that the plaintiffs took to
 23 locate the Doe defendants through other means, including the use of publicly available database
 24 to trace the IP address for each defendant. The court determined that the plaintiffs “established
 25 that they lacked other means to obtain the subpoenaed information . . .” *Id.* Similarly, Bayside
 26 has no alternative means for uncovering MoneyBags’ identity. Bayside carefully examined
 27 MoneyBags’ entire Twitter feed, but it reveals no clues as to his identity or location. (Allen Decl.
 28 ¶ 10). Bayside has also examined the EXIF data associated with the Photographs posted by

1 MoneyBags, but this data also contains no clues about MoneyBags’ real name or identity. *Id.*

2 Fourth Factor—Need to Advance Claim. The subpoenaed information is central to
3 Bayside’s copyright infringement claims. As was the case in *Sony Music*, “[a]scertaining the
4 identities and residences of the Doe defendants is critical to plaintiffs’ ability to pursue litigation,
5 for without this information, plaintiffs will be unable to serve process.” *Sony Music*, 326 F. Supp.
6 2d at 566.

7 Fifth Factor—Expectation of Privacy. The *Sony Music* court found that the defendants
8 had a minimal expectation of privacy where they accepted the ISP’s terms of service, thereby
9 agreeing not to transmit or distribute any material in violation of copyright laws. *Id.* at 566-67.
10 Similarly, MoneyBags had to agree to Twitter’s terms of service, which also preclude the posting
11 of materials in violation of copyright law. (Allen Decl. ¶ 12, Ex. 8). Further, MoneyBags has no
12 “expectation of privacy for copyright infringement.” *Automattic, Inc.*, 941 F. Supp. 2d at 1158.

13 Balancing of the Factors. The *Sony Music* court weighed all of the factors and concluded
14 that the defendants’ “right to remain anonymous must give way to plaintiffs’ right to use the
15 judicial process to pursue what appear to be meritorious copyright infringement claims.” *Sony*
16 *Music*, 325 F. Supp. 2d at 567. Similarly, all five *Sony Music* weigh in favor of allowing Bayside
17 to enforce its Subpoena and uncover MoneyBags’ identity.

18 Other courts, including the Second Circuit, confirm that the *Sony Music* test is the correct
19 standard to evaluate the disclosure of the identity of an anonymous copyright infringer.⁶ *See*,
20 *e.g.*, *Arista Records*, 604 F.3d at 119 (“We agree that [the *Sony Music* test] constitutes an
21 appropriate general standard for determining whether a motion to quash, to preserve the
22 objecting party’s anonymity, should be granted.”); *Crowdgather*, 2014 WL 12601054, at *2
23 (applying the *Sony Music* factors and ordering the disclosure of the identity of those who posted
24 plaintiff’s copyrighted works on defendant’s website); *UMG Recordings, Inc. v. Does 1-4*, 2006
25 WL 1343597, at *2-*3 (N.D. Cal. Apr. 19, 2006) (applying the *Sony Music* factors and finding
26

27 ⁶ The Ninth Circuit cited *Sony Music* positively in describing the different levels of review in
28 cases involving the disclosure of the identity of an online speaker. *Online Speakers*, 661 F.3d
1168 at 1175. *Sony Music* appears to be the only copyright case cited in *Online Speakers*.

1 good cause for the disclosure of the Doe defendants' names and contact information).

2 **E. Although Not Required, Bayside Also Satisfies the Balancing of Harms Test**
 3 **Erroneously Attributed to Highfields.**

4 Twitter argues that this Court should apply the test from *Highfields Capital Management*
 5 to evaluate the Subpoena, even though *Highfields* did not involve copyright infringement or the
 6 issuance of a 512(h) subpoena. The district court's opinion in *Highfields* rested solely on the fact
 7 that the plaintiff "failed to make a sufficient showing that defendant has engaged in wrongful
 8 conduct causing harm to plaintiff." 385 F. Supp. 2d at 971. As the court explained, this standard
 9 is analogous to the requirement of showing "a prima facie claim of actionable harm," citing *Sony*
 10 *Music*, or a showing "that an act giving rise to civil liability actually occurred," citing the lesser
 11 standard set in *seescandy*. *Id.* at 970-71. Bayside satisfied that test by complying with the terms
 12 of obtaining a 512(h) subpoena.

13 The magistrate judge's report and recommendation attached to the opinion, however,
 14 includes a second stage analysis where "the court would balance the parties' competing interests
 15 to determine whether the extent of the harm to defendant's First Amendment and privacy
 16 interests could be justified by the magnitude of the contribution that enforcing the subpoena
 17 likely would make to the interests plaintiff seeks to advance through the litigation." *Id.* at 980.
 18 Notably, the magistrate cites two cases on which he relies, yet *neither of them require a*
 19 *balancing of interest test* nor does the district court mention or address this balancing test. *See id.*
 20 at 978 n.8 (*Dendrite Int'l, Inc. v. Does No. 3*, 42 N.J. Super. 134, 775 A.2d 756 (2001) (denying
 21 discovery because the plaintiff failed to make a prima facie case of defamation, using the test
 22 from *seescandy* to balance free speech rights against the strength of the prima facie case) and
 23 *seescandy.com*, 185 F.R.D. 573 (using its test for the purpose of balancing those rights)).⁷

24
 25 ⁷ To identify a Doe defendant, *seescandy* requires the moving party to: (1) identify the defendant
 26 with enough specificity; (2) recount the steps taken to locate the defendant; (3) show that its
 27 action could survive a motion to dismiss; and (4) file a request for discovery, identifying the
 28 persons on whom discovery might be served and for which there is a reasonable likelihood it will
 lead to identifying information. *SBO Pictures, Inc. v. Does 1-3036*, 2011 WL 6002620, at *2
 (N.D. Cal. Nov. 30, 2011) (citing *seescandy*, 185 F.R.D. at 578-80). This test achieved the
 court's objective in balancing First Amendment rights. It did not apply a separate balancing test.

1 Twitter cites two cases that applied this balancing test, *Music Group Macao Commercial*
2 *Offshore Ltd. v. Does*, 82 F. Supp. 3d 979 (N.D. Cal. 2015) and *Art of Living Found. v. Does 1-*
3 *10*, 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011). *Macao* involved defamation, not copyright
4 infringement. *Art of Living* did involve copyright infringement, but the court misinterpreted the
5 holding of *Highfields* to require the additional balancing of harms. 2011 WL 5444622, at *4. The
6 magistrate in *Highfields* had recommended granting the motion to quash because plaintiff had
7 failed to adduce sufficient evidence of the viability of any of plaintiff's claims. While the
8 magistrate had requested the district court to make such balancing *if* the district court rejected the
9 magistrate's recommendation, the district court accepted the magistrate's recommendation and
10 never got to or addressed whether such balancing was required. *Highfields*, 385 F. Supp. 2d at
11 970, 980. Indeed, the Ninth Circuit, when discussing the different standards applicable to
12 disclosing an anonymous speaker based on the nature of the speech, confirmed that *Highfields*
13 supports the standard requiring a plaintiff to make "a prima facie showing of the claim for which
14 the plaintiff seeks the disclosure of the anonymous speaker's identity. See, e.g., ... *Highfields*
15 *Capital Mgmt., LP v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005)" *Online Speakers*, 661 F.3d
16 at 1175.

17 *Art of Living* is also distinguishable because it did not involve a 512(h) subpoena, the
18 poster extensively criticized the copyrighted work (see section IV.F below on fair use) and the
19 poster not only appeared in the case through counsel but also responded to discovery. *Art of*
20 *Living*, 2011 WL 5444622, at *10 ("[T]his case appears to be unique among the relevant body of
21 case law in that Skywalker has not only appeared through counsel and filed numerous dispositive
22 motions, but also propounded and responded to interrogatories and requests for production.").
23 Thus, the balancing of the harms tipped in favor of the defendant at that stage in the litigation
24 because the infringer had appeared and was actively involved in the case. But the court further
25 noted that "disclosure of Skywalker's identity may be necessary in order to conduct a pre-trial
26 deposition and to enforce any judgment ultimately obtained against him." *Id.*

27 This court addressed the disclosure of a copyright infringer pursuant to a 512(h)
28 subpoena in *Automattic*, 941 F. Supp. 2d 1145. In *Automattic*, the owner of a copyrighted

1 textbook sought the identity of a blogger pseudonymously known as “Amthrax,” who posted
 2 plaintiff’s copyrighted work on his blog “in the context of a critical campaign against the
 3 institution holding the copyright.” *Id.* at 1149-50, 1157. The court applied both the *Sony Music*
 4 test and the balancing test created by the *Highfields* magistrate and adopted by the court in *Art of*
 5 *Living*. First, the court first analyzed whether plaintiff has demonstrated a prima facie case of
 6 copyright infringement. *Automattic*, 941 F. Supp. 2d at 1157. Noting that “the DMCA essentially
 7 requires the party seeking a subpoena to plead a prima facie case of copyright infringement for a
 8 subpoena to issue,” the Court quickly concluded that the plaintiff had demonstrated a prima facie
 9 case. *Id.*

10 Second, the court applied the test from *Art of Living*, balancing the harm to Amthrax that
 11 would occur if the motion to quash was denied with the harm to plaintiff if the motion to quash
 12 was granted. *Id.* at 1157-58. The court examined the harm to Amthrax, finding “that Amthrax’s
 13 First Amendment concerns are predicated on his underlying fear that [plaintiff] will misuse the
 14 DMCA process. The DMCA subpoena is to be used solely for the purposes of protecting the
 15 serving party’s rights in its copyright. Provided [plaintiff] properly uses Amthrax’s identifying
 16 information obtained using the DMCA subpoena, and does not disseminate his identity or take
 17 any retaliatory action, Amthrax will suffer only minimal harm if his Motion is denied.” *Id.*
 18 (citation omitted). The court then examined the harm to the copyright owner, finding that the
 19 copyright owner had a substantial interest in obtaining Amthrax’s identity to facilitate a
 20 copyright infringement action against him. The court concluded that the balance weighed in
 21 favor of disclosure of Amthrax’s identity. “The minimal potential harm to Amthrax of disclosure
 22 of his identifying information for the purposes of the DMCA does not justify the burden placed
 23 on [the copyright owner] by granting Amthrax’s Motion.”⁸ *Id.*

24 Third, the court applied the test from *Sony Music* and found that the plaintiff had satisfied
 25 all of the factors except factor three—the plaintiff had not shown that there was an absence of

26 _____
 27 ⁸ Notably, the Court determined that plaintiff’s “interest in obtaining Amthrax’s identity to
 28 facilitate a copyright infringement action” outweighed the “minimal potential harm” to Amthrax
 even though he had offered to appear anonymously through counsel and offered to accept service
 through his attorney. *Id.*

1 alternative means to obtain the subpoenaed information—and that there was less of a need for
 2 the subpoenaed information than in *Sony Music* because Amthrax had offered to accept service
 3 and defend the copyright claim through his attorney. *Id.* at 1158. Nevertheless, the court
 4 concluded that “[c]ombined, the factors tip in favor of allowing [plaintiff] to obtain Amthrax’s
 5 identifying information” and denied Amthrax’s motion to quash. The copyright owner “has made
 6 a prima facie showing of copyright infringement, and the DMCA will adequately protect
 7 Amthrax’s First Amendment interest. The information may only be used for asserting
 8 [plaintiff’s] rights under its copyright, and Amthrax will be able to raise his fair use defense in
 9 those proceedings.” *Id.*

10 Bayside’s case against MoneyBags is even more compelling than Signature
 11 Management’s was against Amthrax. Unlike in *Automattic*, here, Bayside has met all of the *Sony*
 12 *Music* factors. Additionally, MoneyBags has not appeared and has not offered to accept
 13 service—anonously or otherwise—despite the fact that he was notified of Bayside’s
 14 subpoena. Also, Amthrax’s speech in *Automattic* involved a matter of public concern: multi-level
 15 marketing schemes. *Id.* at 1149. Here, MoneyBags’ tweets concern rumor and inuendo about a
 16 private person. MoneyBags does not criticize private equity generally in the offending tweets nor
 17 criticize any of the Photographs. Regardless, if the Court applies the balancing of harms test
 18 found in *Art of Living*, then, like in *Automattic*, the potential harm to Bayside from quashing the
 19 Subpoena substantially outweighs the potential harm to MoneyBags from enforcing it.

20 **F. Use of the Photographs Did Not Constitute Fair Use.**

21 Although Twitter argues that this Court should apply the *Highfields* test (i.e., inclusive of
 22 the balancing of harms test applied in *Art of Living*), (Dkt. No. 5 at 13-14), Twitter later cites a
 23 recent case from this court, *In re DMCA Subpoena to Reddit, Inc.*, which rejected the *Highfields*
 24 test for use in cases involving copyright infringement and the DMCA. 441 F. Supp. 3d 875, 882
 25 (N.D. Cal. 2020) (“While the *Highfields* test certainly has a role in some online speech cases, it
 26 is not well suited for a copyright dispute.”); Dkt. No. 5 at 10, n.5. Twitter then argues that *Reddit*
 27 merely suggests that *Highfields* does not apply to copyright infringement actions and contends
 28 that the *Reddit* Court applied *Highfields* anyway. Not so. The *Reddit* court did not undertake any

1 balancing of harms. Instead, the *Reddit* court focused solely on whether the infringer’s use of the
2 copyrighted works constituted fair use where the salient facts were not disputed, and the record
3 was well developed. *Id.* at 883-84. In doing so, however, the *Reddit* court required the plaintiff to
4 not just make a prima facie case for copyright infringement, but to prove, without the benefit of
5 discovery, that the infringer’s use was fair—effectively, a summary judgment standard with the
6 burden to disprove the affirmative defense of fair use on the plaintiff. Such holding is
7 inconsistent with the Ninth Circuit’s opinion in *Online Speakers*, 661 F.3d at 1176-77 (the *Cahill*
8 standard, which requires plaintiffs to be able to survive a hypothetical motion for summary
9 judgment, is appropriate for cases involving political speech). Instead, as this court held in
10 *Automattic*, the identity of the infringer should be disclosed (subject to the protections in the
11 DMCA) and the infringer will be able to raise his fair use defense in the copyright infringement
12 action.

13 Even if this Court conducts a fair use inquiry, the copying of the Photographs in the
14 Tweets was not fair use, and it was Twitter’s burden to prove otherwise. *Dr. Seuss Enters., L.P.*
15 *v. ComicMix LLC*, 983 F.3d 443, 459 (9th Cir. 2020) (“[T]he Supreme Court and our circuit have
16 unequivocally placed the burden of proof on the proponent of the affirmative defense of fair
17 use.”). Indeed, if Twitter actually thought that MoneyBags’ use of the Photographs in the tweets
18 constituted fair use, Twitter would not have removed the Photographs from its platform. Failure
19 to do so in accordance with section 512(c) would only have meant that Twitter was ineligible for
20 the DMCA safe harbor for copyright infringement claims.

21 Preliminarily, whether the copying of the Photographs in the tweets constitutes fair use is
22 a mixed question of law and fact. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S.
23 539, 560 (1985). Consequently, courts only address fair use when no material facts are in
24 dispute, which is almost always at the summary judgment stage after the litigants have developed
25 a record. *See Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 530 (9th Cir. 2008). Twitter
26 acknowledges in the Motion that it does not possess all relevant facts (Dkt. No. 5 at 11), yet asks
27 this court to find that the copying of the Photographs constitute fair use based on conjecture and
28

1 speculation.⁹ That is improper and does not satisfy its burden of proof. Further, when similarly
 2 presented with a motion to quash a section 512(h) subpoena, this Court has instead denied the
 3 motion, identified the infringer and acknowledged that “[d]uring the copyright action, [the
 4 accused infringer] will be able to raise his fair use defense.” *Automattic*, 941 F. Supp. 2d at 1158.

5 Turning to the four fair use factors in section 107 of the Copyright Act, Twitter has failed
 6 to meet its burden with respect to any of them.

7 **1. Purpose and Character of the Use.**

8 ***Transformation.*** Twitter claims that the copying of Photographs in the tweets was
 9 transformative. Twitter is wrong, fails to explain how the use of the Photographs was
 10 transformative, and has presented no evidence to meet its burden to support that argument. As
 11 defined by the Supreme Court, “one work transforms another when ‘the new work ... adds
 12 something new, with a further purpose or different character, altering the first with new
 13 expression, meaning or message.’” *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1176 (9th Cir.
 14 2013) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)). MoneyBags,
 15 however, made no alteration to any of the Photographs or to their expressive content or message,
 16 making their use a typical non-transformative case. *Id.* at 1177 (“In the typical ‘non-
 17 transformative’ case, the use is one which makes no alteration to the expressive content or
 18 message of the original work.”).

19 According to Twitter, MoneyBags posted six tweets, each mentioning Sheth and
 20 attaching various images of women. (Dkt. No. 5 at 7). Yet the posts do not provide any
 21 commentary or criticism of the Photographs. Instead, MoneyBags copied the Photographs
 22 without alteration and used them (in at most two of the posts) as illustrative aids to arguably
 23 criticize Sheth (the majority of the posts are devoid of any criticism of either the Photograph or
 24 of Sheth). Nor is there any commentary in the Posts about any of the women in the Photographs.

25
 26 _____
 27 ⁹ Twitter asserts that the Photographs relate to Brian Sheth, but can find no connection between
 28 Bayside and him *or the* Photographs. This is unsurprising, considering that Bayside advised
 Twitter in its January 20, 2021 letter that ***Mr. Sheth never had any ownership or control interest
 in the Photographs and that Mr. Sheth does not own or control any interest in Bayside.*** (Allen
 Decl. ¶ 9, Ex. 6).

1 Absent alterations, criticism, or commentary on the Photographs themselves, their use
2 cannot be transformative. *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1175 (9th Cir. 2012)
3 (“Campbell makes clear that the ‘heart’ of a claim for transformative use is ‘the use of some
4 elements of a prior author’s composition to create a new one that, at least in part, comments on
5 that author’s works.’” (quoting *Campbell*, 510 U.S. at 580)). In *Monge*, a magazine reproduced
6 celebrity photos, accompanied by the following headlines and captions: “The Secret Wedding of
7 Noelia and Jorge Reynoso in Las Vegas”; “We even have photos of their first night as a married
8 couple!”; “In fact, a lot has been said about a supposedly secret wedding in Las Vegas, Nevada,
9 that took place in January 2007, but until now, no one had shown photos of that memorable day.
10 TVNotas got a hold of those photos and shows them to you now, exclusively.” The court found
11 that “neither minor cropping nor the inclusion of headlines or captions transformed the
12 copyrighted works,” *id.* at 1174, because the magazine “did not transform the photos into a new
13 work” and did not “incorporate the photos as part of a broader work,” but instead “left the
14 inherent character of the images unchanged.” *Id.* at 1176; *see also Elvis Presley Enters. v.*
15 *Passport Video*, 349 F.3d 622, 628-29 (9th Cir. 2003) (voice-overs do not transform a work:
16 “There must be real, substantial condensation of the materials . . . and not merely the facile use
17 of scissors; or extracts of the essential parts, constituting the chief value of the original work.”
18 (internal citations omitted)).

19 This court has similarly rejected finding transformation where the infringer did not
20 comment on or alter the original work. *Lucasfilm Ltd. v. Ren Ventures*, 2018 WL 5310831, at *4
21 (N.D. Cal. June 29, 2018) (“Here, defendants merely reposted images and dialogue from the
22 original works with ‘minor cropping [or] the inclusion of headlines or captions’ which cannot
23 transform the copyrighted works into something new.”) (quoting *Monge*, 688 F.3d at 1174)).
24 Other courts have concluded the same: “Display of a copyrighted image or video may be
25 transformative where the use serves to illustrate criticism, commentary, or a news story *about*
26 that work.” *Barcroft Media, Ltd. v. Coed Media Grp., LLC*, 297 F. Supp. 3d 339, 352 (S.D.N.Y.
27 2017); *Cruz v. Cox Media Grp., LLC*, 444 F. Supp. 3d 457 (E.D.N.Y. 2020) (use was as an
28 illustrative aid instead of a transformative use because photograph depicted the subjects

1 described in the article instead of criticizing or commenting on the photo itself); *Ferdman v. CBS*
 2 *Inter. Inc.*, 342 F. Supp. 3d 515, 533 (S.D.N.Y. 2018) (use was not transformative because the
 3 photograph itself was not the story, only the contents of the photograph was of some public
 4 interest); *see also Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 264 (4th Cir. 2019) (use
 5 of a photograph expressly for its content is not transformative—“such a use does not necessarily
 6 create a new function or meaning that expands human thought; if this were so, virtually all
 7 illustrative uses of photography would qualify as transformative.”).

8 Here, even if the text in the tweets constituted more than simple headings, such text does
 9 not transform the Photographs. For example: (1) the October 28, 2020 tweet states “Brian Sheth
 10 is the King of Private Equity,” yet the Photograph is of a posed woman next to a floral display;
 11 (2) the October 21, 2020 tweet states “Brian Sheth is the best investor in private equity. This is
 12 how he spends his money. I would say this is a good investment!” yet the photograph is of the
 13 torso of an unidentifiable woman, posing in a bathing suit; and (3) the October 20, 2020 (8:20
 14 a.m.) tweet states “Life is good when you are Brian Sheth,” yet the photograph is of a posed
 15 woman on a plane. Under copyright law, MoneyBags “possesses an unfettered right to use any
 16 factual information revealed [through the photos] for the purpose of enlightening its audience,
 17 but it can claim no need to bodily appropriate [the copyright owner’s] expression of that
 18 information by utilizing portions of the actual [photos].” *Monge*, 688 F.3d at 1175. Accordingly,
 19 while copyright law does not preclude MoneyBags from criticizing Sheth, it does not allow
 20 MoneyBags to copy the Photographs without altering or commenting on the Photographs
 21 themselves.

22 Twitter cites inapposite cases to support its position. In the out-of-circuit case *Katz v.*
 23 *Google Inc.*, a blogger used a candid photograph of the plaintiff in posts critical of the plaintiff.
 24 Unlike MoneyBags, the *Katz* blogger commented on Katz’s appearance in the photograph itself
 25 and, among other things, cropped and pasted the image of Katz’s face into cartoons that either
 26 depicted him wearing a dunce cap or otherwise ridiculed his behavior. The court concluded that
 27 the blogger’s “use of the Photo was transformative because, in the context of the blog post’s
 28 surrounding commentary, she used Katz’s purportedly ‘ugly’ and ‘compromising’ appearance to

1 ridicule and satirize his character.” 802 F.3d 1178, 1182-83 (11th Cir. 2015). Similarly, the
 2 blogger in *In re DMCA Subpoena to Reddit, Inc.* posted two copyrighted works related to *The*
 3 *Watchtower* magazine, an ad and a chart, and extensive criticism of those works, which the court
 4 found transformative. 441 F. Supp. 3d 875, 884 (N.D. Cal. 2020). The context in both *Katz* and
 5 *Reddit* is absent here where the object of MoneyBags’ commentary, Sheth, is not in any of the
 6 Photographs, nor is there any commentary in the tweets about the Photographs. Consequently,
 7 the use of the Photographs is not transformative.

8 **Commerciality.** Twitter argues that the use was not commercial because “there is no
 9 indication that the Account is getting paid for the content they post and it has a mere 300
 10 followers.” (Dkt. No. 5 at 16) Whether MoneyBags is paid for the content is not the issue. “The
 11 crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain
 12 but whether the user stands to profit from exploitation of the copyrighted material without paying
 13 the customary price.” *Harper & Row*, 471 U.S. at 562. If one of MoneyBags’ Tweets went viral,
 14 MoneyBags would gain followers and the ability to become a paid influencer (brands pay social
 15 media influencers to post about their brands). The Ninth Circuit recognizes that “in weighing
 16 whether the purpose was for ‘profit,’ ‘monetary gain is not the sole criterion . . . particularly in
 17 [a] . . . setting [where] profit is ill-measured in dollars.” *Worldwide Church of God v.*
 18 *Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1117-18 (9th Cir. 2000) (internal citation
 19 omitted) (defendant profited from copying the work by providing it at no cost to its members, by
 20 attracting through distribution of the work new members who donate income to defendant, and
 21 by enabling defendant’s growth); *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (a
 22 professor can “profit” by gaining recognition among his peers and authorship credit). Twitter
 23 wrongly places the burden on Bayside to establish that MoneyBags’ sharing of the Photographs
 24 was not for profit instead of providing any evidence that MoneyBags did not “profit” through
 25 attempting to gain followers and increased influence. Consequently, the first factor weighs
 26 against fair use.

1 **2. Nature of the Copyrighted Work.**

2 Twitter incorrectly refers to the Photographs as “candid,” and then argues that candid
3 photographs are factual as opposed to creative works. Merriam-Webster’s Dictionary defines
4 “candid” as “relating to or being photography of subjects acting naturally or spontaneously
5 *without being posed.*”¹⁰ (Emphasis added.) The subject of each of the Photographs is posed and
6 therefore the Photographs are not candid photographs.

7 Regardless of whether the Photographs are deemed to be candid, however, photographs
8 “are generally viewed as creative, aesthetic expressions of a scene or image and have long been
9 the subject of copyright.” *Monge*, 688 F.3d at 1177 (finding even point-and-shoot images are not
10 entirely factual in nature); see *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884)
11 (photographic portrait of Oscar Wilde was entitled to copyright protection because of various
12 creative elements employed by the photographer); *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068,
13 1074 (9th Cir. 2000) (“Indeed, the idea that photography is art deserving [copyright] protection
14 reflects a longstanding view of Anglo-American law.”); see also *Baraban v. Time Warner, Inc.*,
15 2000 WL 358375, at *4 (S.D.N.Y. Apr. 6, 2000) (“Although photographs are often ‘factual or
16 informational in nature,’ the art of photography has generally been deemed sufficiently creative
17 to make the second fair use factor weigh in favor of photographer-plaintiffs.”); *Jarvis v. K2 Inc.*,
18 2004 WL 7338345, at * 11 (W.D. Wash Oct. 1, 2004) (quoting *Baraban*). Consequently, the
19 second factor weighs against fair use.

20 **3. Amount and Substantiality of the Portion Copied.**

21 Quoting *Seltzer*, Twitter argues that “[w]here a photograph is at issue in a copyright
22 dispute, the third factor ‘will not weight against an alleged infringer, even when he copies the
23 whole work.’” (Dkt. No. 5 at 17) Twitter conveniently omits the final clause of that sentence
24 from *Seltzer*. The full sentence reads as follows: “Given [the fact that the Scream photo is not
25 meaningfully divisible], this court has acknowledged that this factor will not weigh against an
26 alleged infringer, even when he copies the whole work, *if he takes no more than is necessary for*
27

28 ¹⁰ Available at www.merriam-webster.com/dictionary/candid, sense 3.

1 *his intended use.*” Seltzer, 725 F.3d at 1178 (emphasis added). This last clause is key to
 2 determining whether the amount and substantiality of the portion copied was fair. *See Campbell*,
 3 510 U.S. at 586-87.

4 By copying six photographs instead of one to arguably criticize Sheth about the same
 5 issue, MoneyBags has taken too much of Bayside’s copyrighted works to convey that message.
 6 In *Monge*, the court found that this factor weighed against fair use because the defendant “used
 7 far more than was necessary to corroborate its story—all three wedding images and three post-
 8 wedding photos.” *Monge*, 688 F.3d at 1179 (“[O]ne clear portrait depicting the newly married
 9 couple in wedding garb with the priest would certainly have sufficed to verify the clandestine
 10 wedding”); *see Mavrix Photographs LLC v. Sandra Rose LLC*, 2016 WL 6246408, at *3 (C.D.
 11 Cal. Apr. 6, 2016) (this factor weighed against finding fair use because the same pregnant
 12 celebrity appeared four times on defendant’s website, and three photographs depict the celebrity
 13 wearing the same outfit on the same day). Consequently, the third factor weighs against fair use.

14 **4. Effect on the Potential Market for the Copyrighted Work.**

15 Twitter misstates the law with respect to this factor. Purportedly quoting *Campbell*,
 16 Twitter states “[t]he fourth fair use factor asks whether the defendant’s use ‘would result in a
 17 substantially adverse impact on the potential market’ for the original works.” (Dkt. No. 5 at 18).
 18 What the Supreme Court actually stated was that this factor “requires courts to consider not only
 19 the extent of market harm caused by the particular actions of the alleged infringer, but also
 20 *whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would*
 21 *result in a substantially adverse impact on the potential market for the original.*” *Campbell*, 510
 22 U.S. at 590 (internal citation omitted and emphasis added).

23 Twitter fails to mention or address this critical inquiry—whether the unrestricted and
 24 widespread posting of the Photographs would have a substantially adverse impact on the
 25 potential market for the originals. Such omission is fatal to a finding that this factor favors fair
 26 use. *Id.* at 594 (“[I]t is impossible to deal with the fourth factor except by recognizing that a
 27 silent record on an important factor bearing on fair use disentitled the proponent of the defense, 2
 28 Live Crew, to summary judgment.”); *see also Monge*, 688 F.3d at 1181 (finding that the fourth

1 factor weighs against fair use where the defendant “does not offer any evidence of the relevant
2 market or the lack of market harm from its publication other than broad, unsubstantiated
3 statements in its brief.”).

4 Without any evidence, Twitter argues that the Photographs have no apparent commercial
5 value and that Bayside’s sole purpose is to stop the Photographs from being disseminated. (Dkt.
6 No. 5 at 18). Even if the latter statement was true, it is irrelevant because the potential market for
7 the photos exists independent of Bayside’s present intent. *Monge*, 688 F.3d at 1181 (“The
8 potential market for the photos exists independent of the couple’s present intent, and the district
9 court’s decision to the contrary was error.”); *Worldwide Church*, 227 F.3d at 1119 (“Even an
10 author who had disavowed any intention to publish his work during his lifetime was entitled to
11 protection of his copyright, first, because the relevant consideration was the ‘potential market’
12 and, second, because he has the right to change his mind.”).

13 Twitter has thus failed to meet its burden in establishing that this factor weighs in favor
14 of fair use. Further, because MoneyBags did not transform the Photographs and create new
15 works, MoneyBags’ “mere duplication of the photos ‘serves as a market replacement for [the
16 originals], making it likely that cognizable market harm to the original[s] will occur.’” *Monge*,
17 688 F.3d at 1182-83 (quoting *Campbell*, 510 U.S. at 591). Consequently, the fourth factor
18 weighs against fair use.

19 **5. Balance of the Four Factors**

20 Twitter has not met its burden with respect to any of the four fair use factors, as a matter
21 of law. Accordingly, Twitter has failed to show that MoneyBags’ copying of the Photographs
22 was not an infringement of Bayside’s copyrights.

23 **V. CONCLUSION**

24 The court should deny Twitter’s motion to quash and order Twitter to comply with the
25 Subpoena.

DATED: February 4, 2021

GLASER WEIL FINK HOWARD
AVCHEN & SHAPIRO LLP

By: /s/ Robert E. Allen
ROBERT E. ALLEN
Attorneys for Petitioner
Bayside Advisory LLC

Glaser Weil

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28