

1 James G. Snell, State Bar No. 173070
JSnell@perkinscoie.com
2 Sunita Bali, State Bar No. 274108
SBali@perkinscoie.com
3 PERKINS COIE LLP
Four Embarcadero Center, Suite 2400
4 San Francisco, CA 94111-4131
Telephone: 415.344.7000
5 Facsimile: 415.344.7050

6 Attorneys for Nonparty Twitter, Inc.

7

8

UNITED STATES DISTRICT COURT

9

NORTHERN DISTRICT OF CALIFORNIA

10

SAN FRANCISCO DIVISION

11

12 MUSIC Group Macao Commercial
Offshore Limited, a Macao entity, and
13 MUSIC Group Services US, Inc., a
Washington Corporation,

14

Plaintiffs,

15

v.

16

John Does I-IX,

17

Defendant.

18

N. D. Cal. Case No. CV 14-80328 MISC
W.D. Wash. Civil Action No. 14cv621-RSM

**NOTICE OF MOTION AND MOTION
FOR CORRECTION OF COURT'S
ORDER; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT**

Date: February 26, 2015
Time: 9:30 a.m.
Room: Courtroom C

19

20 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

21

Please take notice that on February 26, 2015, at 9:30 a.m. or as soon thereafter as this
22 matter may be heard before Magistrate Judge Laurel Beeler, Courtroom C of the above-entitled
23 court, located at 450 Golden Gate Avenue, 15th Floor, San Francisco, California, 94102, nonparty
24 Twitter, Inc. ("Twitter") will and hereby does move this Court under Fed. R. Civ. P. 60(b)(1) for
25 correction of the Court's order dated January 6, 2015 ("Order"). [Dkt. No. 15].

26

Twitter seeks relief to (1) correct the First Amendment legal standard relied on in the
27 Order and (2) clarify a factual issue concerning the subpoenas and accounts subject to the Order.

28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND LEGAL STANDARD**

3 On January 6, 2015, this Court granted MUSIC Group’s Motion to Compel nonparty
4 Twitter to produce basic identifying user information. [See Dkt. No. 15.] The Court found that
5 MUSIC Group had met the First Amendment legal standard that applied to its request to unmask
6 an anonymous online speaker, subject to potential objections by the speaker. [See *id.*]

7 Twitter respectfully moves under Fed. R. Civ. P. 60(b)(1) to correct the First Amendment
8 legal standard in the Order and clarify the Order’s scope, specifically the subpoenas and Twitter
9 accounts to which it applies. See *Liberty Mut. Ins. Co. v. E.E.O.C.*, 691 F.2d 438, 441 (9th Cir.
10 1982) (“The law in this circuit is that errors of law are cognizable under Rule 60(b).”) (internal
11 citation omitted); *Blanton v. Anzalone*, 813 F.2d 1574, 1577 n.2 (9th Cir. 1987) (internal citation
12 omitted) (mistakes correctable under Fed. R. Civ. P. 60(b)(1) include where “the court changes its
13 mind ... because it made a legal or factual mistake in making its original determination....”).

14 **II. ARGUMENT**

15 **A. Clarifying the Applicable First Amendment Standard**

16 Twitter seeks to correct the First Amendment legal standard cited in the Order to the
17 standard cited in MUSIC Group’s Motion, which Twitter did not oppose. That standard is the
18 one that this district and the Western District of Washington apply to attempts to unmask
19 anonymous speakers. [See Dkt. No. 1 (arguing that MUSIC Group met the standards explicated
20 in *SaleHoo Grp. Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210 (W.D. Wash. 2010) and *Highfields*
21 *Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005), which *SaleHoo* relied on).]

22 The Order relied on a legal standard not cited by MUSIC Group and that does not apply to
23 requests to unmask anonymous online speakers. Specifically, the Order relied on the test from
24 *Perry v. Schwarzenegger* that applies when a discovery request implicates the First Amendment
25 right to freedom of association, not to anonymous speech. 591 F.3d 1126 (9th Cir. 2009); see *In*
26 *re Anonymous Online Speakers*, 661 F.3d 1168, 1174 (9th Cir. 2011) (“The *Perry* decision rested
27 on the importance of political association and political expression, and it did not involve
28 anonymous speakers.”). The *Perry* test is different from the test to unmask an anonymous online

1 speaker because the *Perry* test “evaluated the First Amendment political associational rights
2 *separately from the underlying claims*” *Id.* at 1176 (emphasis added). As the Ninth Circuit
3 has recognized, the test for unmasking an anonymous online speaker is different because the
4 underlying claims are considered and “the initial burden rests on the party seeking discovery and
5 requires varying degrees of proof of the underlying claim.” *Id.*

6 The correct test for unmasking an anonymous online speaker, Twitter respectfully
7 submits, is the test that MUSIC Group presented in its Motion. It first requires that a court find
8 that the plaintiff has alleged a valid cause of action and made a prima facie evidentiary showing
9 to support the elements of the claim within his or her control. *SaleHoo*, 722 F. Supp. 2d at 1216-
10 17 (citing *Highfields Capital Mgmt.*, 385 F. Supp. 2d at 566). It then requires that a court balance
11 the respective parties’ interests, that is, “assess and compare the magnitude of the harms that
12 would be caused to the competing interests by a ruling in favor of plaintiff and by a ruling in
13 favor of defendant.” *Highfields Capital Mgmt.*, 385 F. Supp. 2d at 566. (This second prong in
14 *Highfields* incorporates what is a separate, third factor in *SaleHoo*: the necessity and scope of
15 information sought. See *Art of Living Found. v. Does 1-10*, No. 10-05022, 2011 WL 5444622,
16 *10 (N.D. Cal. Nov. 9, 2011) (discussing when disclosure may be necessary and the scope of
17 discovery under the second prong of *Highfields*). The Ninth Circuit has cited this test with
18 approval, see *In re Anonymous Online Speakers*, 661 F.3d at 1175, and it is also the analysis
19 conducted in *Art of Living*, which is cited extensively in the Order.

20 Twitter respectfully suggests that modifying the Order is necessary to correct the legal
21 standard applicable to requests seeking to unmask anonymous online speakers. Twitter therefore
22 requests that the Court modify the Order to rely on and apply the authority in the Motion,
23 specifically the *Highfields/SaleHoo* test, consistent with *In re Anonymous Online Speakers*.

24 **B. Correcting a Factual Issue**

25 Twitter also seeks to clarify the Order’s scope. MUSIC Group issued two subpoenas to
26 Twitter: (1) the Amended Subpoena seeking basic identifying information for @FakeUli [Dkt.
27 No. 1, Ex. C], and (2) the Second Amended Subpoena seeking basic identifying information for
28 @NotUliBehringer [Dkt. No. 1, Ex. E]. MUSIC Group’s Motion asked in one part that the Court

1 compel compliance only with its Second Amended Subpoena, but also discussed the Amended
2 Subpoena and @FakeUli. The Court addressed both accounts in its Order, but appears to have
3 directed compliance with only the Second Amended Subpoena related to @NotUliBehringer.
4 [See Dkt. No. 15.] As stated in the Motion, Twitter has no records for @NotUliBehringer. And
5 the applicability of the Order to the Amended Subpoena regarding @FakeUli is unclear.

6 Twitter therefore respectfully requests that the Court clarify whether, assuming the First
7 Amendment legal standard is met and subject to any user objections pursuant to the procedures
8 outlined by the Court, its Order compels Twitter’s compliance with the Amended Subpoena
9 seeking basic identifying information for the @FakeUli account.¹

10 **III. CONCLUSION**

11 For the foregoing reasons, Twitter respectfully requests that the Court adjust its Order to
12 correct the legal standard and clarify the factual issue presented above.

13
14 DATED: February 4, 2015

PERKINS COIE LLP

15
16 By: /s/ Sunita Bali
Sunita Bali

17 Attorneys for Nonparty Twitter, Inc.
18
19
20
21
22
23
24
25
26

27 _____
28 ¹ Twitter sent notice of the Amended Subpoena and Order to the email address associated with @FakeUli on February 3, 2015. Twitter has no records for @NotUliBehringer so cannot send notice of the Second Amended Subpoena or the Order, or produce records for the account.