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United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
San Francisco Division

STEPHANIE SMYTHE,  
Plaintiff,  
v.  
DOES 1-10,  
Defendant.

Case No. 15-mc-80292-LB

**ORDER DENYING MOTION TO  
ENFORCE SUBPOENA**

[ECF No. 1]

**INTRODUCTION**

This is a miscellaneous action in which plaintiff Stephanie Smythe moves the court to enforce a subpoena against non-party Twitter, Inc. The subpoena asks for information that would reveal the identity of the anonymous user or users behind two Twitter accounts. Twitter objects to the subpoena on First Amendment and other grounds. This matter can be decided without oral argument; the court thus vacates the hearing that is set for January 14, 2016. See Civil L.R. 7-1(b). The court finds the First Amendment issue dispositive: The plaintiff has failed to make the showing that is needed to uncover the identity of anonymous speakers under *In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011), and *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005). The court therefore denies the plaintiff's motion.

1 **STATEMENT**

2 The plaintiff maintains a pornographic commercial website. (ECF No. 5-8 at 5.)<sup>1</sup> Twitter runs  
3 an Internet social-networking site on which people can post text and images. (See ECF No. 5 at 2;  
4 ECF No. 1-3 at 2-3.) In posting such material, Twitter users need not use their real names or  
5 otherwise publicly identify themselves. The plaintiff claims that someone (or some people) using  
6 two anonymous Twitter accounts, under the names @C12H22011\_UK and @mfc\_scam, illegally  
7 accessed her website, obtained personal information about her, disclosed that information,  
8 uploaded her “mortgage documents” to Twitter, and made “defamatory comments about her.”  
9 (ECF No. 1 at 7.) She sued these anonymous users as Doe defendants in the Central District of  
10 California, bringing claims for: computer fraud and abuse under 18 U.S.C. § 1030; invasion of  
11 privacy; civil harassment under California Code of Civil Procedure § 527.6; intentional infliction  
12 of emotional distress; and negligent infliction of emotional distress. (ECF No. 5-8 (complaint).)  
13 Her motion in this court also asserts that she is suing the defendants for defamation. (ECF No. 1 at  
14 3, 5.) No freestanding defamation claim appears in her underlying complaint, though both her  
15 emotional-distress claims cite the defendants’ alleged “harassment” and “defamation.” (Id. at 8  
16 [¶ 50], 9 [¶ 56].)

17 She now seeks to compel Twitter to respond to a subpoena demanding information that would  
18 identify the C12H22011\_UK and mfc\_scam users. For both accounts, she asks for the following:  
19 “Any and all information, including, but not limited to, name, address, telephone number, e-mail  
20 address, account creation / deletion date, Internet Protocol, and/or Media Access Control  
21 addresses, that is sufficient to identify” the two users. (ECF No. 1-1 at 3.)

22 Her underlying complaint mentions neither the C12H22011\_UK nor the mfc\_scam user. (ECF  
23 No. 5-8.) Her motion in this court does not mention C12H22011\_UK. (ECF No. 1, passim.) With  
24 respect to mfc\_scam, the plaintiff submits two items. The first is her declaration, which states:

25 My investigation indicates that Doe Defendants used the services of Twitter to  
26 engage in unlawful activities against me. For example, my investigation has  
27 determined that the “MFC\_SCAM” profile was used to upload my mortgage

28 <sup>1</sup> Record citations refer to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the tops of documents.

1 documents online and post defamatory comments about me. Stated otherwise, an  
2 unknown person used the “MFC\_SCAM” profile that was owned, operated, or  
3 registered by Twitter, to engage in unlawful conduct.

4 (ECF No. 1-4 at 3 [¶ 7].)

5 The second item consists of two images reproducing *mfc\_scam*’s Twitter webpage. (ECF No.  
6 1-3 at 2-3.) These “screenshots” contain a number of *mfc\_scam*’s Twitter posts — that is, short  
7 segments of text that can also contain images. The salient image is of a document whose heading  
8 contains the word “MORTGAGE” but that is otherwise illegible. (Id. at 2.) The screenshots also  
9 contain the following text posts (all grammar, spelling, and punctuation in original):

10 @indy\_39 may not be on the mortgage but he’s certainly making the payments for  
11 Ginny’s 40 yr old unemployed husband

12 Not jealous of @GinnyPotterMFC. Just feel sorry for @G1PotterBF and the other’s  
13 supporting a lazy husband and con artist woman. @GGWOW1

14 Does @G1PotterBF even realize he has been supporting Mr. GinnyPotter and  
15 @GinnyPotterMFC all these years?

16 twitter.com/GinnyPotterMFC . . . Giving ur minions an extra day to enter ur scam  
17 data raffle where only winners r u and ur husband @GinnyPotterMFC?

18 (Id. at 2-3.) On the filed exhibit the post containing the term “con artist” has been circled. (Id. at  
19 3.)

20 \* \* \*

### 21 GOVERNING LAW

22 “It is well established that the First Amendment protects the right to anonymous speech.” Art  
23 of Living Found. v. Does 1-10, No. 10-5022, 2011 WL 5444622, \*3 (N.D. Cal. Nov. 9, 2011)  
24 (citing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995)). “As with other forms of  
25 expression the ability to speak anonymously on the Internet promotes the robust exchange of ideas  
26 and allows individuals to express themselves freely without ‘fear of economic or official  
27 retaliation . . . or concern about social ostracism.’” In re Anonymous Online Speakers, 661 F.3d  
28 1168, 1173 (9th Cir. 2011) (quoting in part *McIntyre*, 514 U.S. at 341-42). “However, the right to  
anonymity is not absolute.” Art of Living, 2011 WL 5444622 at \*4; accord *Anonymous Online  
Speakers*, 661 F.3d at 1173 (“The right to speak, whether anonymously or otherwise, is not

1 unlimited . . .”). “Where anonymous speech is alleged to be unlawful, the speaker’s right to  
2 remain anonymous may give way to a plaintiff’s need to discover the speaker’s identity in order to  
3 pursue its claim.” *Art of Living*, 2011 WL 5444622 at \*4.

4 In *Anonymous Online Speakers*, the Ninth Circuit reviewed the developing tests in the area of  
5 anonymous online speech. 661 F.3d at 1174-77. “[I]n choosing the proper standard to apply, the  
6 district court should focus on the ‘nature’ of the [defendant’s] speech . . .” *Art of Living*, 2011  
7 WL 5444622 at \*5 (citing *Anonymous Online Speakers*, 661 F.3d at 1177 (“[T]he nature of the  
8 speech should be a driving force in choosing a standard by which to balance the rights of  
9 anonymous speakers in discovery disputes.”) and *SI03, Inc. v. Bodybuilding.com, LLC*, 441 F.  
10 Appx. 431, 431-32 (9th Cir. 2011) (same)).

11 Of the approaches that *Anonymous Online Speakers* discussed, the one that best suits this case  
12 is the test enunciated in *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal.  
13 2005). The Ninth Circuit has indicated that the *Highfields Capital* test is of medium rigor,  
14 appropriate where, as here, the challenged speech falls somewhere beneath the most protected  
15 realm of “political, religious, or literary” discourse; is, in significant part, “commercial speech”  
16 that enjoys “lesser” protection; but may be more safeguarded than pure “fighting words and  
17 obscenity,” which is “not protected by the First Amendment at all.” See *Anonymous Online  
18 Speakers*, 661 F.3d at 1173, 1175-76; *Art of Living*, 2011 WL 5444622 at \*5.

19 The challenged speech in this case consists of an uploaded image that is allegedly of the  
20 plaintiff’s “mortgage documents,” as well as supposedly derogatory remarks about the plaintiff.  
21 (See ECF No. 1 at 7.) It is not clear whether these remarks were aimed at the plaintiff personally,  
22 in her commercial capacity, or both. The court views the statements as a form of social or  
23 commercial criticism. They may not be either of those things perfectly. But neither are they  
24 “political, religious, or literary” commentary, at one end of the First Amendment spectrum, or, at  
25 the other, “fighting words or obscenity.” The *Highfields Capital* test thus best suits this  
26 intermediate speech. However it is most aptly labeled or categorized, the court has kept in mind  
27 the specific content of the challenged speech in weighing the plaintiff’s request in light of the First  
28 Amendment.

1 Under Highfields Capital, a party seeking to discover the identity of an anonymous speaker  
2 must first “persuade the court that there is a real evidentiary basis for believing that the defendant  
3 has engaged in wrongful conduct that has caused real harm to the interests of the plaintiff.”  
4 Highfields Capital, 385 F. Supp. 2d at 975-76. If the plaintiff makes this showing, the court must  
5 then “assess and compare the magnitude of the harms that would be caused to the [plaintiffs’ and  
6 defendants’] competing interests” by ordering that the defendant’s identity be disclosed. Id. at 976.  
7 If such an assessment reveals that disclosing the defendant’s identity “would cause relatively little  
8 harm to the defendant’s First Amendment and privacy rights,” but is “necessary to enable [the]  
9 plaintiff to protect against or remedy serious wrongs,” then the court should allow the disclosure.  
10 Id.

11 \* \* \*

## 12 ANALYSIS

### 13 1. Highfields Capital — “Real evidentiary basis”

14 The first prong of Highfields Capital requires the plaintiff to demonstrate that its claims rest on  
15 a “real evidentiary basis.” Highfields Capital, 385 F. Supp. at 975-76. “It is not enough for a  
16 plaintiff to plead and pray. Allegation and speculation are insufficient.” Id. at 975. “[T]he plaintiff  
17 must adduce competent evidence” of each fact that is “essential” to “at least one of [its] causes of  
18 action.” Id. at 975-76 (emphasis in original). The Ninth Circuit’s discussion in Anonymous Online  
19 Speakers suggests that this is a requirement of moderate rigor. More demanding than the “good  
20 faith” or “motion to dismiss” standard that some courts have used, the Highfields Capital “real  
21 evidentiary basis” prong is less demanding than the “most exacting” test, enunciated in Doe v.  
22 Cahill, 884 A.2d 451 (Del. 2005), which requires a plaintiff to submit “sufficient evidence” of  
23 each element of its claims “to survive a hypothetical motion for summary judgment” — and which  
24 Anonymous Online Speakers indicates is not appropriate to speech akin to that at issue here. See  
25 Anonymous Online Speakers, 661 F.3d at 1175-77.

26 \* \* \*

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1 From none of this material does the plaintiff explicate a “real evidentiary basis” for any of her  
2 claims. Her motion does little more than restate her basic allegations. This is not enough. As  
3 Highfields Capital states:

4 It is not enough for a plaintiff simply to plead and pray. Allegation and  
5 speculation are insufficient. . . . [T]he plaintiff must adduce competent evidence —  
6 and the evidence plaintiff adduces must address all of the inferences of fact that  
7 plaintiff would need to prove in order to prevail under at least one of the causes of  
8 action plaintiff asserts. . . . The court may not enforce the subpoena if, under  
9 plaintiff’s showing, any essential fact or finding lacks the requisite evidentiary  
10 support.

11 Highfields Capital, 385 F. Supp. 2d at 975-76 (emphases in original). The plaintiff’s showing does  
12 not meet this standard. To hold that the submitted material constitutes a “real evidentiary basis”  
13 for any of her claims, the court would have to ride a cascade of inferences to a point teetering on,  
14 and maybe verging into, outright speculation. Given the important First Amendment concerns in  
15 play here, and the specific demands of the Highfields Capital test, that is not a route the court is  
16 inclined to take.

17 \* \* \*

18 **2. Highfields Capital — Balancing**

19 Because the plaintiff has not shown that the challenged comments yield a real evidentiary basis  
20 for her claims against either user, the court does not reach the second, balancing prong of the  
21 Highfields Capital test, and expresses no view on how that part of the test would play out in this  
22 case. See Highfields Capital, 385 F. Supp. 2d at 976 (“The court proceeds to the second  
23 component of the test if, but only if, the plaintiff makes an evidentiary showing sufficient to  
24 satisfy the court in the first component of the test.”).

25 \* \* \*

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1 **CONCLUSION**

2 The plaintiff has not shown a “real evidentiary basis” for any of her claims against the  
3 @C12H22011\_UK and @mfc\_scam users. She therefore has not given the court enough to  
4 overcome these anonymous users’ First Amendment rights. The court denies the plaintiff’s motion  
5 to enforce the subpoena. The court expresses no view on Twitter’s other objections to that  
6 subpoena.

7 This disposes of ECF No. 1.

8 **IT IS SO ORDERED.**

9 Dated: January 5, 2016

10 

11 LAUREL BEELER  
12 United States Magistrate Judge