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CBS BROADCASTING INC.

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14 WESTERN DIVISION

15 CBS Broadcasting Inc.,
16 Plaintiff,
17 v.
18 American Broadcasting Companies Inc.,
19 et al.,
20 Defendants.

CASE NO. 2:12-cv-04073 GAF (JEMx)

**CBS'S REPLY IN SUPPORT OF ITS
EX PARTE APPLICATION FOR A
TEMPORARY RESTRAINING
ORDER AND AN ORDER TO SHOW
CAUSE WHY A PRELIMINARY
INJUNCTION SHOULD NOT ISSUE
PURSUANT TO FEDERAL RULE OF
CIVIL PROCEDURE 65**

Hearing:

Date: None set
Time: None set
Place: Courtroom No. 740
Judge: Hon. Gary A. Feess

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1 **I. Introduction**

2 Defendants’ late-filed opposition to CBS’s *ex parte* TRO application is short on
3 the merits and replete with procedural improprieties.¹ Because of the voluminous
4 nature of Defendants’ submission and in the interest of time, CBS submits this brief
5 reply that focuses only on the substance of Defendants’ arguments. CBS intends to
6 provide responses to Defendants’ evidentiary objections, as well as objections to the
7 declarations proffered by Defendants, and hopes that the Court will allow it to do so in
8 the course of any subsequent briefing or hearing on a preliminary injunction.

9 CBS has established its entitlement to a TRO based on both copyright
10 infringement and misappropriation of trade secrets. Regarding copyright infringement,
11 Defendants concede a high degree of access—which in turn lowers CBS’s burden to
12 demonstrate substantial similarity, *see, e.g., Rice v. Fox Broad. Co.*, 300 F.3d 1170,
13 1178 (9th Cir. 2002)—and they fail to identify a single show (other than their own)
14 that employs the same compilation of elements and expression that *Big Brother* does.
15 Instead, what Defendants have done thus far is continually change their story on
16 infringement. They used to say that their show was not final; now they do not. Their
17 Show Runner (Kenny Rosen) tried to say *Glass House* was based on the teenage
18 fiction series *The Hunger Games* rather than *Big Brother* (Declaration of Scott A.
19 Edelman in Support of *Ex Parte* Application for a TRO and OCS re a Preliminary
20 Injunction (“Edelman Decl.”), Exh. A (“Rosen Dep.”) at 27:16-21, 39:20-24);
21 Defendants now abandon that position. And now all Defendants offer is a series of
22

23
24 ¹ To name a few: (1) Defendants included a 10-page, single-spaced “appendix,”
25 which consists of legal and factual arguments that nearly double the 25-page length
26 restriction imposed by Local Rule 11-6, and which therefore should be struck from
27 the record; (2) Defendants failed to serve CBS with their appendix until after 8:30
28 p.m. on Monday night; (3) all of Defendants’ papers were filed after 5:00 p.m., the
deadline by which the Court ordered Defendants to file any opposition; and (4)
Defendants submitted a percipient witness declaration with a legally ineffectual
digital signature (*see* Bock Decl.; Local Rule 5-4.3.4(a)(3) (for non-attorney
declarations “the filer shall scan the hand-signed signature page(s) of the document
in PDF format”).

1 trivial distinctions such as differences between the show's rules, without articulating
2 how any of these differences translate into *meaningful differences between the*
3 *expressive qualities of Glass House and Big Brother*. But as Defendants never dispute,
4 both shows will feature the same expressive quality that is uniquely *Big Brother's* and
5 which it pioneered; *Big Brother* takes a format where contestants are sequestered in a
6 house, filmed around the clock by 50 cameras, and placed in competitive situations
7 where alliances will form and tensions will rise, and the show depicts that form of
8 competition with heightened reality and voyeurism because the episodes are broadcast
9 shortly after the events occur and with minimal alteration or editing. Meanwhile, on
10 trade secrets, having been caught in culpable conduct in the one deposition taken to
11 date, Defendants concede misappropriation entirely, only to try to minimize the value
12 of the material stolen.

13 The clear theft and use of CBS's material, coupled with the admitted destruction
14 of emails, clearly warrants a TRO at this stage. And ABC's protestations that
15 injunctive relief would harm their business are of no moment because any harm is of
16 their own making and should not bar relief designed simply to protect the status quo
17 and ensure that ABC be allowed only "to compete, *in a lawful manner*, with
18 Plaintiff." *Richmond Techs., Inc. v. Aumtech Business Sol'ns*, No. 11-cv-02460-LHK,
19 2011 WL 2607158, at *22 (N.D. Cal. July 1, 2011) (emphasis added).

20 **II. CBS Is Likely To Succeed On Its Copyright Infringement Claim**

21 Instead of disputing whether they are copying, Defendants simply try to
22 rationalize it, claiming that "[w]hen a successful reality show develops a good idea,
23 other shows observe that idea and incorporate it into their own show." (Opp'n at 14.)
24 But CBS is not complaining about the copying of an idea. What Defendants did here
25 was entirely different: They had an extraordinary level of access to *Big Brother*, used
26 it to produce *Glass House*, then lifted not just a few of *Big Brother's* elements, but the
27 entire protectable *expression and compilation* of them. And now, only after the fact,
28 do Defendants try to latch onto trivial rule changes, which are insignificant distinctions

1 and do not translate into tangible differences that distinguish *Glass House*'s overall
2 expression from *Big Brother*'s.

3 **A. Defendants' Opposition Confirms That *Glass House* Is By Now In A**
4 **Concrete, Final Form**

5 Notably, Defendants' Opposition—for the first time in this case—resists arguing
6 against copyright infringement on the ground that *Glass House* does not yet exist and
7 therefore cannot be substantially similar to *Big Brother*. CBS understands this to mean
8 that Defendants are finally conceding that the format of *Glass House* is now fixed in
9 advance of the series' June 18, 2012 premiere and the live internet streaming
10 beginning today. Given Defendants' voluntary concession on this point, it is
11 appropriate to compare the similarities between *Glass House* and *Big Brother* as they
12 exist now.

13 **B. Defendants Concede Access Which Lowers CBS's Burden to Show**
14 **Substantial Similarity**

15 By conceding access, Defendants attempt to downplay the significance of their
16 hiring of nearly thirty *Big Brother* production employees (Opp'n at 5 & n.3), claiming
17 that “[b]ecause no dispute regarding access exists here, CBS’s claim hinges on its
18 ability to demonstrate substantial similarity.” That grossly distorts the importance of
19 access here.

20 A “concession of access by the defendant” is a “prominent factor” in finding
21 copyright infringement, because “[u]nder the inverse ratio rule, [there is] a lower
22 standard of proof of substantial similarity when a high degree of access is shown.”
23 *Rice*, 300 F.3d at 1178. Moreover, where a defendant “concede[s] that [they] had a
24 *high degree of access* to [a plaintiff’s work],” the plaintiff’s “burden of proof of
25 substantial similarity is *thus commensurately lowered*.” *Swirsky v. Carey*, 376 F.3d
26 841, 844 (9th Cir. 2004) (emphases added).

27 Ignoring all of this, Defendants (in a footnote, Opp'n at 5 n.3) say that “CBS’s
28 ‘poaching’ charge is nonsense,” and “[e]veryone in America has all the access they

1 could possibly have to *Big Brother*'s expressive elements [for the past 13 seasons]."
2 But copyright law does not ignore reality in the way that Defendants try to; it is highly
3 probative of copying and substantial similarity because here, it is not as if Defendants
4 hired 30 random employees from one reality show to work on a run-of-the-mill reality
5 show; they targeted 30 *key* people from the *only* successful fast-turnaround "house
6 reality" competition show to comprise the key production staff of a copycat show.
7 Copyright law recognizes that circumstances like these are highly probative. *See, e.g.,*
8 *TMTV Corp. v. Mass Prods., Inc.*, 645 F.3d 464, 470 (1st Cir. 2011) (copying was "not
9 in doubt" where ex-employee "obviously had access to the original scripts and based
10 [the new show] upon them" and brought a number of actors from the original show);
11 *Swirsky*, 376 F.3d at 844 & n.3 (9th Cir. 2004) ("high degree of access" leading to a
12 "lower standard of proof of substantial similarity" where "[a] number of people
13 involved in recording [plaintiff's] work were also involved in the recording of
14 [defendant's] work"). Saying there is "no dispute regarding access . . . here" (Opp'n at
15 5 n.3) is an understatement.

16 **C. Defendants Failed To Identify A Single Show, Other Than *Glass House*,**
17 **That Shares *Big Brother*'s Compilation Of Elements**

18 Because a plaintiff's copyright case is "strengthened considerably" by
19 "defendant's concession of access to their work," *Metcalf v. Bochco*, 294 F.3d 1069,
20 1075 (9th Cir. 2002), it simply does not do for Defendants to caricature *Big Brother* as
21 "people living in a house, competing with each other to avoid elimination, and winning
22 a prize." (Opp'n at 1.) That is as useful as saying that *Sherlock Holmes* lacks
23 copyrightable expression because it is just "the idea of a detective and a sidekick, who
24 live in London, and use disguises and forensic science to solve crimes." As Judge
25 Learned Hand observed, "a great number of patterns of increasing generality will fit
26 equally well as more and more of the incident is left out." *Nichols v. Univ. Pictures*
27 *Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). Defendants' level of generality conveniently
28 glosses over all the similarities between the shows. Likewise, Defendants' attempt to

1 dissect each element of the show (*see, e.g.*, Opp. at 11) loses sight of the *complete*
2 *expression* of *Big Brother*, which is copied directly by *Glass House*. *See also Coquico,*
3 *Inc. v. Rodriguez-Miranda*, 562 F.3d 62, 67 (1st Cir. 2009) (“In [evaluating copyright
4 infringement], the court should not lose sight of the forest for the trees; that is, it
5 should take pains not to focus too intently on particular unprotected elements at the
6 expense of a work’s overall protected expression.”).

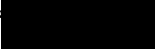
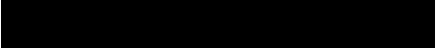

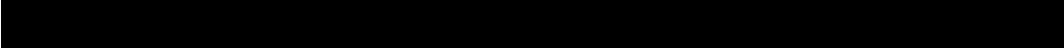


7 But the point Defendants (and for that matter, their expert) never address is that
8 no other show until now has incorporated all the elements together that *Big Brother*
9 has. As CBS’s expert Jeffrey Rovin explains in his rebuttal report, the essence of
10 CBS’s copyright claim is that it is the *combination* of various devices all wrapped up
11 in one show—not just contestants in a house, not just periodic evictions, not just fast
12 turnaround broadcast, for example, but all these elements combined—that “makes *Big*
13 *Brother* unique in the reality television world” and “had never appeared in the history
14 of reality show television.” (Decl. of Michael W. Seitz, Ex. A (“Rovin Rebuttal”) at
15 1.) Even Kenny Rosen acknowledged that no other show—besides *Glass House*—
16 combines the elements found in *Big Brother* (Rosen Dep. at 171), and indeed, no other
17 show that Defendants cite even manages to share greater than four common elements
18 with *Big Brother* (Rovin Rebuttal at 5). Despite Defendants’ attempts to portray it
19 otherwise, it is clearly established that combining all these elements, whether
20 individually protectable or not, in an infringing work is the basis of a compilation
21 claim. *See, e.g., Metcalf*, 294 F.3d at 1073-74 (even where individual elements were
22 not protectable, the “presence of so many generic similarities” and the “common
23 patterns in which they [arose]” led to “striking” similarities between the two works);
24 *Shaw*, 919 F.2d at 1363 (similar); *TMTV*, 645 F.3d at 470 n.4 (“Such an ensemble may
25 be protected by copyright when reduced to expression . . . even though it may itself
26 contain non-copyrightable elements such as stock characters borrowed from prior
27 works.”). And it is this compilation aspect that distinguishes this case from others like
28 *Milano v. NBC Universal, Inc.*, 584 F. Supp. 2d 1288 (C.D. Cal. 2008), where the

1 court was asked to address only a preliminary treatment of a show, where plaintiff’s
2 copyright claim centered on discrete elements and ideas, rather than a unified
3 compilation and expression as a whole.

4 Defendants’ only rebuttal to CBS’s compilation argument is a misleading
5 analogy to the *Survivor/I’m A Celebrity . . . Get Me Out of Here* case. But there, the
6 *expressive* quality of the two shows, among other facts, set them apart: as the court
7 observed, the “major difference between the two shows is the serious tone of *Survivor*
8 and the comedic tone of *Celebrity*,” not to mention *Survivor*’s “camera work . . . of the
9 very highest professional level” contrasted “to the home video look” of *I’m a*
10 *Celebrity*. *CBS Broad., Inc. v. ABC, Inc.*, No. 02 Civ. 8813, 2003 U.S. Dist. LEXIS
11 20258, at *28-29 (S.D.N.Y. Jan. 14, 2003). Moreover, the *Survivor* case undoubtedly
12 lacked the additional clear-cut evidence of infringement here—namely, the mass
13 poaching of critical employees, along with admissions from Show Runners like Rosen
14 that the newer show shares all the key elements of the original.

15 **D. Defendants Identify No Significant Differences That Result In *Glass House***
16 **Having Different Expression Than *Big Brother***

17 “No plagiarist can excuse the wrong [of infringement] by showing how much
18 of his work he did not pirate.” *Shaw*, 919 F.2d at 1362 (quoting 4 Nimmer on
19 Copyright § 1303[B][1]). And the only differences Defendants offer between *Glass*
20 *House* and *Big Brother* are simply immaterial. *See TMTV*, 645 F.3d at 471 (“[T]rivial
21 modifications are not a defense [to copyright infringement].”).

22 For example, Defendants insist that the viewers of *Glass House* “
23 ” (Opp’n at 10), glossing over the facts that 
24  (the same
25 current format as *Big Brother*) and that *Big Brother* also has had the public vote
26 contestants off the show. And Defendants’ attempt to distinguish “limbo” is simply
27 disingenuous: that “
28 ” (*id.* at 15) is just a disguised

1 way of saying that, as in *Big Brother*, one of the bottom two-ranking contestants is
2 voted off while the other gets to stay. Meanwhile, Defendants point to *Big Brother*'s
3 host Julie Chen as a supposed difference, which actually proves CBS's point. (Opp'n
4 at 10.) Chen rarely appears on the show (usually as an add-on at the beginning or end),
5 and while she may give instructions during the show, *Glass House* uses a very similar
6 method, a [REDACTED] This is simply
7 more evidence that *Glass House* emulates *the* key expressive features of *Big Brother*—
8 namely, an unscripted house reality competition show whose voyeuristic feel depends
9 on minimal interaction between cast and production, and viewer and production.
10 (Rosen. Decl. ¶¶ 193, 194, 196; *see also* Rovin Rebuttal at 8-9 (explaining how
11 Defendants' proffered distinctions between the shows are insignificant).)

12 Tellingly, Defendants make no real attempt to explain just exactly how any of
13 their trivial distinctions actually translate into differences in the look and feel of *Glass*
14 *House* compared to *Big Brother*. The closest Defendants get is asserting (through
15 attorney argument, not competent evidence) that “the two programs encourage
16 different character traits.” (Opp'n at 10.) But even if this came close to articulating
17 some meaningful difference (which it does not), “[a]s Professor Nimmer explains, ‘it is
18 entirely immaterial that, in many respects, plaintiff's and defendant's works are
19 dissimilar, if in other respects, similarity as to a substantial element of plaintiff's work
20 can be shown.’” *Straughter v. Raymond*, 2011 WL 3651350, at *16 (C.D. Cal. 2011)
21 (quoting 4 Nimmer on Copyright § 1303[B][1]).

22 Because copyright protects “the *expression* of . . . ideas” over and above the
23 “ideas themselves,” *Feist Pub'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362
24 (1991), the ultimate question is how are *Glass House*'s expressive qualities different
25 from *Big Brother*'s, despite all of the other similarities the two share? Defendants and
26 their expert never say, and they simply do not address the heart of *Big Brother*'s
27 unique expression: a voyeuristic house reality show that is edited to broadcast in
28 virtually real time (rather than being edited down after the entire season airs to fit a

1 known outcome). *See* Rovin Rebuttal at 4 (“*Big Brother* did not simply lift ideas
2 whole, as the Defendants imply. The creators shaped and reimagined them, pared
3 them and expanded them, refined and redefined them to create a new kind of reality
4 show. It was not a random recipe. It was an ingenious creative effort that resulted in a
5 new balance, a unique expression.”). If Defendants have their way, a show that copies
6 *Big Brother*’s protectable expression in every material way will soon air. It should not.

7 **III. CBS Is Likely To Succeed In Establishing Trade Secret Misappropriation**

8 Defendants’ arguments regarding CBS’s trade secret claim focus almost
9 exclusively on whether CBS has identified protectable trade secrets. (Opp’n at 17-21;
10 Defs’ App’x A.) This should come as no surprise because Mr. Rosen has already
11 conceded multiple acts of use and disclosure of *Big Brother* materials while working
12 on *Glass House*. (E.g., Rosen Dep. at 90:15-19, 94, 98) But Defendants’ attack on
13 CBS’s trade secrets suffer from a fatal defect: If *Big Brother*’s materials are publicly
14 available, and/or valueless “common sense” (Opp’n at 19), then why was it necessary
15 for Mr. Rosen—who testifies of having “worked in television production for over 15
16 years” and of “working my way up the ranks from Story Editor to Co-Executive
17 Producer” on *Big Brother* (Rosen Decl. ¶ 2)—to consult them, disclose them to his
18 colleagues, and have them “typed up?” The answer is obvious: Mr. Rosen did so
19 because he believed the materials were valuable and he needed them to produce *Glass*
20 *House*.

21 Moreover, Defendants’ recitation of all the reasons they believe CBS’s trade
22 secret designations are inadequate under California Civil Code section 2019.210 (e.g.
23 Opp’n at 18), including their voluminous “Appendix A” arguing against each
24 designation separately—which should be stricken too²—is a sideshow and an effort to

25
26 ² Defendants’ Appendix A consists of ten additional pages of argument and legal
27 authorities, exceeding the Court’s 25-page limit, and should be stricken. *See* L.R.
28 11-6. Alternatively, if the Court is not willing to strike Defendants’ Appendix A,
CBS respectfully requests that the Court consider CBS’s response, which is
attached as Appendix A to this brief.

1 distract the Court from the obvious misappropriation that has already taken place.
2 Section 2019.210 is a discovery provision, and the subject of separate briefing before
3 Magistrate Judge McDermott; it is not central to a request for a TRO, which CBS has
4 brought based on the minimal discovery it has been able to conduct to date and based
5 on the information publicly disclosed by Defendants about *Glass House*. CBS has
6 identified, and Defendants know exactly, which trade secrets are at issue here. For the
7 TRO, CBS need only establish that it is *likely to succeed* in showing that its trade
8 secrets are protectable and that Defendants have misappropriated them, not the
9 reasonable particularity necessary to commence trade secret related discovery. *See,*
10 *e.g., Wyndham Resort Dev. Corp. v. Bingham*, 2010 WL 2740158 (E.D.Cal. 2010).
11 CBS has done so here, and Mr. Rosen’s conduct and admissions provide ample
12 evidence to warrant injunctive relief.

13 **A. Defendants’ Arguments That CBS’S Trade Secrets Are Not Protectable**
14 **Are Unavailing Because They Concede Misappropriation**

15 First, Defendants concede that Mr. Rosen used the *Big Brother* HouseGuest
16 Manual for his work on *Glass House*, asserting only that Mr. Rosen’s use was not
17 “meaningful” while minimizing as just “common sense.” Of course, Defendants’
18 counsel improperly instructed Rosen in his deposition not to answer questions as to
19 why Rosen had the manual typed up. But if the HouseGuest manual is just common
20 sense material with no trade secret value, then it would have been unnecessary for Mr.
21 Rosen to “type it up.” (Rosen Dep. at 94:17-19.) Mr. Rosen’s “typing up” of the
22 HouseGuest Manual is direct evidence that it was useful in the hands of a *Big Brother*
23 competitor—*per se* evidence of its value to *Big Brother*. And regardless, it is well
24 settled that compilations of material like the *Big Brother* HouseGuest Manual, even if
25 they are comprised of non-secret material, are protectable as trade secrets. *Vt.*
26 *Microsystems, Inc. v. Autodesk, Inc.*, 88 F.3d 142, 147 (2d Cir. 1996); *O2 Micro Int’l*
27 *v. Monolithic Power Sys.*, 420 F. Supp. 2d 1070, 1089 (N.D. Cal. 2006). It is absurd
28 for Defendants to suggest that the 50-page HouseGuest Manual—which indisputably

1 “represent[s] many years of trial-and-error and reflect[s] the wide range of
2 considerations that production must take into account when interacting with
3 HouseGuests” (Edelman Decl., Exh. D (“Wollman Decl”). ¶ 15)—is mere “common
4 sense” with no value to *Big Brother*.³

5 Moreover, the fact Defendants now have a “final ‘Player Handbook’” (which
6 Defendants produced to CBS for the first time with their opposition papers) that
7 allegedly “looks nothing like the *Big Brother* House Guest Manual except for a few
8 stray items” does not excuse their misappropriation. If anything, it is evidence, and
9 further discovery will reveal, that Defendants have now cleansed their manual of the
10 material they “typed up” and plagiarized from *Big Brother*. Removing the offending
11 content does not change the fact that Mr. Rosen disclosed the manual to his colleagues
12 and made use of it on *Glass House*.⁴

13 Second, although Mr. Rosen testified that he “referenced [the *Big Brother* MCR
14 schedule] to figure out how many story positions . . . to hire,” Defendants argue that
15 this does not constitute “use” of the MCR schedule because it “actually didn’t help
16 [him] a whole lot.” (Opp’n at 19.) *How much* the MCR Schedule “helped” Mr. Rosen
17 is beside the point; the standard for trade secret misappropriation is “use”—and

18
19 ³ Defendants’ reliance on *Perlan Therapeutics, Inc. v. Superior Court*, 178
20 Cal.App.4th 1333 (2009) to suggest that the manual is not a trade secret is
21 misplaced. *Perlan* addressed whether trade secret disclosures were reasonably
22 particular under California Civil Code section 2019.210, not whether (having
23 already been misappropriated) specific documents could qualify as protected
24 compilations. Moreover, *Perlan* involved, among other things, “a full page of text
25 consisting of a ‘preliminary Statement’ and ‘general objections,’ . . . similar . . . to the
26 boilerplate reservations of right and objections,” references to “approximately 50
27 additional documents,” and designations of “*all* related research, development,
28 advancements, improvements and processes related” to three specified trade
secrets. *Id.* at 1339, 1341 (emphasis added). Those circumstances do not apply
here.

⁴ Defendants call CBS’s chart showing the similarities between the “first draft” of the
Glass House manual and the *Big Brother* HouseGuest Manual a “gross[]
exaggerat[ion].” A cursory review of the chart CBS provided makes it clear that
the language is plagiarized, and Defendants’ attempt to shrug off the similarities is
troubling given their repeated assurances that they will “remediate” any ongoing
misappropriation. (*E.g.* Dkt. 44 at 18.)

1 Defendants cannot seriously dispute that the MCR schedule was in fact used here. *E.g.*
2 *O2 Micro*, 399 F. Supp. 2d at 1070, 1073, 1075 (“internal experimentation with trade
3 secret information,” “use for research and development,” and use for evaluative
4 purposes all constitute illegal misappropriation). Further, Mr. Rosen did not just admit
5 to his own use—he also conceded that he “showed the master control room schedule to
6 Marie Mitchell [a *Glass House* employee not yet deposed] . . . [p]robably in March.”
7 (Rosen Dep. at 94:11-14.) This admitted *disclosure* of the MCR Schedule is a separate
8 and independent act of misappropriation, regardless of whether the material was “a
9 whole lot” helpful. *Morlife, Inc. v. Perry*, 56 Cal.App.4th 1514, 1527 (1997) (“Under
10 the UTSA, simple disclosure . . . may suffice to create liability.”) In addition,
11 Defendants do not argue (nor could they given the evidence in this case and Mr.
12 Rosen’s obligations under his nondisclosure agreement with *Big Brother*) that *Big*
13 *Brother* failed to take reasonable steps to maintain the confidentiality of the MCR
14 Schedule; and the fact that Mr. Rosen found it necessary to consult and disclose the
15 MCR Schedule during his work for a competitor is evidence of the schedule’s value.

16 Third, Defendants gloss over the ongoing threat of misappropriation—a wholly
17 separate basis for this TRO application—by responding only to these openly conceded
18 acts of misappropriation (uses of the HouseGuest Manual and the MCR Schedule, and
19 disclosure of both). But these acts were discovered after only one deposition and with
20 more than begrudging access to a very limited universe of *Glass House* documents.
21 This evidence alone justifies the issuance of a TRO because it establishes that a TRO
22 is necessary to: (1) “insure against additional harm from further unauthorized use of
23 the trade secret and to deprive the defendant of additional benefits from the
24 appropriation,” and (2) “remedy any head start or other unfair advantage [already]
25 acquired.” *DVD Copy Control Ass’n v. Bunner*, 116 Cal. App. 4th 241, 253-54 (2004).

26 Indeed, these instances are only the tip of the iceberg in what was a calculated
27 scheme to poach former *Big Brother* employees in order to gain access to the trade
28 secrets and creative processes they gained knowledge of on *Big Brother*. CBS is likely

1 to succeed in showing further misappropriation by Defendants once it is allowed
2 further discovery.

3 For example, Defendants do not contend (nor could they) that is customary for
4 an up-start show to have its production staffed by individuals who previously worked
5 on a rival network's similar, highly successful competing show that airs during the
6 same time of year.⁵ The evidence (and common sense) establishes otherwise.

7 (Wollman Decl. ¶ 8 (“Typically, when show staffers work on other shows, it is
8 because the other shows do not air during the same season . . . But in my 44 years in
9 the entertainment industry, I have never seen anything like this—where a competitor
10 hires a large number of people for a startup competing show, which airs during the
11 same time of year.”). Moreover, even at this stage, there is evidence that these
12 individuals were hired specifically for the knowledge they gained on *Big Brother*.
13 Defendants initiated the contact with the former *Big Brother* employees. (See, e.g.,
14 Wollman Decl. ¶ 6.) [REDACTED]

15 [REDACTED]
16 [REDACTED] Indeed, Mr. Rosen even testified that when he recruited former *Big*
17 *Brother* employee Carle Simpson to work on *Glass House*, he sent her an email (not
18 yet produced) stressing the “big MCR similar to *Big Brother*.” (Rosen Dep. at 64:10-
19 66:21.) This is not, as Defendants suggest, a case where CBS asks the Court to
20 “assume former *Big Brother* employees will use those processes.” (Opp’n at 20.) This
21 is a clear cut case where Defendants admitted to using, and where all the evidence
22 suggests Defendants *intend to continue using*, CBS’s trade secrets in producing their
23

24 ⁵ Neither *FLIR Systems, Inc. v. Parrish*, 174 Cal.App.4th 1270 (2009) nor *Whyte v.*
25 *Schlage Lock Co.*, 101 Cal.App.4th 1443 (2002) help Defendants here, where there
26 is admitted misappropriation. *See FLIR Systems*, 174 Cal.App.4th at 1275 (after
27 “eight days of testimony, the trial court found no misappropriation or threatened
28 misappropriation”); *Whyte*, 101 Cal.App.4th at 1458 (we “have serious concerns
over evidence in the record suggesting Whyte took Schlage’s trade secrets or
destroyed evidence [but] [w]e are constrained . . . by the applicable standard of
review....”).

1 show—acts which the Court unquestionably can enjoin. *See, e.g., ReadyLink*
2 *Healthcare v. Cotton*, 126 Cal.App.4th 1006 (2005); *Morlife, Inc. v. Perry*, 56
3 Cal.App.4th 1514 (1997).

4 **B. CBS Has Established Reasonable Efforts To Maintain Secrecy**

5 Defendants do not contest CBS’s showing that it requires individuals with
6 access to its trade secrets to sign Non-Disclosure agreements, and in this Circuit
7 requiring “employees to sign confidentiality agreements respecting [] trade secrets”
8 alone constitutes “reasonable steps to insure the secrecy [of] this information as
9 required by the UTSA.” *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511,
10 521 (9th Cir. 1993); *American Credit Indemnity Co. v. Sacks*, 213 Cal.App.3d 622, 631
11 (1989) (reversing denial of preliminary injunction).

12 Instead, Defendants submit a host of declarations to argue that “CBS shared the
13 alleged trade secrets with journalists, fans, and even executives of competing
14 networks.” (Opp’n at 21.) But every single declaration confirms what CBS already
15 stated in its *ex parte* application—that *Big Brother* staff occasionally gives tours of the
16 *Big Brother* stage, but that such tours do not reveal confidential processes. For
17 example, the YouTube clip Defendants’ declarants repeatedly reference (*see* Bock
18 Decl. ¶ 9, Henson Decl. ¶ 13, Rosen Decl. ¶ 40) is four minutes long, of which less
19 than two minutes is shot inside the *Big Brother* MCR and which (consistent with the
20 description in Mr. Wollman’s declaration) reveals practically nothing of substance
21 regarding *Big Brother*’s production processes. *See*
22 <http://youtube.com/watch?v=JE1Ank-TVss>. Similarly, in the internet blog referenced
23 by Mr. Rosen, the only sentences possibly relevant to CBS’s trade secrets are the few
24 he directly quotes. (Rosen Decl. ¶¶ 26, 36, 40) CBS has never disputed that it gives
25 short, behind-the-scenes tours of the *Big Brother* set. And importantly, *despite*
26 *submitting multiple declarations from individuals who profess to have knowledge*
27 *about Big Brother tours*, Defendants have utterly failed to refute the sworn statement
28 from a *Big Brother* producer establishing that *Big Brother* “do[es] not discuss

1 confidential processes, and no tours are taken inside the post-production offices,” as
2 well as the fact that “[e]ven for someone who has experience producing a reality
3 television show, it is impossible to decipher [during a tour], among other things, what
4 the Switchers, Shaders, loggers, and story-producers are doing, or how the story
5 producing process works.” (Wollman Decl. ¶ 19.) Even ABC executive Tim Bock
6 admits that his request for access to the master control room during his tour was denied
7 (a request which is wholly inconsistent with his contention that the only reason he
8 sought a tour was to look for stage space). Defendants simply have not refuted CBS’s
9 showing that the tours do not destroy confidentiality.

10 In addition, CBS did not, as Defendants assert, “state[] that it learned the
11 production processes for *Big Brother* from its licensor, Endemol.” (Opp’n at 21 (citing
12 Wollman Decl. ¶ 12).) [REDACTED]

13 [REDACTED]
14 [REDACTED] It is therefore irrelevant
15 whether “Endemol licensees . . . freely post their own versions of [House Guest “Rule
16 Books”] online” (Opp’n at 21), and Defendants do not identify any similarities
17 between these “Rule Books” and the confidential *Big Brother* HouseGuest Manual
18 because they are in fact substantially different than the HouseGuest Manual developed
19 by CBS. (Luedtke Decl. Exhs. A & B (screenshots of websites from *Big Brother*
20 productions in the U.K. and the Philippines referencing different entities’ *Big Brother*
21 “rules”).)

22 **C. A Production Injunction Is Necessary To Avoid Additional**
23 **Misappropriation**

24 Finally, Defendants’ suggestion that their misappropriation “is not a basis to
25 shut down the show” (Opp’n at 21-22) is contrary to the law. As the Court held in *O2*
26 *Micro*, 299 F. Supp. 2d at 1070, which Defendants rely on in their Opposition,
27 “production injunctions” are appropriate where “trade secrets are inextricably
28 connected to the defendant’s [work]” and “the misappropriator cannot be relied upon

1 to unlearn . . . the misappropriated technology.” The only reason a production
2 injunction was unwarranted in *O2 Micro* was because the Defendant proffered no
3 evidence of any inextricable connection. *Id.* In contrast, *Glass House* is set to air in
4 less than one week. To think that in six days *Big Brother*’s trade secrets—which to
5 date are the foundation on which *Glass House* is built—can be “un-learned” or have
6 been remediated so that “there is no ongoing threat of use” (Opp’n at 22) is pure
7 fantasy. An injunction against *Glass House* is warranted given the extraordinary
8 ongoing misappropriation already divulged by Defendants in the very limited
9 discovery to date and the likelihood of additional ongoing misappropriation on the part
10 of *Glass House*.

11 **IV. Defendants Offer No Reasons Not To Enjoin Their Admitted Destruction of**
12 **Evidence**

13 Defendants do not dispute that Mr. Rosen has destroyed evidence since this
14 lawsuit was filed. Their only response is that the emails he deleted were allegedly
15 “non-substantive” and “tangentially related to *Glass House*.” (Opp’n at 25.) But it is
16 up to CBS or the Court, *not ABC or Mr. Rosen*, to determine whether the *Glass House*
17 emails are pertinent to this litigation. *Cf. Blankenship v. Hearst Corp.*, 519 F.2d 418,
18 429 (9th Cir. 1975). And if it is true that there is “no ongoing destruction of
19 evidence,” as Defendants claim (Opp’n at 25) then an injunction will simply preserve
20 the status quo. Based on Mr. Rosen’s past actions, the Court should issue an
21 injunction to ensure that no more relevant evidence is destroyed—by Mr. Rosen, or
22 any other individual or entity.

23 **V. The Balance Of Equities Favor CBS, As CBS Will Be Irreparably Harmed**
24 **Without Injunctive Relief**

25 The “underlying purpose” of a TRO is to “preserv[e] the status quo and
26 prevent[] irreparable harm.” *Granny Goose Foods, Inc. v. B’hood of Teamsters &*
27 *Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439 (1974). Here, preserving the
28 status quo demands that CBS not be faced with an infringing show about to air in less

1 than a week, and that ABC be allowed only “to compete, *in a lawful manner*, with
2 Plaintiff” not employing CBS’s trade secrets. *Richmond Techs., Inc. v. Aumtech*
3 *Business Sol’ns*, No. 11-cv-02460-LHK, 2011 WL 2607158, at *22 (N.D. Cal. July 1,
4 2011) (emphasis added).

5 Other than asserting that CBS’s harms can be redressed by money damages,
6 Defendants offer nothing to rebut CBS’s showing of irreparable harm. CBS’s harms
7 extend beyond loss of viewership, lower ratings and loss of advertising dollars. As
8 CBS explained, the cascading harms from infringement of *Big Brother* are
9 undoubtedly difficult to quantify, and as such cannot be remedied by money damages.
10 Because the entire network’s summer lineup is affected, *Big Brother* is hampered in its
11 ability to compete against other “house reality” shows, and ABC gets an unquantifiable
12 unfair advantage in making a cheap show. Bresnan Decl. ¶ 18-21, 23.

13 Meanwhile, Defendants offer a supposed parade of horrors if *Glass House* is
14 not allowed to air. But Defendants miss the most important point: any harm to ABC
15 is a direct result of ABC’s own illegal conduct and so should not bar injunctive relief.
16 *See Wetzel’s Pretzels, LLC v. Johnson*, 797 F.Supp.2d 1020, 1029 (C.D.Cal. 2011)
17 (granting a preliminary injunction, and noting that “[w]hile it is apparent that
18 Defendants would suffer a loss of revenue and that its employees would, in all
19 likelihood, lose their employment, it is Defendants who brought on those risks”).
20 Furthermore, the harm that ABC alleges—having its production stopped right before it
21 airs—would undoubtedly be worsened if *Glass House* were pulled off television mid-
22 season, *after* the show began airing.

23 Finally, Defendants’ argument about injunctive relief serving as a prior restraint
24 is simply meritless. A preliminary injunction would not constitute a prior restraint, as
25 the First Amendment does not protect copyright infringement or the misappropriation
26 of trade secrets. *See Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 924
27 F.Supp. 1559, 1575-76 (S.D. Cal. 1996) (rejecting such an argument because
28 “[c]opyright law accommodates the concerns of the First Amendment through its

1 exclusion of protection for ideas, and through the fair use doctrine”); *DVD Copy*
2 *Control Ass’n, Inc. v. Bunner*, 31 Cal.4th 864, 882 (“The First Amendment does not
3 prohibit courts from incidentally enjoining speech in order to protect [against
4 disclosure of trade secrets.”) (citations omitted). Moreover, the public interest strongly
5 favors injunctions here, as “public policy favors the issuance of injunctions in
6 intellectual property infringement lawsuits,” *Nintendo of AM., Inc. v. Lewis Galoob*
7 *Toys, Inc.*, 16 F.3d 1032, 1038 (9th Cir. 1994), and California’s trade secret law
8 specifically provides for injunctions in light of the need to “maintain ‘standards of
9 commercial ethics,’” *DVD Copy Control*, 31 Cal.4th at 880-81.



10 VI. Conclusion

11 For the foregoing reasons and for those stated in CBS’s *Ex Parte* Application,
12 CBS respectfully requests that the Court grant CBS’s Application for a TRO and an
13 OSC regarding a preliminary injunction.

14
15 /s/ Scott A. Edelman

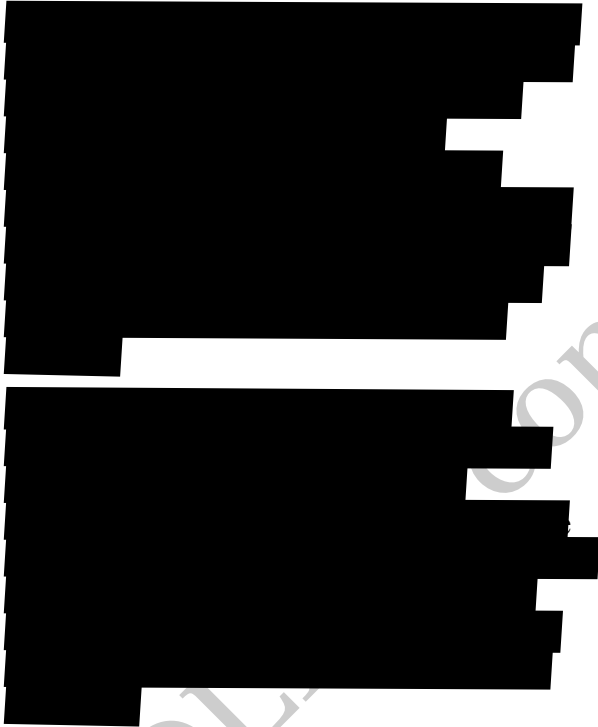
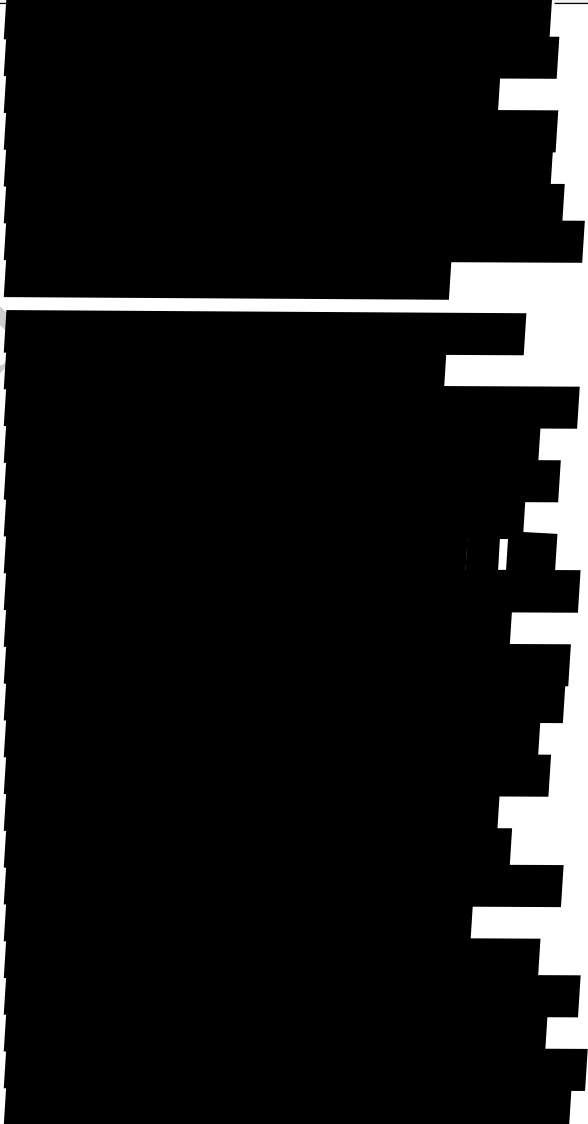
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Appendix A – Reply

CBS's Trade Secret	Defendants' Response	CBS's Reply
		

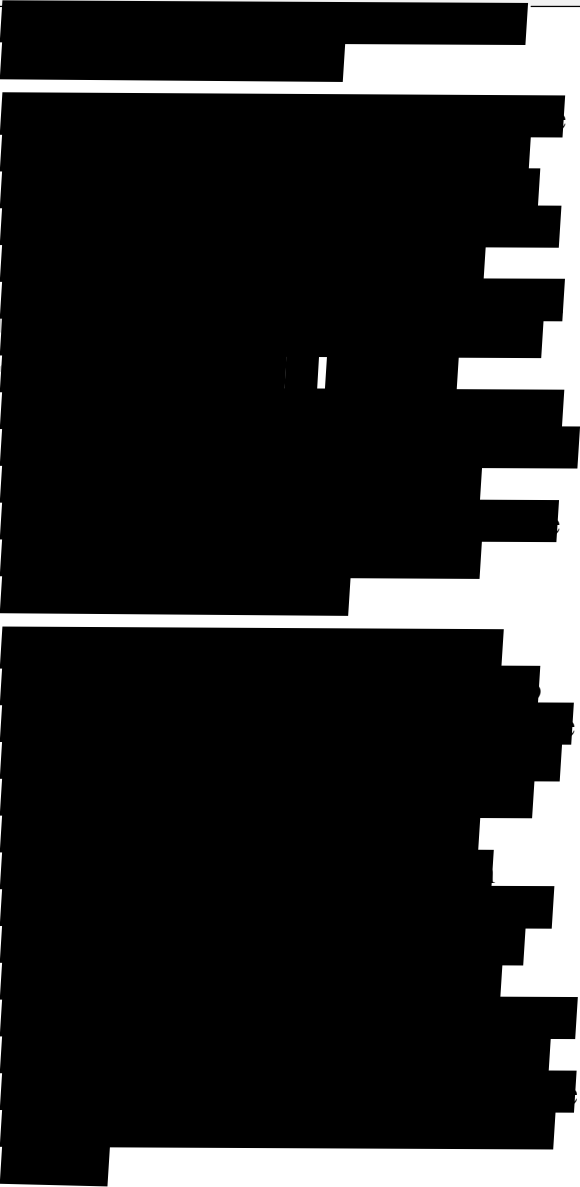
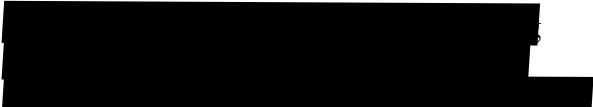
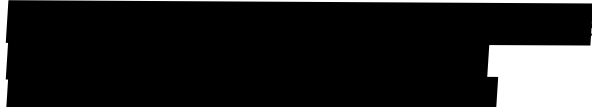
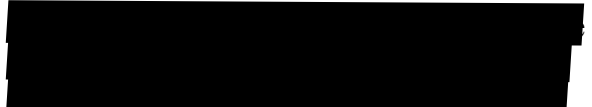


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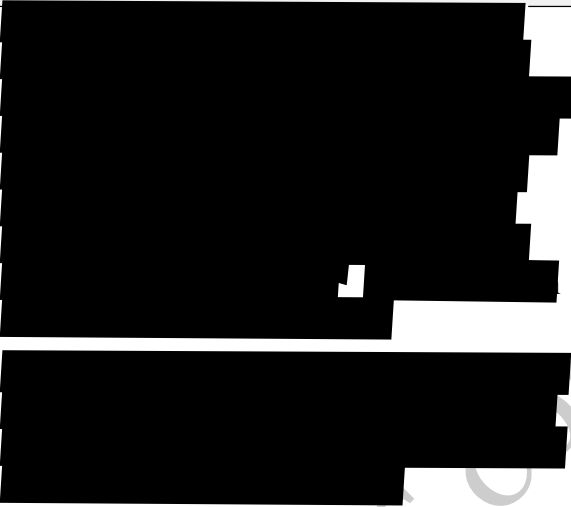





CBS's Trade Secret	Defendants' Response	CBS's Reply
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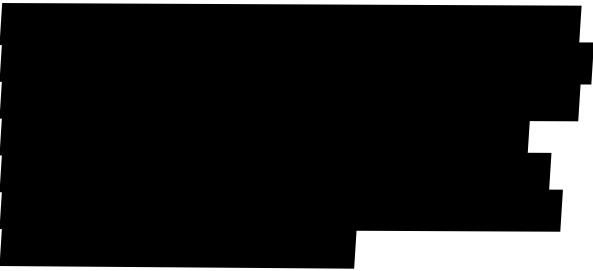
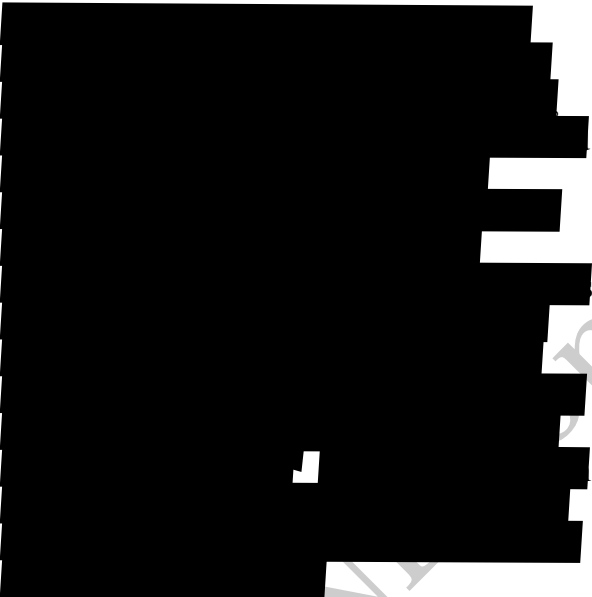
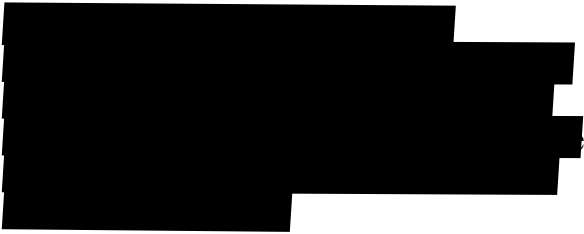



CBS's Trade Secret	Defendants' Response	CBS's Reply
		
		

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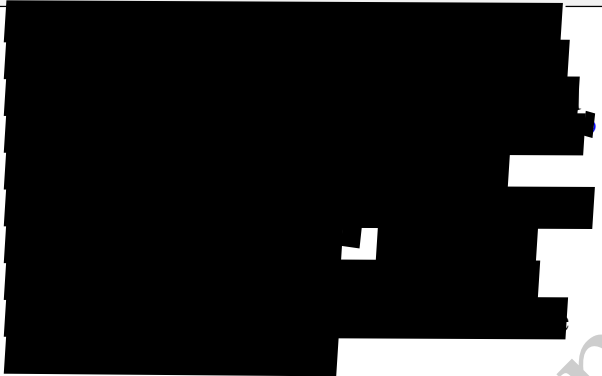


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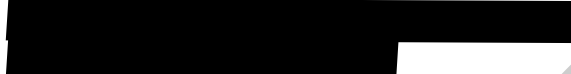

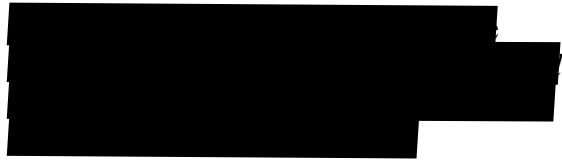
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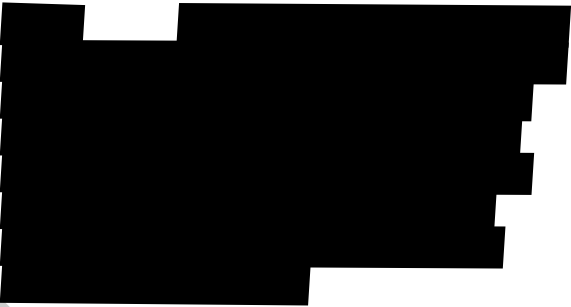
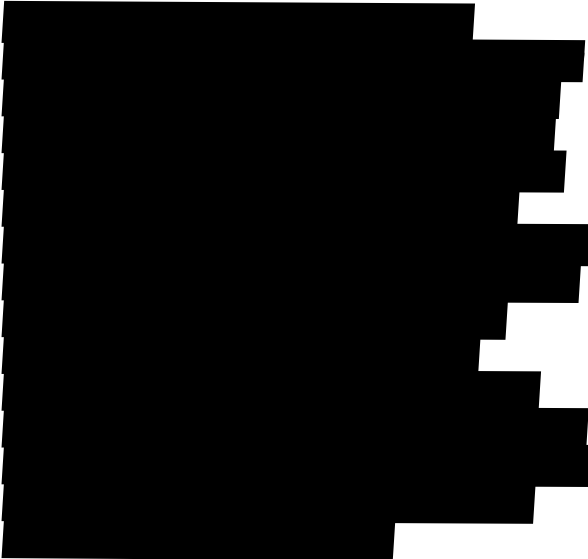
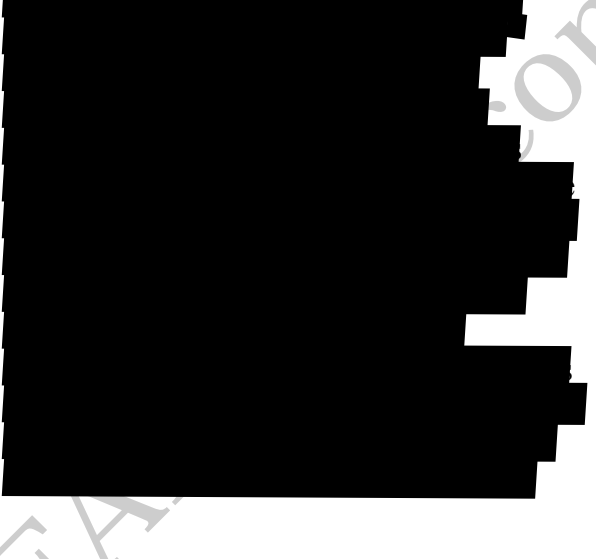



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