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19 UNITED STATES DISTRICT COURT
 20 CENTRAL DISTRICT OF CALIFORNIA
 21 WESTERN DIVISION

23 CBS Broadcasting, Inc.,
 24 Plaintiff,
 25 vs.
 26 American Broadcasting Companies,
 Inc., et al.,
 27 Defendants.
 28

CASE NO. 2:12-CV-04073 MMM
 (JEMx)
 DEFENDANTS’ OPPOSITION TO *EX*
PARTE APPLICATION FOR
 EXPEDITED DISCOVERY AND TO
 SHORTEN TIME FOR BRIEFING
 AND HEARING ON CBS’S MOTION
 FOR A PRELIMINARY INJUNCTION

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1
2 **I. INTRODUCTION**

3 Defendants American Broadcasting Companies, Inc., The Walt Disney
4 Company, Disney Enterprises, Inc., Abc, Inc., Disney/Abc Television Group, Keep
5 Calm And Carry On Productions, Inc., Corie Henson, Michael O’Sullivan, and
6 Kenny Rosen (collectively “Defendants”) oppose CBS’s overbroad, over-the-top *ex*
7 *parte* motion for expedited discovery and for a shortened briefing schedule
8 regarding CBS’s anticipated preliminary injunction motion, which appears to be a
9 meritless attempt to shut down development of ABC’s newest reality television
10 program *Glass House*.

11 The Court should reject CBS’s expedited discovery request for three
12 reasons:

13 First, the law bars CBS from taking *any* discovery on its trade secret
14 claims until CBS identifies with particularity the *Big Brother* trade secrets that
15 *Glass House* supposedly misappropriated. Cal. Code Civ. Pro. §2019.210; *see*
16 *Neothermia Corp. v. Rubicor Medical, Inc.*, 345 F. Supp. 2d 1042 (N.D. Cal. 2004)
17 (Section 2019.210 applicable in federal court). Despite repeated requests from
18 Defendants, CBS has done little more than hint in its Complaint that *Big Brother*
19 uses secret camera set-ups and video editing techniques. (Complaint ¶ 64.)
20 Leaving to one side that *Big Brother* has been airing for over a decade, that over
21 400 reality programs have permeated the airwaves during that period, and that it
22 strains credulity to imagine that the process of editing a reality show from videotape
23 is secret, CBS’s disclosures are entirely inadequate under Section 2019.210. This
24 Court should order no discovery until CBS fully complies with its legal obligations.

25 Second, with respect to its copyright claim (the only claim that could
26 possibly justify enjoining an entire television program, and thus the only claim with
27 any possible time constraint), CBS needs only limited discovery to prepare a
28 preliminary injunction motion. Obviously, no issue of access exists in this case

1 because *Big Brother* has been running for nearly 14 years. Therefore, in theory,
2 CBS would need nothing more than the first episode of *Glass House* to compare
3 with *Big Brother* in order to file its motion. Because *Glass House* is still in
4 development, however, and does not exist in a fixed, tangible form, neither CBS,
5 ABC, the Court, nor anyone else can view it before CBS's proposed date for the
6 preliminary injunction hearing. Therefore, the best Defendants can offer CBS is the
7 latest, most current description of *Glass House*'s rules, themes, and style, which
8 Defendants proposed to provide before CBS filed its unwieldy *ex parte* application.
9 Indeed, most copyright preliminary injunction motions are decided on just such
10 evidence, without the need for imposing extraordinarily expensive and onerous
11 "expedited" discovery on an important competitor preparing a new, state-of-the-art
12 reality show.

13 Third, as described in detail below, CBS is essentially trying to cram a
14 year of litigation into two weeks. It would be astronomically expensive, if not
15 simply impossible, for Defendants to produce the documents requested (e.g., every
16 shred of paper, email, text message, instant message, Facebook post, tweet, and
17 every other conceivable kind of document related to, referring to, or having any
18 logical or factual connection to *Glass House* and every iteration of the show before
19 it was called *Glass House*) and provide 10 depositions -- the presumptive limit
20 under the Federal Rules of Civil Procedure -- in two weeks. CBS's request is
21 particularly outrageous because not only is it wildly overbroad, but, as just
22 discussed, it is entirely unnecessary to obtain the injunction that supposedly
23 justifies it.

24 Regardless, Defendants are prepared to work with CBS to develop a
25 *reasonable* expedited discovery schedule, a version of which we include in our
26 papers and the attached Proposed Order.

27
28

1 **II. BACKGROUND**

2 **A. Big Brother**

3 Big Brother was originally developed by Endemol, a Dutch-based
4 international television company, in the late 1990s. A version of the game airs in
5 many countries, including the United States, where CBS acts as Endemol's
6 exclusive licensee. Sometimes called the "indoor *Survivor*," *Big Brother* features
7 12 to 14 contestants living together in a specially constructed house on a sound
8 stage and competing to avoid elimination. The show airs three times a week.

9 The reality TV genre now dominates television – one compilation of
10 reality shows listed over 400 programs since 2000 -- and numerous shows have
11 used the format of a group of people living together and competing to avoid
12 elimination.¹ In *Big Brother*, the contestants are continuously on camera, and must
13 compete with each other in game-show like challenges, often involving bizarre
14 stunts, to become Head of Household. The Head of Household has the power to
15 nominate two contestants for eviction from the house. Later in the week,
16 contestants play to win the Power of Veto, which can "save" one of the two
17 contestants from eviction. If the winner of the Power of Veto uses his or her veto,
18 the Head of Household must then nominate a different contestant for eviction to
19 take the saved player's place. The contestants then vote on which of the two
20 players eligible for eviction will actually leave the house. The last person
21 remaining in the house wins a \$500,000 cash prize.

22 The show is characterized by the intense isolation of the contestants
23 from the outside world combined with their lack of privacy. The contestants only
24 interact with other contestants during their approximately 10 weeks in the house,
25 and occasionally, through a video monitor or speaker, with Julie Chen, the show's
26

27 ¹ http://en.wikipedia.org/wiki/List_of_reality_television_programs. Other examples
28 of this format include, e.g., *The Farm*, *The Bar*, *Under One Roof* and *Paradise Hotel*. See *id.*

1 host.

2 **1. *Big Brother's* Supposed Secrets**

3 Although CBS claims that *Big Brother* has many unspecified, but
4 extremely confidential “trade secrets” of which the world at large is unaware, *Big*
5 *Brother* has been one of the more highly publicized programs of the last decade,
6 and would appear to have few secrets left. The show has been on the air for 13
7 years, and has a continuous web feed to the Internet so that subscribers can watch
8 uncensored activities within the house 24-hours per day. The cable channel
9 Showtime airs a three-hour uncensored look at the house, *Big Brother After Dark*;
10 CBS gives tours of the *Big Brother* house and the control room; and numerous
11 critics, bloggers, and fans post insights, essays, complaints, and critiques about the
12 show on the Internet each week.

13 The notion that some secret inheres in *Big Brother's* use of multiple
14 camera feeds to cover all areas of the house is untenable, nor has CBS suggested
15 anything about *Big Brother's* camera set-up or production that is unique to *Big*
16 *Brother* or unknown to competitors. Likewise, there is nothing secret about editing
17 a program with many multiple feeds together or developing a narrative structure for
18 it. That *is* reality TV. As set forth in detail below, CBS has so far refused to list
19 the supposed trade secrets they believe are at issue here, despite the legal
20 requirement that they do so before taking discovery on their trade secret claim. Cal.
21 Civ. Proc. Code § 2019.210.

22 **2. *Big Brother's* Former Employees**

23 CBS characterizes *Glass House's* hiring of 19 former *Big Brother*
24 employees as “remarkabl[e]” and strongly suggests that it demonstrates copying
25 and misappropriation. (CBS’s Memorandum of Points and Authorities “Mem.” at
26 1, 4). CBS is being misleading. There is nothing unusual about reality show staff
27 and producers moving between various shows. Both Defendant Kenny Rosen and
28 Defendant Michael O’Sullivan worked with the crew members from *Big Brother*

1 who are now at *Glass House* on *other* reality shows in addition to *Big Brother*.
2 Employee mobility is the norm, not the exception, in reality TV. Employees, who
3 generally must be rehired each season, are often itinerant, going from series to
4 series looking for a better opportunity. Indeed, Mr. Rosen worked at four other
5 reality shows between leaving *Big Brother* in 2007 and becoming show runner at
6 *Glass House* in 2012.

7 Although CBS implies that 19 employees left *Big Brother* only last
8 year to join *Glass House* this year, the majority of *Glass House* staff who once
9 worked at *Big Brother* worked there years ago. *Big Brother* represents one of many
10 reality shows on their resumes. Furthermore, it is common knowledge in the
11 industry that low pay and the 24 hours a day/ 7 days a week filming schedule makes
12 life on the *Big Brother* set difficult for the employees as well as the contestants.
13 That employees prefer a different show with benefits and better hours is hardly
14 evidence of a trade secret violation.

15 **B. The Glass House**

16 *Glass House*, which will air only once a week, as opposed to *Big*
17 *Brother*'s three-times-a-week broadcast schedule, is still in development, does not
18 exist in any fixed, tangible form, and has never appeared on television. The
19 producers have not finalized the rules, nor has the set even been completed.
20 Nevertheless, it is already clear that, as the title suggests, the show's dynamic and
21 structure differ from *Big Brother*. Not only will viewers be able to see into the
22 "glass house" via television cameras, but the contestants can "see out" of the glass
23 house using social media. Thus, *Glass House* players will have repeated
24 opportunities to interact with their fans and the public, making them far less
25 isolated than *Big Brother* contestants. As CBS itself explains it, viewers can
26 communicate with the players and "offer encouragement, criticism, or suggestions."
27 (Mem. at 4 (citing Cmpl. ¶ 36 and attempting to characterize this difference
28 between the shows as a similarity).) Because the planned show will include and

1 encourages substantial contestant interaction with the public, *Glass House* does not
2 plan to have a host to serve as a bridge between viewer and contestant.

3 *Glass House* intends to be team-oriented, in stark contrast to the
4 “every man for himself” theme of *Big Brother*. Currently, the producers envision
5 that the public will elect two captains in the glass house each week. The two
6 captains will choose teams from the remaining contestants to compete against each
7 other, led by the two captains. The team competitions will play a large part in
8 determining who stays and who leaves the glass house. Furthermore, the public
9 will nominate one contestant to be voted off each week, elimination will not solely
10 be determined by the other contestants, as has been the case for *Big Brother* since
11 its second season.² While the winner of *Big Brother* is often one of the more
12 ruthless and manipulative contestants, it will be impossible to win *Glass House*
13 without broad support and affection from the television audience.

14 *Glass House* will also look entirely different from *Big Brother*, which
15 is an inexpensively made program recorded on standard definition video tape. *Big*
16 *Brother* is shot “square” – that is, the show’s aspect ratio duplicates the aspect ratio
17 of an old-style square television set. Disney/ABC intend to record *Glass House*
18 with state-of-the-art, high definition digital technology using a rectangular aspect
19 ratio suitable for modern televisions and much more closely resembling a movie
20 screen. The planned look and feel for *Glass House* is cinematic, whereas *Big*
21 *Brother* retains a tabloid television feel.

22 C. **CBS’s Copyright Infringement Claims Are Meritless And Do Not**
23 **Justify Imposing Expensive And Burdensome Discovery On**
24 **Defendants**

25 Despite never even having seen *Glass House*, CBS attempts to justify

26 ² Being voted off by the public is a very common device in reality television
27 shows, such as *American Idol* or *Dancing with the Stars*. The fact that *Big Brother*
28 tried but abandoned it after the first season in favor of the more insular (and also
common) format of contestants voting each other off, underscores the thematic
differences between *Big Brother* and the planned *Glass House* show.

1 its extraordinarily burdensome discovery request by insisting that *Glass House*
2 infringes on the copyrights licensed by CBS because “[G]lass House, like *Big*
3 *Brother*, involves 14 contestants living together in a house rigged with cameras.
4 [C]ontestants on *Glass House* will face eviction, with the last person standing
5 winning a six-figure cash prize.” (Mem. at 3 (citing Cmpl. ¶ 35).)³

6 CBS fails to describe anything resembling a copyright violation. Even
7 CBS must realize it cannot copyright the idea of 14 contestants living together in a
8 house rigged with cameras. Nor can CBS protect the idea of contestants facing
9 elimination until only one winner remains. These are commonplace, stock elements
10 in many reality and game shows. “[P]roviding protection to a combination of
11 generic elements without more -- that is, *without consideration of the presentation*
12 *or expression of those elements* -- would stifle innovation and would stifle the
13 creative process” *CBS Broadcasting, Inc. v. ABC, Inc.*, No. 02 Civ. 8813,
14 2003 U.S. Dist. LEXIS 20258, at *24 (S.D.N.Y. Jan. 13, 2003) (holding that reality
15 television show “*I’m A Celebrity, Get Me Out Of Here*” was not substantially
16 similar to reality television show “*Survivor*,” and observing that in general
17 “copyright protection in a compilation of ideas [is] thin”) (emphasis added).

18 Although CBS suggests that “courts have had few occasions to apply
19 the Copyright Act to ‘reality’ shows” (Mem. at 5-6 n.1), in this district alone courts
20 have decided numerous cases involving reality TV, and our research discloses none
21 where the plaintiff established substantial similarity.⁴ CBS so far gives every

22 ³ Plaintiff also claims that *Glass House* copies the interactive features that *Big*
23 *Brother* supposedly “pioneered,” (Mem. at 3), but these features did not even *exist*
24 when *Big Brother* experimented with some rudimentary audience participation.
25 The use of social media interaction envisioned for *Glass House* will be far more
extensive than anything ever seen in *Big Brother*, and is currently envisioned to be
a major feature of the game.

26 ⁴ See *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1176-77 (9th Cir. 2003) (no
27 infringement based on following shared generic elements: magicians wearing
28 masks; opening monologues explaining that secrets of magic tricks are closely
guarded and expressing a desire to inspire children; secret locations without an
audience; opening sequences with a magician walking forward; magicians
performing an illusion as if it were a normal performance and then re-performing

1 reason to believe the result here will be the same. This Court should not permit
 2 CBS to impose enormous litigation costs on a key competitor with paper-thin
 3 allegations about a handful of alleged commonalities between *Big Brother* and the
 4 planned *Glass House* show.

5 **III. ARGUMENT**

6 With that background, Defendants will address the merits of CBS's *ex*
 7 *parte* motion for expedited discovery and a shortened briefing schedule.

8 **A. CBS May Not Take Any Discovery On Its Trade Secret Claims** 9 **Until It Identifies Its Trade Secrets.**

10 As a threshold matter, CBS may not proceed with expedited discovery
 11 until it identifies what its so-called "trade secrets" are that have been

12 the illusion and explaining how it was done; and moods of secrecy and mystery);
 13 *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1134-35 (C.D. Cal. 2007) (no
 14 infringement based on following shared generic elements: a cooking show with a
 15 host; guest celebrities; an interview and a cooking segment; discussion of the
 16 celebrity's current projects; and a tour of the celebrity's home, including the
 17 kitchen); *Milano v. NBC Universal, Inc.*, 584 F. Supp. 2d 1288, 1295-97 (C.D. Cal.
 18 2008) (no infringement based on following shared generic elements: a competition
 19 or game in which contestants compete to lose the most weight; contestants receive
 20 rewards and prizes, including for specific contests and a grand prize awarded to the
 21 person with the greatest weight loss at the end of the show; exercise and fitness
 22 activities focusing on struggles of contestants whom were grossly overweight and
 23 seriously out of shape; fitness tips included; scenes involving discussions of diet
 24 and healthy eating; exercise and dietary experts acting in an advisory capacity to
 25 assist contestants in losing weight; weigh-ins, before and after photographs; and
 26 some challenges that would require contestants to work as a team); *Bethea v.*
 27 *Burnett*, No. CV04-7690, 2005 WL 1720631, at *8, *14 (C.D. Cal. June 28, 2005) (no
 28 infringement based on following shared generic elements: having a group of
 dynamic contestants from varied backgrounds; having a reality television show set
 in the corporate environment; having a board room; having a group of professionals
 evaluate contestants' performances; having contestants live in the same quarters in
 specially constructing living spaces designed to maximize social dynamics; using
 no scripted dialogue, including incidental characters; and editing a week of action
 down to approximately 44 minutes); *Pelt v. CBS, Inc.*, No. CV-92-6532, 1993 WL
 659605, *3 (C.D. Cal. Oct. 25, 1993) (no infringement based on following shared
 generic elements: show about race relations targeting young adults; using an
 opening song; having a moderator; having audience participation; including a panel
 of guests; having a topic for discussion; pausing for commercials and having a
 closing statement by the moderator); *Dick Clark Co., Inc. v. Alan Landsburg*
Prods., Inc., No. CV 83-3665, 1985 WL 1077775, at *1 (C.D. Cal. June 13, 1985)
 (no infringement based on following shared generic elements: special featuring
 "bloopers" (i.e., outtakes of television and film clips); similar methods of
 presentation of blooper clips; use of a raised set with a large screen; a live studio
 audience; a host; and various studio guests).

1 misappropriated. California Code of Civil Procedure Section 2019.210 (“Section
2 2019.210”) prohibits CBS from commencing trade secret discovery until it has
3 identified its alleged trade secrets “with reasonable particularity.” The bar on
4 discovery not only applies to the trade secret misappropriation cause of action, but
5 also to every cause of action that is “factually dependent” on the misappropriation
6 allegation. *See Advanced Modular Sputtering, Inc. v. Superior Court*, 132 Cal.
7 App. 4th 826, 834-35 (2005). Section 2019.210 is a substantive rule applicable in
8 federal courts. *See, e.g., Neothermia Corp. v. Rubicor Medical, Inc.*, 345 F. Supp.
9 2d 1042, 1043 (N.D. Cal. 2004); *Computer Economics, Inc. v. Gartner Group, Inc.*,
10 50 F. Supp. 2d 980, 992 (S.D. Cal. 1999).

11 Section 2019.210 “was enacted to curb unsupported trade secret
12 lawsuits routinely commenced to harass competitors and former employees.”
13 *Computer Economics*, 50 F. Supp. 2d at 992. The California legislature
14 “understood that plaintiffs in trade secret cases are often unable to identify any
15 trade secrets,” and that such claims are “especially prone to discovery abuse.” *Id.*
16 Without a clear and particularized prior identification of trade secrets, “neither the
17 court nor the defendant can delineate the scope of permissible discovery.” *Id.*
18 Worse, without Section 2019.210, a plaintiff could “conform misappropriation
19 claims to the evidence produced by the defendant in discovery,” or in other words,
20 embark on a fishing expedition into its competitor’s files in search of a claim. *Id.*
21 By contrast, a particular identification of trade secrets before discovery commences
22 “promotes well-investigated claims, frames the appropriate scope of discovery,
23 prevents needless discovery disputes, and enables defendants to form complete and
24 well-reasoned defenses.” *Id.*

25 The Complaint fails to satisfy Section 2019.210. Its only disclosure of
26 so-called trade secrets is a broad, generic description in Paragraph 64 that was filed
27 in the public record and does not disclose with reasonable particularity what the
28 trade secrets at issue are. For example, the Complaint alleges that the trade secrets

1 “include, but are not limited to” several vague subject areas, such as “[t]he process
2 surrounding the live around-the-clock streaming of the *Big Brother* house to
3 viewers.” (Complaint ¶ 64.) These are merely “high-level, generic categories in
4 which its alleged trade secrets are said to reside,” not the particular identification of
5 confidential and economically valuable trade secrets that Section 2019.210 requires.
6 *See Perlan Therapeutics, Inc. v. Superior Court*, 178 Cal. App. 4th 1333, 1344
7 (2009) (quoting Charles Tait Graves & Brian D. Range, *Identification of Trade*
8 *Secret Claims in Litigation: Solutions For A Ubiquitous Dispute*, 5 Nw. J. Tech. &
9 *Intell. Prop.* 68, 68 (2006)). For example, what is the allegedly trade secret
10 “rehearsal period” that CBS identifies (Complaint ¶64(e)) and what is the secret
11 process of “setting up and performing complicated challenges in a live and taped
12 television environment confined to a small space” (Complaint ¶ 64(f))? Without
13 an explanation of what these so-called “secrets” are, discovery from Defendants
14 cannot be tailored to the allegations, and importantly, Defendants cannot defend
15 whether or not these are indeed trade secrets and whether they are in fact being used
16 at *Glass House*. Until CBS has complied with Section 2019.210, trade secret
17 discovery may not proceed.

18 Defendants raised the problem with the trade secret disclosure with
19 CBS by letter on May 11, 2012 and requested a proper Section 2019.210 disclosure.
20 (*See Altman Decl. Ex. A.*) Defendants raised the need for a trade secret disclosure
21 again yesterday, May 14, 2012. (*See Kapur Decl. Ex. D.*) CBS has simply said it is
22 looking into the matter, but has provided nothing beyond Paragraph 64 of the
23 Complaint. CBS needs to satisfy this threshold burden before embarking on a
24 fishing expedition about *Glass House*.

25 Disclosure is needed prior to proceeding with expedited discovery.
26 Enabling the Court to frame the appropriate scope of discovery would seem
27 particularly critical when CBS is requesting a lawsuit’s worth of discovery in the
28 course of two weeks. Early disclosure of the allegedly misappropriated trade

1 secrets not only protects Defendants, it also benefits CBS. A clear identification by
2 CBS of its trade secret information will facilitate Defendants' efforts to make sure
3 that the information is not used in the production of *Glass House*. Defendants have
4 no interest in using CBS trade secrets, and are fully prepared to return or destroy
5 anything in its possession that CBS can substantiate is a CBS trade secret. This
6 should obviate any need for a preliminary injunction motion. *See, e.g., FLIR*
7 *Systems, Inc. v. Parrish*, 174 Cal. App. 4th 1270, 1279-80 (2009) (former
8 employer's pursuit of injunctive relief was specious and brought in bad faith when
9 action was based solely on a theory of "inevitable disclosure" and any allegedly
10 trade secret materials in the possession of former employee had already been
11 destroyed).

12 CBS cannot end run the requirements of Section 2019.210 by bringing
13 an *ex parte* motion for expedited discovery. The Court should deny any request for
14 trade secret discovery until CBS provides an adequate trade secret disclosure.

15 **B. CBS Does Not Have Good Cause to Seek Overbroad, One-Sided**
16 **Expedited Discovery.**

17 **1. CBS's Sweeping Discovery Must Be Significantly Narrowed.**

18 Discovery in this matter can be thought of in two categories –
19 copyright discovery and trade secret discovery.

20 On the copyright claims, the discovery that CBS may need to move for
21 injunctive relief is very narrow. Ordinarily, no discovery at all would be needed in
22 advance of a preliminary injunction motion, since the Court could simply review
23 the tape of the allegedly infringing show. In this unusual case, CBS seeks to enjoin
24 *Glass House* before it has even been recorded, let alone aired. Defendants want to
25 remove any cloud over the show and are confident that the copyright claim is
26 meritless. As such, Defendants are willing to provide the most complete documents
27 available that describe the anticipated format to the fullest extent these elements
28 have even been fixed or ascertained. Defendants offered yesterday to produce this

1 to CBS, and Defendants will agree to provide it. What Defendants oppose in this
2 motion is the overbroad, sweeping discovery requests promulgated by CBS that are
3 unrelated to their need to assess the show as it currently exists.

4 On the trade secret claims, this discovery may not proceed without an
5 adequate Section 2019.210 disclosure, as discussed above. If and when CBS
6 provides a particularized disclosure pursuant to Section 2019.210, Defendants are
7 also willing to provide correspondingly particularized discovery regarding CBS's
8 trade secret claim. For example, if CBS provides a particularized description of the
9 purportedly secret aspects of its camera setups for *Big Brother*, Defendants may
10 allow inspection of its *Glass House* set to confirm that those secret camera setups
11 are not being used. In no circumstances, however, should that inspection take place
12 before the alleged trade secrets are identified with reasonable particularity, allowing
13 CBS "conform [its] misappropriation claims" to what it finds. *Computer*
14 *Economics*, 50 F. Supp. at 992. Nor should CBS be entitled, e.g., to every single
15 communication between Disney/ABC and its former *Big Brother* employees, as
16 requests 4 - 6 demand.

17 The case law is clear that this Court should evaluate the scope of the
18 expedited discovery and the "surrounding circumstances" to determine whether
19 there is "good cause" to allow expedited discovery prior to the Rule 26(f)
20 conference. *See American Legalnet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1066
21 (C.D. Cal. 2009) (denying motion for expedited discovery where discovery was
22 "not 'narrowly tailored to obtain information relevant to a preliminary injunction
23 determination' and instead goes to the merits of plaintiff's claims in [the] action")
24 (citation omitted). Factors for this Court to consider include "(1) whether a
25 preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the
26 purpose for requesting the expedited discovery; (4) the burden on the defendants to
27 comply with the requests; and (5) how far in advance of the typical discovery
28 process the request was made.'" *Id.* at 1067 (citation omitted). The fact that CBS

1 is moving for a preliminary injunction does not end the inquiry – expedited
2 discovery is “not automatically granted merely because a party seeks a preliminary
3 injunction.” *Id.* at 1069.

4 A look at each of these factors here illustrates that there is *not* “good
5 cause” to grant CBS’s sweeping requested expedited discovery.

6 *First*, the fact that no preliminary injunction is pending weighs against
7 expedited discovery in this case. Despite apparently having sufficient
8 understanding of the *Glass House* show in development to send a threatening letter
9 (and releasing it to the press) on May 4, 2012, and then to file a lawsuit on May 10,
10 2012, CBS still has not filed for a preliminary injunction. This weighs against
11 allowing expedited discovery. In a similar case, *Facebook, Inc. v. Various, Inc.*,
12 2011 WL 2437433 (N.D. Cal. June 17, 2011), the court found that there was not
13 “good cause” to order expedited discovery because courts “usually do not [find
14 good cause for expedited discovery] when presented with a party’s mere inclination
15 to file such a [motion for preliminary injunction].” *Id.* at *3. Here, too, CBS’s
16 “mere inclination” to file a preliminary injunction motion, but failure to actually do
17 so, undermines any “good cause.”

18 *Second*, the discovery requests are clearly overbroad. Courts agree
19 that in assessing “good cause,” it is important to look at the breadth of the requests.⁵
20 Through its *ex parte* motion, CBS seeks to compel six far-reaching document
21 requests plus a remarkable *ten* depositions. (*See* Kapur Decl. Ex. A.) The requests
22 are facially unsupportable. For example, Request for Production 1(f) seeks all
23 documents concerning the hiring of persons to work on *Glass House*, even if those
24

25 ⁵ In *Facebook*, , where the court denied the motion for expedited discovery, the
26 court found that the requests were “so broad as to be implausibly tailored for the
27 sole purposes of . . . crafting a motion for preliminary injunction. 2011 WL 2437433
28 at *3. Similarly, in *Semitoool Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273
(N.D. Cal. 2002), the court denied expedited third party discovery because
“Plaintiff has not made any showing how this additional discovery is likely to
materially change its patent claims assessment.” *Id.* at 277.

1 potential candidates were not affiliated with *Big Brother*, and even though none of
2 the individuals at issue have any non-solicitation restrictions. *See id.* Similarly,
3 CBS has asked for all communications between more than a dozen individuals who
4 used to work for *Big Brother* and anyone affiliated with *Glass House* – with no
5 subject matter or date limitation for the communication. *See Id.* at Request Nos. 4-
6 5. All six requests suffer from similar overbreadth. We sought to meet and confer
7 with CBS about narrowing these requests after receiving them yesterday, but CBS
8 instead filed its motion. This is a clear fishing expedition that would not be
9 sustainable in the ordinary course of litigation, and is particularly egregious when
10 styled as expedited discovery requests.

11 Moreover, the request to take *ten* depositions in the next few weeks is
12 far-fetched. Under the Central District of California Rules, CBS only gets to take
13 ten deposition in the *entire litigation*. It is thus asking to compress an entire case
14 into a few week period. There is no good cause for such an extreme action.
15 Defendants have proposed that each side be allowed to take 7 hours of depositions
16 next week to support the preliminary injunction briefing. This is more than
17 appropriate to provide information needed for the preliminary injunction motion
18 and opposition.

19 *Third*, CBS has never articulated what its purpose is for the overbroad
20 requests. Defendants fear that the purpose is to burden and overload Defendants
21 during a crucial time when they are working to create, finalize, and launch the
22 *Glass House* series on June 18, 2012.

23 *Fourth*, the burden to comply with the proposed timeline for these
24 discovery requests is significant and unduly prejudicial. CBS asks this Court to do
25 what no other Court has done. CBS does not cite to a single case that asks a litigant
26 to prepare substantial document production responses in four business days to
27 sweeping requests for “all documents” concerning broad topics and including
28 multiple custodians. To the contrary, the cases relied upon by CBS support a *denial*

1 of the motion for expedited discovery in such a situation. For example, in *Apple,*
2 *Inc. v. Samsung Electronics Co., Ltd.*, No. 11-cv-01846, 2011 WL 1938154 (N.D.
3 Cal. May 18, 2011), a case cited repeatedly by CBS, the court noted that the parties
4 had been talking about the requested materials for more than a year, the responding
5 party had the specific discovery requests at issue for almost a month, and the
6 expedited discovery ultimately ordered was limited to production of the latest
7 iteration of the allegedly infringing product and product packaging. *Id.* at *2, *4.⁶
8 There was no production of “all emails relating to the Samsung product.” Such a
9 request would be unduly burdensome as an expedited request and entirely
10 unnecessary for a motion for preliminary injunction on infringement issues.
11 Instead, the court in *Apple* ordered that a representative sample of the allegedly
12 infringing product be produced. This is just what Defendants have offered to do
13 here.

14 *Fifth*, the final factor in the contextual analysis of the expedited
15 discovery is the degree of expediting. Here, there is not yet a schedule from the
16 Court setting the Rule 26(f) conference so the parties cannot calculate when
17 discovery would be served absent an order. Defendants do note, however, that CBS
18 could have provided its requests for information when it sent its May 4, 2012 letter
19 about *Glass House*, (Kapur Decl. Ex. B), and it could have called Defendants’
20 counsel after serving the Complaint on May 10, 2012 and sought to work out a
21 schedule for expedited discovery. CBS did not take any of these actions and
22 instead sprung the broad requests for production and deposition requests on
23 Defendants yesterday (Monday) morning and demanded that a production be made
24 by Friday. This Court should reject this short-notice exercise.

25
26 ⁶ Similarly, in *Semitoil* 208 F.R.D. at 278, the court granted the expedited
27 discovery in part, and denied it in part. The discovery that was ordered expedited
28 was a representative set of technical specifications, schematics, and manuals of the
allegedly infringing cleaning system that could be inspected and analyzed for the
infringement claim. The responding party had 20-30 days to produce.

1 At the end of the day, it makes sense for Defendants to produce to
2 CBS documents sufficient to show the *Glass House* show as it is currently
3 envisioned. Defendants can provide documents with the most complete available
4 descriptions of the show and drawings and photographs of the most complete
5 available imagery for the show. Defendants are confident that with this information
6 in hand, CBS and this Court will find that there is no copyright infringement for the
7 *Glass House* show in development. Everything else can wait until after the parties'
8 Rule 26(f) conference.

9 2. **Defendants Should Be Granted Expedited Discovery As**
10 **Well.**

11 If this Court decides that CBS can proceed with reasonably tailored
12 expedited discovery, then Defendants respectfully request the right to take some
13 targeted expedited discovery to prepare for an opposition to the anticipated motion
14 for preliminary injunction. (*See* Altman Decl. Ex. B) (Proposed First Set of
15 Expedited Requests for Production). This discovery is necessary, for instance, to
16 ascertain the nature of the trade secrets that were allegedly misappropriated, the
17 steps taken to keep that information secret, and the identifies of the persons to
18 whom it was disclosed. Defendants have endeavored to make these discovery
19 requests narrowly tailored to discovery that would be relevant to Defendants'
20 defense to the preliminary injunction motion. There is "good cause" for such
21 discovery.

22 In addition, if this Court allows CBS to proceed with any expedited
23 depositions, Defendants respectfully request an order granting Defendants the right
24 to take expedited depositions. Defendants proposed that the parties could each get
25 7 hours of deposition testimony per side to allocate as determined by the party
26 between noticed depositions set for shortened time.

27 CBS argues in its motion to expedite that because Defendants have not
28 asserted a counterclaim yet, Defendants do not need discovery. That misses the

1 point. In opposing a motion for a preliminary injunction on a trade secret claim,
 2 Defendants will show that CBS does not have likelihood of success on the merits.
 3 To do that, Defendants will show (a) that their purported trade secrets are not
 4 secret, and are instead available in the public domain and (b) that they did not take
 5 reasonable steps to protect their trade secrets. Defendants are entitled to expedited
 6 discovery on these defenses just as CBS is entitled to that expedited discovery on
 7 the merits of their claim.

8 **C. Overall Proposed Schedule Must Be Modified.**

9 Once CBS has provided a reasonably particular Section 2019.210
 10 statement, and if the Court determines there is “good cause” for even a subset of the
 11 expedited discovery, Defendants propose the following schedule, which would
 12 allow for CBS’s requested preliminary hearing prior to the June 18, 2012
 13 anticipated launch of *Glass House*:

14	May 16, 2012	CBS to Provide Adequate 2019.210 Disclosure
15	May 18, 2012	Defendants to Provide Representative Documents
16		With Most Complete Description and Imagery
17		For the <i>Glass House</i> Show
18		CBS To Provide Responses to Request for
19		Production Nos. 1-6
20	May 21-24, 2012	Seven Hours of Deposition Testimony Per Side
21	May 25, 2012	Deadline for CBS’s Preliminary Injunction Brief
22	June 4, 2012	Deadline for Defendants’ Opposition Brief
23	June 6, 2012	Deadline for any Reply Brief for CBS
24	June 11, 2012	Hearing on Preliminary Injunction Motion

25 **IV. CONCLUSION**

26 Defendants respectfully request that the Court deny CBS’s application
 27 in its entirety or, in the alternative, order limited, narrowly-tailored expedited
 28 discovery in the manner proposed by Defendants above.

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