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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CROSSFIT, INC., a Delaware
corporation,

Plaintiff,

vs.

NATIONAL STRENGTH AND
CONDITIONING ASSOCIATION, a
Colorado corporation,

Defendant.

CASE NO. 14cv1191-JLS(KSC)

ORDER RE JOINT MOTION FOR
DETERMINATION OF DISCOVERY
DISPUTE (PEER REVIEW AND
COMPENSATION DISCOVERY)

[Doc. No. 25.]

Before the Court is the parties' Joint Motion for Determination of Discovery Dispute concerning defendant's responses to plaintiff's Requests for Production of Documents and Special Interrogatories. [Doc. No. 25.] In the Joint Motion, plaintiff seeks an order compelling defendant to disclose the identities of peer reviewers who reviewed and provided comments on an article that was later published by defendant in its professional journal. In response, defendant seeks a protective order precluding disclosure of the identities of the peer reviewers based on confidentiality and other concerns. Plaintiff also seeks an order compelling defendant to disclose contractual and compensation information pertaining to its relationship with certain authors and editors of its professional journal.

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1 For the reasons outlined more fully below, the Court finds that plaintiff's request
 2 for an order compelling defendant to disclose the identities of the peer reviewers for
 3 the Devor Study must be DENIED without prejudice. The Court also finds that
 4 plaintiff's request for an order requiring defendant to produce contractual and
 5 compensation information about its relationship with certain authors and editors of its
 6 professional journal must be GRANTED subject to the Protective Order filed in this
 7 case.¹

8 **Background**

9 The Complaint states that plaintiff and defendant "are competitors in the fitness
 10 industry." [Doc. No. 1, at p. 2.] Defendant is a fitness organization founded in 1978,
 11 and its business involves: (1) promulgating "standards for physical training;"
 12 (2) certifying "personal trainers and strength and conditioning professionals;"
 13 (3) offering "seminars, study guides, and tests that are used throughout the industry;"
 14 and (4) publishing "scholarly journals that perpetuate their fitness model." [Doc. No.
 15 1, at pp. 2, 6.] Defendant's long-time peer in the industry is known as the American
 16 College of Sports Medicine or ACSM, and certifications by defendant and ACSM "are
 17 viewed as nearly interchangeable in the fitness industry." [Doc. No. 1, at p. 2.]

18 Plaintiff is a newcomer to the fitness industry, and, according to the Complaint,
 19 has "experienced a meteoric rise from a single affiliate gym in 2000 to approximately
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21 ¹ The Court notes that the parties did not brief the Joint Motion in the
 22 manner required by Chambers' Rules. Any joint discovery motions filed after the date
 23 of this Order that fail to meet the briefing requirements in Chambers' Rules will be
 subject to denial.

24 In this regard, Chambers' Rule V(D) states as follows: "If the discovery dispute
 25 concerns written discovery requests (e.g., interrogatories, requests for admissions,
 requests for production, subpoenas), the parties shall submit a "Joint Motion for
 Determination of Discovery Dispute." For each written discovery request in dispute,
 the Joint Motion must include:

- 26 1. The exact wording of the discovery request;
- 27 2. The exact response to the request by the responding party;
- 28 3. A statement by the propounding party and any points and authorities as
 to why a further response should be compelled; and,
4. A precise statement by the responding party and any points and
 authorities as to the bases for all objections and/or claims of privilege."

1 10,000 affiliate gyms” with “80,000 certified CrossFit trainers teaching CrossFit to
2 more than a million participants.” [Doc. No. 1, at p. 3.] Plaintiff claims that its fitness
3 regimen “is a radically different approach to the brand of fitness fostered by
4 [defendant]” and credits its success to “better and faster results than traditional forms
5 of fitness training.” [Doc. No. 1, at p. 3.] Both plaintiff and defendant allegedly make
6 a significant portion of their revenue through certification of trainers. [Doc. No. 1, at
7 pp. 3, 6.]

8 Defendant publishes the Journal of Strength and Conditioning Research
9 (“JSCR”). [Doc. No. 1, at pp. 3, 7.] Dr. William J. Kraemer is the editor-in-chief of the
10 JSCR and a fellow of the ACSM. The key allegations in the Complaint are as follows:
11 “In November 2013, the JSCR published a study by Steven T. Devor (an ACSM
12 ‘fellow’), Michael M. Smith, Allan J. Sommer, and Brooke E. Starkoff, entitled
13 ‘Crossfit-based [sic] high intensity power training improves maximal aerobic fitness
14 and body composition’ (the ‘Devor Study’).² The Devor Study purported to track a
15 ten-week CrossFit program. While the Devor Study correctly found that CrossFit
16 improved the athletes’ fitness levels, it also reported that nine of fifty-four participants
17 (16% of the sample population) dropped out of the program due to ‘overuse or injury.’
18 That assertion was based on false data.” [Doc. No. 1, at p. 4.] According to the
19 Complaint, it is simply not true that nine participants dropped out of the program
20 because of overuse or injury. [Doc. No. 1, at p. 4.] In addition, plaintiff believes that
21 the false data and information in the Devor Study was “contrived” not only to dissuade
22 people from using CrossFit as a form of exercise but also to dissuade trainers from
23 seeking certification as a CrossFit trainer. [Doc. No. 1, at pp. 4-5.]

24 The most important factual allegations in the Complaint are that defendant
25 published the following false, misleading, and/or deceptive statements about CrossFit’s
26 injury rates in the Devor Study: (1) “[N]ine subjects (16% of total recruited subjects)

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28 ² The Devor Study is sometimes referred to herein as the “Devor Article”
or the “published article.”

1 cit[ed] overuse or injury for failing to complete the [CrossFit] program and finish
2 follow up testing;" and (2) "[T]here are emerging reports of increased rates of
3 musculoskeletal and metabolic injury in these programs [including CrossFit]." [Doc.
4 No. 1, at pp. 16-20.]

5 Plaintiff's Complaint includes causes of action for false advertising (15 U.S.C.
6 § 1125(a) and Cal. Bus. & Prof. Code § 17500), and unfair business competition (Cal.
7 Bus. & Prof. Code § 17200). [Doc. No. 1, at pp. 1, 15-20.] The Complaint also includes
8 a request for declaratory relief. [Doc. No. 1, at p. 19.] In the two causes of action for
9 false advertising and unfair business competition, plaintiff repeats the general factual
10 allegations that defendant published two false and misleading statements in the JSCR.

11 Currently under submission before the District Court is plaintiffs' Motion for
12 Partial Summary Judgment on the Element of Falsity. [Doc. No. 38.] In the Motion,
13 plaintiff argues there is no material issue of fact as to the falsity of the injury data
14 included in the Devor Study. In support of the Motion, plaintiff submitted declarations
15 by ten study participants and contends that the information in these declarations
16 directly refutes the "overuse or injury" data included in the Devor Study and shows the
17 data to be false. [Doc. No. 41, at pp. 11-12.] Defendant has filed an Opposition to the
18 Motion. In the Opposition, defendant argues that plaintiff's Motion for Partial
19 Summary Judgment should be denied because the evidence submitted by plaintiff is not
20 enough to establish that the overuse or injury data in the Devor Study is false. [Doc.
21 No. 41, at pp.] Defendant also argues that plaintiff's Motion should be denied as
22 premature, because the parties have not completed discovery [Doc. No. 42, at pp. 14-
23 15.]

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Discussion

A. Discovery Related to the Peer Review Process.

In several written discovery requests, plaintiff seeks documents and information about the “peer review process” used by defendant in the course of publishing the Devor Study. [Doc. No. 25, at p. 3.] Document requests that seek information about defendant’s “peer review process” include the following:

Document Request No. 7: All documents and communications concerning the Devor Article. [Doc. No. 27-1, at p. 39.]

Document Request No. 12: All documents and communications concerning the peer review process of the Devor Article. [Doc. No. 27-1, at p. 42.]

Document Request No. 13: All documents and communications referring or relating to the individuals who performed the peer review of the Devor Article. [Doc. No. 27-1, at pp. 42-43.]

Defendant responded to these documents requests with general objections and indicated that some responsive communications may be privileged. Defendant also objected that these document requests “unreasonably interfere[] with the peer review process” and would unnecessarily have “a chilling effect upon the publication of defendant’s academic journal.” [Doc. No. 27-1, at 40, 42-43.] However, defendant stated it would produce responsive, nonprivileged documents with redactions subject to the Stipulated Protective Order. [Doc. No. 27-1, at pp. 40, 42-43.] In the Joint Motion, plaintiff indicates that defendant produced some responsive documents but “redacted the names of peer reviewers.” [Doc. No. 25, at p. 3.]

Plaintiff has also requested information about defendant’s “peer review process” in the following interrogatories:

Special Interrogatory No. 3: Identify and describe all persons or entities involved in editing the Devor Article and the decision to publish the Devor Article. [Doc. No. 27-1, at p. 59.]

Special Interrogatory No. 6: Describe the peer review process used in connection with the Devor Article. [Doc. No. 27-1, at p. 60.]

Special Interrogatory No. 7: Identify and describe all persons or entities involved in the peer review process of the Devor Article. [Doc. No. 27-1, at p. 61.]

1 **Special Interrogatory No. 8:** Identify and describe all the standards,
2 policies and procedures used in connection with the peer review process
3 for the JSCR articles, including the selection of reviewers, the process for
4 providing comments to authors, and the criteria by which an article for
5 review is accepted for final publication. [Doc. No. 17-1, at p. 60.]

6 Defendant objected to Interrogatory Nos. 3 and 7 on several grounds but did
7 state that Dr. William J. Kraemer, Joan Kraemer, and N. Travis Triplett “were involved
8 in the editorial process for the peer review of the Devor Article.” [Doc. No. 27-1, at p.
9 59.] However, defendant declined to provide any further information because it would
10 “unreasonably interfere[] with the peer review process” and would have “a chilling
11 effect upon the publication of defendant’s academic journal.” [Doc. No. 27-1, at p. 59.]

12 Despite general objections to Interrogatory No 6, defendant described the peer
13 review process as follows: “In general, the JSCR utilized a double blind peer review
14 procedure whereby the authors do not know who the reviewers are and the reviewers
15 likewise do not know who the authors are. The editorial staff (Managing Editor and
16 Senior Associate Editor) would know the identities of the authors and reviewers as they
17 are managing the manuscript peer review process. The editorial staff are involved in
18 directing the flow of communication between the corresponding author and the
19 reviewers. During the process, the reviewers provide comments with regards to
20 research methodology and the corresponding author may respond. The reviewers are
21 not involved in data accumulation or verification. Revised papers may be submitted
22 and further reviews occur. Further revisions may be submitted. Ultimately, the
23 manuscript is either accepted or rejected for publication.” [Doc. No. 27-1, at pp. 60-
24 61.]

25 In response to Interrogatory No. 8, which seeks information about the standards,
26 policies and procedures used in connection with the peer review process, defendant
27 incorporated its response to Interrogatory No. 6. Defendant also referred plaintiff to
28 information in a document that was produced entitled “JSCR Instructions to Authors.”
[Doc. No. 27-1, at p. 61.] From the information provided in the Joint Motion, it is not

1 clear whether defendant's response to Interrogatory No. 8 addresses the standards,
2 policies, and procedures used to select peer reviewers or the criteria by which an article
3 for review is accepted for final publication. [Doc. No. 27-1, at pp. 60-61.]

4 Citing paragraph 22 of defendant's Answer to the Complaint, plaintiff argues in
5 the Joint Motion that the identities of defendant's peer reviewers are relevant because
6 defendant contends that it is "not liable because it maintained an 'independent' peer
7 review process." [Doc. No. 25.] According to plaintiff, defendant "has already invoked
8 the purported integrity of the peer review process as part of its defense in this matter,"
9 so plaintiff must be allowed to "test that defense." [Doc. No. 25, at p. 4.] However, this
10 argument is unconvincing. At paragraph 22, the Complaint alleges that defendant
11 publishes "peer-reviewed, evidenced based findings" in the JSCR. [Doc. No. 1, at p.
12 7.] In response, paragraph 22 of the Answer "admits that [defendant] publishes
13 scientific, peer-reviewed journals." [Doc. No. 9, at p. 3.] This admission does not
14 indicate that defendant intends to invoke the integrity of the peer review process as a
15 defense to the allegations in the Complaint. Nor does defendant's Answer cite the peer
16 review process as an affirmative defense to the allegations in the Complaint. [Doc. No.
17 9, at 7-10.] Rather, defendant merely states in the Answer that it "lacks knowledge or
18 information sufficient to form a belief as to whether or not what was asserted by
19 Mr. Devor [in the Devor Study] was correct." [Doc. No. 9, at p. 2.]

20 Contrary to plaintiff's argument, defendant's Points and Authorities provided in
21 connection with the Joint Motion suggest its defense to liability for any false
22 statements in the Devor Study is that it "did not author the article or conduct the study
23 from which the alleged false statement arose." [Doc. No. 28, at pp. 2, 7.] Instead,
24 defendant contends that "its sole role was to facilitate peer review, which is not
25 actionable." [Doc. No. 28, at p. 8.] In other words, "the JSCR received a manuscript for
26 potential publication and it went through the peer review process, which resulted in
27 ultimate publication." [Doc. No. 28, at p. 8.]

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On the other hand, the allegations against defendant in the Complaint do include subtle challenges to the integrity of defendant's peer review process, as well as its effect on the content of the Devor Study and its impact in the fitness market. For example, the Complaint alleges that:

4. ... ***Through its supposedly 'peer reviewed' journal*** – the [JSCR] – [defendant] has published falsified data suggesting that Crossfit causes injuries at a high rate. It has done so in an effort to portray Crossfit as 'dangerous,' and therefore a fitness program that should be avoided. ... The purported 'overuse or injury' data published in the JSCR was contrived to dissuade people from pursuing Crossfit as a form of exercise, and relatedly to dissuade trainers from seeking Crossfit certification instead of NSCA and ACSM certifications.

* * * *

22. [Defendant] publishes at least six journals. According to [defendant's] website, the JSCR is the 'official research journal of the National Strength and Conditioning Association.' ***It purports to publish 'monthly issues containing peer-reviewed, evidence based findings intended to increase your professional knowledge....'***

23. [Defendant's] website indicates that the 'goal' of its journals, including the JSCR, is to 'provide you with a valuable balance of the newest findings in strength and conditioning research and its practical application.' ***It advertises its allegedly peer-reviewed journals, of which the JSCR is its most notable, as 'some of the most sought after in the industry' and as 'top resources for your continuing education and professional development.'***

24. Upon information and belief, ***[defendant] coordinates the supposed peer-review process for articles published in the JSCR.***

[Doc. No. 1, at p. 3, 7 (emphasis added).]

The Complaint does not include allegations explaining how or why plaintiff believes the peer review process is related to the allegedly false statements in the Devor Study or to the false advertising and unfair business competition causes of action. However, plaintiff's theory, as expressed in the Joint Motion, is that defendant heavily influenced the content of the published article and did so by: (1) exercising "editorial control;" (2) exerting "editorial pressure;" and (3) selecting biased peer reviewers. [Doc. No. 25, at pp. 4-5; Doc. No. 27, at p. 4.] Plaintiff contends that the

1 peer review process was not “independent” as defendant maintains. Rather, plaintiff
2 claims that defendant “cherry-pick[ed]” peer reviewers based on full knowledge of the
3 contents of the [Devor Study].” [Doc. No. 25, at pp. 4-5.] According to plaintiff,
4 defendant “may have engaged friends or others” who were “predisposed to be critical
5 of Crossfit” so that the published article would be critical of Crossfit. [Doc. No. 25, at
6 p. 4.]

7 Plaintiff’s challenge to the independence and fairness of defendant’s editorial
8 and peer review processes is based on facts believed by plaintiff to show the editors of
9 the Devor Study were biased. In the Joint Motion, plaintiff states that it has learned
10 through the discovery process that the editors for the Devor Study were:
11 (1) Dr. William J. Kraemer; (2) Joan Kraemer; and (3) N. Travis Triplett. Plaintiff
12 believes these editors were biased, because: (1) Dr. Kraemer previously published an
13 article that was critical of CrossFit; (2) Joan Kraemer is Dr. Kraemer’s wife; and
14 (3) Mr. Triplett is a “longtime assistant” of Dr. Kraemer. [Doc. No. 27, at p. 4.; Doc.
15 No. 27-1, at p. 59.]

16 Based on a letter from Mrs. Kraemer, in her capacity as Managing Editor of the
17 JSCR, addressed to “Dr. Smith,” who is apparently one of the authors of the Devor
18 Study, plaintiff also argues there is evidence indicating Mrs. Kraemer exerted “editorial
19 pressure,” which appears to have lead to the addition of the “false” injury data. The
20 letter states, in pertinent part, as follows: “You also need to caution readers as to the
21 context of your findings due to the fact many people do get injured doing these types
22 of workouts.” [Doc. No. 27, at p. 4, citing Doc. No. 27-1, at p. 172-173 (Ex. 15).]

23 Defendant argues that plaintiff’s “cherry-picking” theory is too “attenuated” to
24 justify an order compelling disclosure of the identities of the peer reviewers.
25 According to defendant, plaintiff has not adequately explained how its “cherry-
26 picking” theory relates to its claims of false advertising and unfair competition. [Doc.
27 No. 28, at pp. 2, 7.] Even if plaintiff could show that its “cherry-picking theory” is
28 relevant, defendant argues there are less intrusive means to discover details about the

1 peer review process, as plaintiff intends to depose Dr. and Mrs. Kraemer. [Doc. No. 28,
2 at p. 8.] In addition, defendant argues that the identities of the peer reviewers are
3 irrelevant, because the communications between the authors of the Devor Study and
4 the peer reviewers during the peer review process have been “fully disclosed.” [Doc.
5 No. 25, at p. 8.] Defendant also argues that the identities of the peer reviewers should
6 be protected from disclosure for reasons of confidentiality and the integrity of the peer
7 review process. [Doc. No. 25, at pp. 6-8; Doc. No. 28, at pp. 3-7.]

8 The scope of discovery under Rule 26(b) is broad: “Parties may obtain discovery
9 regarding any matter, not privileged, which is relevant to the claim or defense of any
10 party involved in the pending action. Relevant information need not be admissible at
11 trial if the discovery appears reasonably calculated to lead to the discovery of
12 admissible evidence.” Fed.R.Civ.P. 26(b). The party resisting discovery generally
13 bears the burden to show that the discovery requested is irrelevant to the issues in the
14 case or is overly broad, unduly burdensome, unreasonable, or oppressive. *Henderson*
15 *v. Holiday CVS, L.L.C.*, 269 F.R.D. 682, 686 (2010). “Once the resisting party meets
16 its burden, the burden shifts to the moving party to show the information is relevant
17 and necessary.” *Id.*

18 As presented in the Joint Motion, plaintiff seeks an order compelling defendant
19 to disclose the identities of the peer reviewers so that it may discover information
20 explaining how and why the peer reviewers were selected; any connections the
21 reviewers might have to defendant; any knowledge the peer reviewers might have
22 about the challenged injury data; the “source of specific edits and proposed changes”
23 to the Devor Study; and any past relevant work they performed that might bear on their
24 independence or suitability as reviewers. [Doc. No. 27, at p. 8.]

25 Defendant also argues that the Court should not compel disclosure of the
26 identities of the peer reviewers, because its interest in maintaining the confidentiality
27 of this information outweighs plaintiff’s need to access it. [Doc. No. 25, at pp. 6-8;
28 Doc. No. 28, at pp. 2-8.] Essentially, defendant seeks a limitation on discovery

1 pursuant to Federal Rule of Civil Procedure 26(b)(2)(C) and/or a protective order under
2 Federal Rule of Civil Procedure 26(c).

3 Under Rule 26(b)(2), discovery of relevant material can be limited if the Court
4 determines that it is unreasonably cumulative or duplicative, or obtainable from some
5 other source that is more convenient, less burdensome, or less expensive, or the burden
6 or expense of the proposed discovery outweighs the likely benefit.
7 Fed.R.Civ.P. 26(b)(2)(C). Pursuant to Rule 26(c), the Court may, for good cause, issue
8 a protective order “to protect a party or person from annoyance, embarrassment,
9 oppression, or undue burden or expense. . . .” Fed.R.Civ.P. 26(c). In this regard, the
10 Court may forbid inquiry into certain matters; limit the scope of disclosure; specify the
11 terms of discovery; or require “that a trade secret or other confidential research,
12 development, or commercial information not be revealed or be revealed only in a
13 specified way.” Fed.R.Civ.P. 26(c)(A)-(H).

14 Defendant cites several Federal cases in support of its request for a protective
15 order prohibiting disclosure of the identities of the peer reviewers for the Devor Study.
16 The case most directly on point relates to a discovery dispute in a patent infringement
17 action entitled *Solarex Corporation v. Arco Solar, Inc.*, 121 F.R.D. 163 (E.D.N.Y.
18 1988). The defendant in *Solarex* sought an order compelling a non-party professional
19 organization that published a scholarly journal to disclose the identities of “an
20 independent scholar/referee who assisted the journal’s editor by evaluating the
21 suitability of a manuscript submitted for publication.” *Id.* Citing two specific defenses
22 raised in its answer, defendant argued that the identity of the independent
23 scholar/referee was relevant and necessary to its defense of the plaintiff’s patent
24 infringement claims. Specifically, defendant wanted to determine whether the
25 scholar/referee disseminated the unpublished version of the manuscript to anyone,
26 including the inventors of the patent at issue. Under certain circumstances,
27 dissemination of the manuscript “could bar patentability” or could render the patent
28 unenforceable as a result of inequitable conduct. *Id.* at 166, 175-179.

1 In response to the defendant's motion to compel, the non-party publisher in
2 *Solarex*, 121 F.R.D. 163, submitted several affidavits attesting to the central
3 importance of the "peer review" process to critically evaluate the merits of scientific
4 manuscripts. *Id.* at 170. The affidavits also stated that confidentiality is a "central and
5 common quality-control feature" of a peer review process. A peer reviewer's evaluation
6 of a manuscript is not considered confidential because the evaluation is communicated
7 to the author of the manuscript. ***However, the identity of the peer reviewer remains***
8 ***confidential to assure "complete and candid advice" by peer reviewers.*** *Id.* at 171,
9 173 (emphasis added).

10 The non-party publisher in *Solarex*, 121 F.R.D. 163, also identified a number of
11 social values in its evidentiary showing that supported "special consideration,"
12 including "some measure of [F]irst [A]mendment protection to the 'editorial processes'
13 of journalists." *Id.* at 171-172. Thus, "[w]here discovery sought from a third party
14 journal or journalist impinges upon editorial activities, a court is required to evaluate
15 and balance the competing legitimate interests." *Id.* at 172. These legitimate interests
16 include maintaining the confidentiality of the identities of peer reviewers, because
17 disclosure would undermine or "chill" the peer review process and make it more
18 difficult for a publisher to obtain the services of an independent reviewer in the future.
19 *Id.* at 174.

20 The District Court in *Solarex* identified four factors to be considered when
21 balancing the need for discovery against intrusion upon editorial processes: (1) the
22 nature of the suit in which the discovery is being sought; (2) whether the information
23 sought "goes to the 'heart of the claim' of the party seeking disclosure;" (3) whether
24 the party seeking disclosure has exhausted other sources; and (4) the impact of the
25 requested discovery on First Amendment protections. *Id.* at 173.

26 Based on a detailed analysis and a balancing of the equities, the District Court
27 in *Solarex*, denied the defendant's motion to compel disclosure of the identity of the
28 anonymous peer reviewer. *Id.* at 180. The District Court reasoned that the defendant's

1 desire to learn the identity of the peer reviewer was merely a “fishing expedition,” as
2 there was nothing in the record to indicate there was any substance to the defendant’s
3 theory that the anonymous peer reviewer disseminated the manuscript to anyone,
4 including the inventor. *Id.* at 175-179. By contrast, the publisher “demonstrated a
5 strong interest in preserving the confidentiality of its reviewer’s identity.” *Id.* at 179.
6 In addition, the publisher was a non-party to the litigation and disclosure of the
7 reviewer’s identity would constitute an undue burden. *Id.* at 179. Under the
8 circumstances presented, the District Court in *Solarex*, 121 F.R.D. 163, further
9 concluded that “a carefully drawn protective order” restricting disclosure of the
10 reviewer’s identity to key individuals involved in the litigation would not be sufficient
11 to protect the third party publisher’s substantial need for confidentiality. *Id.* at 180.

12 Here, defendant has made a convincing showing that the identities of the peer
13 reviewers are not relevant to the claims or defenses alleged in the parties’ pleadings.
14 First, the information provided by defendant indicates that the peer reviewers had a
15 very limited role in connection with the publication of the Devor Study. They simply
16 reviewed the Devor Study prior to publication on a volunteer basis and made comments
17 which were then relayed to the authors through the JSCR editors. Only the editors of
18 the JSCR knew the identities of the peer reviewers. [Doc. No. 25, at pp. 6, 8; Doc. No.
19 27-1, at pp. 60-61.] There is nothing to indicate the peer reviewers had any direct
20 contact with the authors or with anyone involved in conducting the Devor Study.
21 Defendant has also represented that “[t]he reviewers [were] not involved in data
22 accumulation or verification,” so there is nothing to connect the peer reviewers to the
23 allegedly inaccurate “overuse or injury” data in the published article. [Doc. No. 27-1,
24 at pp. 60-61.]

25 Second, defendant has represented that it has “fully disclosed” the
26 communications back and forth between the authors and the peer reviewers, and
27 plaintiff does not dispute this representation. [Doc. No. 25, at p. 8.] Despite the fairly
28 detailed information already made available by defendant through the discovery

1 process, plaintiff has not cited anything to connect the peer reviewers to the allegedly
2 false statements made in the published article, to the false advertising or unfair business
3 competition causes of action in the Complaint, or to any of defendant's affirmative
4 defenses. If, for example, the peer reviewers were biased, as plaintiff contends, and
5 they were somehow able to influence or pressure the authors of the Devor Study to
6 include the allegedly false "overuse and injury" data in the final published article for
7 the purpose of injuring plaintiff's business reputation, it would probably be apparent
8 in their "fully disclosed" communications with the authors. [Doc. No. 25, at p. 8.]
9 Plaintiff has not cited anything in these communications that would justify disclosure
10 of the identities of the peer reviewers. In other words, plaintiff's challenges to the
11 integrity of the peer reviewers and the peer review process are wholly speculative at
12 this time.

13 In sum, the Court agrees with defendant's argument that plaintiff has not
14 adequately justified the need for an order compelling defendant to disclose the
15 identities of the peer reviewers for the Devor Study. Some allegations in the Complaint
16 do make subtle challenges to the integrity of the peer review process and seem to allege
17 that the peer reviewers and/or the peer review process had some speculative or
18 unspecified effect on the content of the Devor Study and plaintiff's reputation in the
19 fitness market. However, it is unclear how these allegations about the peer review
20 process relate to the false advertising and/or unfair competition causes of action against
21 defendant in the Complaint or to an affirmative defense set forth in defendant's
22 Answer. The Court declines to speculate or to comb through false advertising and/or
23 unfair competition law to determine the possible relevance of this information to the
24 claims or defenses of the parties. Without more, the Court also declines to burden non-
25 parties to this litigation when it is unclear whether it is even possible they could
26 provide information that meets the relevance standard of Rule 26.

27 Defendant also argues convincingly that the Court should not compel disclosure
28 of the identities of the peer reviewers for the Devor Study at this time, because

1 defendant's need for confidentiality outweighs plaintiff's demand for disclosure.
 2 Defendant represents that the peer reviewers who reviewed the Devor Study prior to
 3 publication were unpaid volunteers who agreed to conduct the review for academic
 4 reasons. Their identities were not disclosed so they could conduct objective, candid
 5 reviews. According to defendant, the peer review process could not function if the
 6 reviewers were identified and subjected to involvement in the litigation process. There
 7 are also First Amendment concerns, because defendant has represented that identifying
 8 the peer reviewers would "undoubtedly chill" its ability to obtain scholars to volunteer
 9 their time in the future to conduct peer reviews of academic manuscripts.³ [Doc. No.
 10 25, at p. 6.]

11 Although the Court finds that plaintiff is not entitled at this time to an order
 12 compelling defendant to disclose the identities of the peer reviewers, this decision is
 13 not intended to preclude plaintiff from making further inquiries about the scope and
 14 integrity of the peer review process. As defendant acknowledged in the Joint Motion,
 15 plaintiff intends to depose the editors who were involved in publishing the Devor
 16 Study. [Doc. No. 28, at p. 8.] For example, plaintiff may ask questions of these editors
 17 that relate to the integrity of the peer review process, such as how or why the peer
 18 reviewers were selected to participate,⁴ and the terms of any formal or informal
 19 agreement defendant may have had with the peer reviewers to maintain the
 20 confidentiality of their identities or of the manuscripts being reviewed. Plaintiff may

21 ³ Unlike the publisher in *Solarex*, 121 F.R.D. 163, who provided affidavits
 22 to support its strong interest in confidentiality, defendant in this case did not make an
 23 evidentiary showing to support its interest in keeping the identities of the peer
 24 reviewers confidential. However, defendant did request more time to provide
 25 additional briefing, and based on defendant's representations thus far, the Court is
 26 confident that defendant could provide a supporting declaration if given additional
 time. In addition, as outlined more fully above, the Court is not convinced at this time
 that the identities of the peer reviewers are relevant to the claims or defenses in the
 parties' pleadings.

27 ⁴ As noted above, plaintiff's Interrogatory No. 8 asked defendant to identify
 28 and describe "all the standards, policies and procedures used in . . . the selection of
 [peer] reviewers. . . ." [Doc. No. 17-1, at p. 60.] However, it does not appear that
 defendant responded to this portion of Interrogatory No. 8. [Doc. No. 27-1, at pp. 60-
 61.]

1 also discover non-specific information about the peer reviewers, such as their general
2 qualifications for reviewing the Devor Study. To the extent it does not require
3 defendant to reveal the identities of the peer reviewers for the Devor Study, plaintiff
4 is entitled to full and complete responses to Document Request Nos. 7, 12, and 13, and
5 Interrogatory Nos. 3, 6, 7, and 8. However, without further order of the Court, plaintiff
6 may not discover or inquire about the specific identities of the peer reviewers or
7 discover specific documents or information that would make their identities obvious.

8 The Court acknowledges that the circumstances at issue here are somewhat
9 distinguishable from those in *Solarex*, 121 F.R.D. 163, in that defendant is a party to
10 the action rather than a third-party publisher with no interest in the outcome of the
11 litigation. The Complaint does challenge the integrity of the peer review process, and
12 it is possible that plaintiff may, at some time in the future, be able to present evidence
13 and additional argument that would tip the balance in favor of disclosure of the
14 identities of the peer reviewers. For these reasons, the Court will only issue a limited
15 protective order precluding plaintiff from discovering the identities of the peer
16 reviewers for the Devor Study at this time. However, as outlined above, this protective
17 order does not preclude plaintiff from exhausting other sources and making further
18 inquiries about the peer review process. In addition, this protective order is without
19 prejudice to plaintiff seeking to compel disclosure of the identities of the peer
20 reviewers in the future if it can establish the relevance of this information to its false
21 advertising and/or unfair business competition causes of action in the Complaint, or to
22 an affirmative defense, and establish a genuine need to obtain evidence directly from
23 the peer reviewers that it cannot obtain by other means.

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1 **B. Compensation Information.**

2 In the Joint Motion, plaintiff seeks an order compelling defendant to disclose all
3 compensation information for the authors⁵ and editors of the Devor Study. [Doc. No.
4 25, at pp. 8-9; Doc. No. 27, at p. 11.] Plaintiff requested this information from
5 defendant in the following written discovery requests:

6 **Document Request No. 5:** All agreements, whether informal or formal,
7 including drafts or proposed agreements, between NSCA and any of the
8 Authors, William Kraemer, and/or Ohio State University and its affiliated
9 entities and organizations. [Doc. No. 25-1, at p. 38; Doc. No. 27-1, at
10 p. 38.]

11 **Document Request No. 6:** All documents and communications referring
12 or relating to funding, payment and/or other compensation given by the
13 NSCA and/or JSCR to any of the Authors, William Kraemer, and/or Ohio
14 State University and its affiliated entities and organizations. [Doc. No. 25-
15 2, at pp. 38-39; Doc. No. 27-1, at pp. 38-39.]

16 **Special Interrogatory No. 1:** Identify, describe, and quantify all funding,
17 payment and/or other compensation given by the NSCA and/or the JSCR
18 to any of the Authors, William Kraemer, and/or anyone involved in the
19 editing and/or peer review process of the Devor Article. [Doc. No. 25-2,
20 at p. 57; Doc. No. 27-1, at p. 57.]

21 Defendant objected to these discovery requests on several grounds, including
22 privacy. In response to Document Request Nos. 5 and 6, defendant stated that it would
23 produce a redacted copy of its Consulting Agreement with Dr. Kraemer. Defendant
24 also stated there were no other responsive agreements. However, defendant's response
25 does not address any formal or informal agreement it may have had with the authors
26 of the Devor Study. This response appears to conflict with information provided by
27 defendant in response to Interrogatory No. 1, [Doc. No. 27-1, at pp. 38-39,] in which
28 defendant provided the following information:

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26 ⁵ It is unclear why plaintiff seeks an order compelling defendant to produce
27 compensation information for the authors of the Devor Study. Defendant has already
28 represented in response to Interrogatory No. 1 that the authors of the Devor Study
"were not paid any fees or compensation for their involvement in regards to the Devor
[Study]." [Doc. No. 27-1, at pp. 57-58.] As a result, the Court will not order defendant
to provide compensation information for the authors of the Devor Study.

1 Dr. William J. Kraemer entered into a consulting agreement with
2 the defendant to perform services as Editor-in-Chief for the [JSCR].
3 Joan M. Kraemer entered into a consulting agreement with defendant to
4 perform services as Managing Editor for the JSCR. Both Dr. Kraemer
5 and Ms. Kraemer are paid fees and reimbursement for expenses pursuant
6 to the agreements. N. Travis Triplett, a Senior Associate Editor for the
JSCR, was involved in the editorial process for the Devor Article but was
not paid for her services. The reviewers involved in the peer review of
the Devor Article and the authors of the Devor Article were not paid any
fees or compensation for their involvement in regards to the Devor
Article.

7 Doc. No. 27-1, at pp. 57-58.]

8 In the Joint Motion, plaintiff argues that the Court should order defendant to
9 provide a complete response to Interrogatory No. 1 and produce un-redacted copies of
10 all documents sought in response to Document Request Nos. 5 and 6. Plaintiff argues
11 that discovery of the information requested in response to these discovery requests is
12 necessary to allow plaintiff “to understand the full commercial relationship” between
13 defendant, Dr. and Mrs. Kraemer, who were “key players” in editing and publishing the
14 Devor Study, and the authors. Plaintiff also claims that the documents and information
15 sought in response to these discovery requests are relevant to the issue of bias on the
16 part of the authors and editors and to show a motive to support defendant “in its
17 ongoing business competition with plaintiff.” [Doc. No. 25, at pp. 8-9; Doc. No. 27, at
18 pp. 11-12.] To address defendant’s privacy and confidentiality concerns, plaintiff
19 argues that the requested documents and information, including private compensation
20 information, could be produced subject to the Protective Order that was previously
21 entered in this case to facilitate the exchange of confidential information. [Doc. No. 25,
22 at pp. 8-9.]

23 Defendant argues that the Court should deny plaintiff’s request for an order
24 compelling production of private compensation information, because the editors have
25 an interest in keeping this information private and the information is not relevant to the
26 claims or defenses in the parties’ pleadings. [Doc. No. 28, at p. 8-9.] In addition,
27 defendant contends that it is unnecessary for plaintiff to discover and understand the
28 “full commercial relationship” between defendant, the editors, and the authors, because

1 this information is not relevant to a specific claim or defense. Defendant also contends
2 that private compensation information is not discoverable to show bias. [Doc. No. 28,
3 at p. 9.] Defendant's arguments are unconvincing.

4 "Bias is a term used in the 'common law of evidence' to describe the relationship
5 between a party and a witness which might lead the witness to slant, unconsciously or
6 otherwise, his testimony in favor of or against a party. Bias may be induced by a
7 witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is
8 almost always relevant because the jury, as finder of fact and weigher of credibility, has
9 historically been entitled to assess all evidence which might bear on the accuracy and
10 truth of a witness' testimony. The 'common law of evidence' allowed the showing of
11 bias by extrinsic evidence. . . ." *United States v. Abel*, 469 U.S. 45, 52 (1984).

12 "Bias usually is proven circumstantially. . . . There are many different types of
13 circumstantial evidence of bias. . . . But a number of scenarios reoccur. Thus, the
14 credibility of a witness frequently has been attacked on the ground of bias where there
15 is evidence that the witness is favorably disposed to a party because of . . . [a] business
16 relation, . . . friendship, employment, shared beliefs or background, or payment of . . .
17 fees. . . . [¶] A witness is biased where [he or] she has a personal interest in the outcome
18 of the litigation or in the matters about which [he or] she testifies. Examples include
19 instances where the witness . . . may be subject to criticism or disgrace for the content
20 of [his or] her testimony." 27 Fed. Prac. & Proc. Evid. § 6095 (2d ed.).

21 Here, the Complaint alleges that the Devor Study includes two false, misleading,
22 and/or deceptive statements. Plaintiff also alleges that these false, misleading, and/or
23 deceptive statements were fabricated or "contrived" to discredit CrossFit as a fitness
24 method and to have an adverse effect on plaintiff's competitive position in the fitness
25 market. [Doc. No. 1, at 4, 11.] Dr. and Mrs. Kraemer have been identified in the
26 Complaint and in discovery responses as editors involved in the publication of the
27 Devor Study. [Doc. No. 1, at p. 9.] Plaintiff has further alleged that the allegedly false,
28 misleading, and/or deceptive statements were included in the published version of the

1 Devor Study under suspicious circumstances. [Doc. No. 1, at pp. 11-13.] Plaintiff is
 2 therefore entitled to discover information about the relationships among the authors
 3 and editors of the Devor Study that could be indicative of bias. This includes any
 4 compensation paid to the editors. As a result, the Court will order defendant to provide
 5 full and complete responses to Document Request Nos. 5 and 6 and Interrogatory No.
 6 1, except as these requests seek compensation information pertaining to the authors of
 7 the Devor Study. *See* Fn. 5, *supra*. Compensation information may, of course, be
 8 produced subject to the Protective Order previously entered in this case to facilitate the
 9 exchange of confidential information. [See Doc. No. 14.]

10 **Conclusion**

11 For the reasons outlined above, plaintiff's request for an order compelling
 12 defendant to provide further responses to written discovery requests is GRANTED in
 13 part and DENIED in part without prejudice. [Doc. No. 25.] Accordingly,

14 **IT IS HEREBY ORDERED THAT:**

15 1. At this time, plaintiff is not entitled to an order compelling defendant to
 16 disclose the identities of the peer reviewers or to disclose documents or information
 17 that would make the identities of the peer reviewers obvious. However, plaintiff is not
 18 precluded from making further inquiries about the peer reviewers for the Devor Study
 19 and/or the integrity of the peer review process. In addition, this Order is without
 20 prejudice to plaintiff seeking to compel disclosure of the identities of the peer
 21 reviewers in the future if it can establish the relevance of this information to its false
 22 advertising and/or unfair business competition causes of action in the Complaint or to
 23 an affirmative defense in defendant's Answer and establish a genuine need to obtain
 24 evidence directly from the peer reviewers that it cannot obtain by other means.

25 2. Other than providing the specific identities of the peer reviewers and to
 26 the extent it has not already done so, defendant is ordered to provide full and complete
 27 responses to Document Request Nos. 7, 12 and 13, and Special Interrogatory Nos. 3,
 28

1 6, 7, and 8. These full and complete responses must be served on plaintiff *no later*
2 *than June 12, 2015.*


3 3. *No later than June 12, 2015*, defendant is ordered to provide full and
4 complete responses to Document Request Nos. 5 and 6 and Interrogatory No. 1 as
5 delineated herein, including compensation information for any editor of the JSCR who
6 had any involvement in editing the Devor Study. To the extent any of the requested
7 agreements were unwritten or “informal,” defendant shall provide a full and complete
8 description of its understanding of the terms of any such agreement. Compensation
9 information shall be produced subject to the Protective Order previously entered in this
10 case to facilitate the exchange of confidential information. [See Doc. No. 14.]

11 4. Defendant’s full and complete responses to the above-referenced
12 discovery requests must be accompanied by a declaration signed under penalty of
13 perjury by defendant’s authorized representative. The declaration must state under
14 penalty of perjury that the responses are full and complete “to the best of the person’s
15 knowledge, information, and belief formed after a reasonable inquiry.” Fed.R.Civ.P
16 26(g)(1).

17 IT IS SO ORDERED.

18 Date: July 15, 2015

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KAREN S. CRAWFORD
United States Magistrate Judge