

1 JAMES P. HARRISON (SBN 194979)

2 Attorney at Law  
3 980 9th Street, 16<sup>th</sup> Floor  
4 Sacramento, CA 95814  
5 Telephone: (916) 492-9778

6 ELIZABETH H. RADER (SBN 184963)

7 559 Nathan Abbott Way  
8 Stanford, CA 94305-8610  
9 Telephone: (650) 724-0517

10 *Attorneys for Plaintiff*  
11 OPEN SOURCE YOGA UNITY

12 UNITED STATES DISTRICT COURT  
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
14 SAN FRANCISCO DIVISION

15 OPEN SOURCE YOGA UNITY,  
16 A California Corporation,

17 Plaintiff,

18 v.

19 BIKRAM CHOUDHURY,  
20 An Individual, and DOES 1-20,

21 Defendants.

22 ) Case No. C 03-3182 PJH

23 ) **PLAINTIFF'S OPPOSITION TO**  
24 ) **DEFENDANT'S MOTION FOR**  
25 ) **JUDGMENT ON THE PLEADINGS**  
26 ) **OR, IN THE ALTERNATIVE, FOR**  
27 ) **SUMMARY JUDGMENT OR**  
28 ) **SUMMARY ADJUDICATION**

29 ) Date: April 14, 2004  
30 ) Time: 9:00 A.M.  
31 ) Judge: Hon. Phyllis J. Hamilton  
32 ) Court: Courtroom 3

1 **TABLE OF CONTENTS**

2 TABLE OF AUTHORITIES ..... *ii*

3

4 I. INTRODUCTION..... 1

5 II. COUNTER STATEMENT OF FACTS ..... 2

6 III. ARGUMENT

7 A. OSYU Meets All the Requirements for Associational Standing

8 on Behalf of its Members..... 8

9 B. OSYU Is a Real Organization Which Had Genuine Members at the

10 Time of Filing ..... 9

11 C. OSYU's Members Have Standing in Their Own Right Because Each

12 Has a Reasonable Apprehension of Suit As a Result of Defendant's

13 Express Threats to Sue ..... 12

14 D. The Interests OSYU Seeks to Protect in this Suit Are Germane to

15 OSYU's Corporate Purpose ..... 17

16 E. Individual Participation Is Not Necessary to Resolve the Pure Legal

17 Issues of Copyright Validity and Trademark Validity or Scope ..... 18

18 F. Declaratory Relief Would Not Be "Unfair" to Defendant Because

19 His Threats Constitute Grounds for Standing and He Will Have

20 Full Opportunity to Litigate the Issues..... 19

21 G. Bikram's Licenses Are Not Necessary Parties in a Suit to Adjudicate

22 the Validity and Scope of Intellectual Property ..... 21

23

24

25

26

27

28 IV. CONCLUSION..... 23

29

TABLES OF CONTENTS AND AUTHORITIES

1 **TABLE OF AUTHORITIES**

2 **CASES**

3

4 *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937)..... 13

5 *Allen v. Wright*, 468 U.S. 737 (1984)..... 12

6 *Animal Lovers Volunteer Association v. Weinberger*,

7 765 F.2d 937 (9<sup>th</sup> Cir. 1985) ..... 18

8 *Arrowhead Indus. Water, Inc. v. Ecolochem, Inc.*,

9 846 F.2d 731 (Fed. Cir. 1988)..... 20

10 *Bourne Co. v. Hunter Country Club, Inc.*,

11 990 F.2d 934, 937 (7<sup>th</sup> Cir. 1993) ..... 21

12 *California v. Campbell*, 138 F. 3d 772, 780 (9<sup>th</sup> Cir. 1998).....8

13 *California Sportfishing Protection Alliance v. Diablo Grande, Inc.*,

14 209 F. Supp. 2d 1059 (E.D. Cal. 2002)..... 17

15 *Celotex v. Catrett*, 477 U.S. 317, 325 (1986).....8

16 *Diagnostic Unit Inmate Council v. Films, Inc.*,

17 88 F.3d 651 (8<sup>th</sup> Cir. 1996) ..... 19

18 *Everex Sys. v. Cadtrak Corp.*, 89 F.3d 673 (9<sup>th</sup> Cir. 1996)..... 22

19 *Fernandez v. Brock*, 840 F.2d 622 (9<sup>th</sup> Cir. 1988)..... 13

20 *Friends of the Earth v. Chevron Chem. Co.*,

21 129 F. 3d 826 (5<sup>th</sup> Cir. 1997) ..... 10

22 *Hal Roach Studios Inc. v. Richard Feiner & Co., Inc.*,

23 896 F.2d 1542 (9<sup>th</sup> Cir. 1990) ..... 13

24 *Harris v. Emus Records, Corp.*, 743 F.2d 1329 (9<sup>th</sup> Cir. 1984)..... 22

25 *Harris v. United States Fid. & Guar. Co.*,

26 569 F.2d 850 (5<sup>th</sup> Cir. 1978) ..... 16

27

28 **TABLES OF CONTENTS AND AUTHORITIES**

|    |   |       |
|----|---|-------|
| 1  | <i>Hulex Music v. Santy</i> , 698 F. Supp. 1024 (D. N.H. 1988).....                             | 22    |
| 2  | <i>IMS Health, Inc. v. Vality Tech., Inc.</i> ,   |       |
| 3  | 59 F.Supp.2d 454 (E.D. Pa. 1999).....   | 19    |
| 4  | <i>Individuals for Responsible Gov't. Inc. v. Washoe County</i> ,                               |       |
| 5  | 110 F.3d 699 (9th Cir. 1997).....   | 9     |
| 6  | <i>Lear v. Adkins</i> , 395 U.S. 653 (1969).....  | 20    |
| 7  | <i>Lopez v. Smith</i> , 203 F.3d 1122, 1131 (9 <sup>th</sup> Cir. 2000) (en banc).....          | 8     |
| 8  |   |       |
| 9  | <i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....                                | 13    |
| 10 | <i>Nissan Fire &amp; Marine Ins. Co., Ltd. v. Fritz Cos., Inc.</i> ,                            |       |
| 11 | 210 F.3d 1099, 1102-03 (9 <sup>th</sup> Cir. 2000).....   | 8     |
| 12 | <i>NAACP v. Alabama</i> , 357 U.S. 449 (1958).....  | 11    |
| 13 | <i>Newmark v. Turner Broad. Network</i> ,   |       |
| 14 | 226 F. Supp. 2d 1215 (C.D. Cal. 2003).....  | 13-15 |
| 15 | <i>Ocasek v. Hegglund</i> , 673 F.Supp. 1084 (D. Wyo. 1987).....                                | 20    |
| 16 | <i>O'Hagins, Inc. v. M5 Steel Mfg., Inc.</i> ,  |       |
| 17 | 276 F.Supp.2d 1020 (N.D. Cal. 2003).....  | 19    |
| 18 | <i>Ortho Pharm. Corp. v. Genetics Inst., Inc.</i> ,   |       |
| 19 | 52 F.3d 1026 (Fed. Cir. 1995).....  | 21    |
| 20 | <i>Peick v. Pension Benefit Guar. Corp.</i> , 724 F.2d 1247 (7th Cir. 1983).....                | 8     |
| 21 | <i>Presidio Golf Club v. Nat'l. Park Serv.</i> , 155 F.3d 1153 (9 <sup>th</sup> Cir. 1998)..... | 17    |
| 22 |   |       |
| 23 | <i>Project Sentinel v. Evergreen Ridge Apartments</i> ,   |       |
| 24 | 40 F. Supp. 2d 1136 (N.D. Cal. 1999).....   | 18    |
| 25 | <i>Republic of Ireland</i> , 787 F.2d 655 (D.C. Cir. 1986).....                                 | 21    |
| 26 | <i>Rodriguez v. California Highway Patrol</i> ,   |       |
| 27 | 89 F. Supp. 2d 1131 (N.D. Cal. 2000).....   | 8     |

28 TABLES OF CONTENTS AND AUTHORITIES

29

|    |   |                |
|----|---|----------------|
| 1  | <i>San Diego County Gun Rights Committee v. Reno,</i>                                 |                |
| 2  | 98 F.3d 1121 (9th Cir. 1996) .....  | 12             |
| 3  | <i>Sierra Assn. for Envt. v. Fed. Energy Reg. Comm'n.,</i>                            |                |
| 4  | 744 F.2d 661 (9 <sup>th</sup> Cir. 1984) .....  | 9              |
| 5  | <i>Snake River Farmer's Assoc., Inc. v. Department of Labor,</i>                      |                |
| 6  | 9 F.3d 792 (1993).....  | 13             |
| 7  | <i>Societe de Conditionnement en Aluminium v. Hunter Eng'g. Co., Inc.,</i>            |                |
| 8  | 655 F.2d 938 (9th Cir. 1981) .....  | 13, 15, 16, 20 |
| 9  | <i>Ultrapure Sys., Inc. v. Ham-Let Group,</i> 921 F. Supp. 659 (N.D. Cal. 1996) ..... | 21             |
| 10 | <i>United Food and Commercial Workers Union Local v. Brown Group, Inc.,</i>           |                |
| 11 | 517 U.S. (1996).....  | 9              |
| 12 | <i>Upper Deck Authenticated, Ltd. v. CPG Direct,</i>                                  |                |
| 13 | 971 F. Supp. 1337 (S.D. Cal. 1997).....   | 21             |
| 14 | <i>Windmoller v. La Querre,</i> 284 F. Supp. 563 (D. D.C. 1968).....                  | 20             |

15  
16 **STATUTES**

|    |   |    |
|----|---|----|
| 17 | United States Constitution                |    |
| 18 | Article III, § 2 .....                    | 12 |
| 19 | Title 28 United States Code               |    |
| 20 | § 2201 ("Declaratory Judgment Act") ..... | 13 |

21 **OTHER REFERENCES**

|    |   |    |
|----|---|----|
| 22 | <i>Advising California Non-Profit Corporations,</i> Rutter Group (2003) ..... | 10 |
| 23 |   |    |
| 24 | 3 <i>Nimmer on Copyright</i> § 12.02(B).....                                  | 21 |

25  
26  
27  
28 **TABLES OF CONTENTS AND AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

## I. INTRODUCTION

Open Source Yoga Unity (“OSYU”) is a group of yoga instructors and studio owners who banded together to defend their rights to teach all styles of yoga, in response to the attempts of Defendant Bikram Choudhury to misuse his copyrights in his book about yoga to gain an unfair monopoly on teaching an entire style of yoga. Defendant has made threats, both public and private, to sue any yoga instructor who teaches “his” yoga or anything like it, for copyright infringement and trademark infringement. He has sued two already but settled before a court could rule on his outrageous claims. Now, faced with a suit for declaratory judgment, Defendant cries “unfair” and brings a motion challenging OSYU’s standing and jurisdiction.

Defendant’s motion is based on allegations of fact: OSYU is a sham created by its attorney so he can palm off counterfeit yoga and OSYU had no members when it brought suit. Both of these allegations are demonstrably false and certainly would not support judgment on the pleadings or summary judgment. OSYU, like many California non-profit corporations, has no voting members but is managed by its board of directors. It has numerous non-voting members whose interest it represents and who support it with donations. OSYU’s board members have submitted declarations attesting to their membership. The evidence supports their real and reasonable apprehension of suit by Defendant for copyright infringement. The relief sought in this suit — adjudication of Defendant’s broad intellectual property claims — is germane to OSYU’s corporate purpose of defending the idea that yoga knowledge cannot be protected and monopolized as intellectual property. Contrary to Defendant’s reckless allegation, neither of OSYU’s attorneys teaches yoga or has any interest in doing so. This is a suit about the validity and scope of Defendant’s claimed intellectual property rights, not about hundreds of contracts he now claims to have with individual yoga instructors who trained with him.

Defendant’s unclean hands argument is does not even go to the merits of this suit, much less to standing. Defendant’s argument that all his licensees are necessary parties is completely contrary to well-settled intellectual property law. Indeed, apart from few

1 references to “palming off” Defendant barely acknowledges that this case is about  
2 copyrights and other intellectual property, ignoring this Court’s intellectual property cases  
3 and relying on irrelevant cases from other jurisdictions. The Court should deny  
4 Defendant’s motion so that this case can be promptly resolved on the merits.

## 5 6 **II. COUNTER STATEMENT OF FACTS**

7 Defendant Bikram Choudhury compiled a routine of Hatha Yoga known as  
8 “Bikram’s Basic Yoga System” or, more commonly, “Bikram yoga.” Bikram’s Basic  
9 Yoga System is a sequence of twenty-six specific *asanas*, or yoga postures, and two  
10 breathing exercises. It is undisputed that the individual postures are ancient and in the  
11 public domain. Bikram’s Basic Yoga System was first published in 1979 in *Bikram’s*  
12 *Beginning Yoga Class*, presently in its Second Edition. Defendant founded Yoga College  
13 of India, now called Bikram’s Yoga College of India (“YCOI”), to teach Bikram’s Basic  
14 Yoga System to beginning students and to train yoga instructors to teach Bikram’s Basic  
15 Yoga System. Defendant has trained hundreds of people as teachers of the Bikram Basic  
16 Yoga System. Defendant has also authored, and registered copyright in, a script for  
17 instructors to recite when teaching the System, which he calls the “Dialogue.” Over the  
18 years, Bikram yoga has grown in popularity. Hundreds of studios, gyms, and fitness  
19 centers offer instruction in Bikram Yoga. See Declaration of Elizabeth H. Rader,  
20 (“Rader Decl.”) Exh. A (“Amended Complaint”) at ¶¶ 3 and 19.

21 As Defendant has tried to standardize teaching of Bikram’s Basic Yoga System,  
22 however, many yoga instructors have created variations of the original routine. They  
23 teach additional postures, or change the order of the twenty-six postures, or find their own  
24 unique expressions to describe how to assume a posture, rather than reciting the  
25 Dialogue. Declaration of Vanessa Calder (“Calder Decl.”) at ¶ 5. Others play  
26 background music, or tell anecdotes from their own experience, or parables from  
27 traditional yoga literature, or light candles in the studio, or have hardwood floors instead  
28 of carpet in their studios. All these practices are anathema to Defendant, who tries to

1 prohibit them. Many studios find that consumers want a choice of styles of yoga and that  
2 it is better business to teach not only Bikram's Basic Yoga System but also other kinds of  
3 classes, such as Ashtanga yoga, Iyengar yoga, gentle yoga, Power Yoga, etc. Calder Decl.  
4 at ¶ 5. Some studio owners have rejected the premise that only Bikram Choudhury  
5 himself can teach and "certify" instructors to teach Bikram's Basic Yoga System and  
6 have trained instructors themselves. Calder Decl. at ¶¶ 3, 7. OSYU member Jimmy  
7 Barkan trains instructors to teach a yoga style some consider similar to Bikram Yoga, thus  
8 directly competing with YCOI. See Calder Decl. at ¶ 13. Defendant has reacted by  
9 threatening to sue anyone who teaches Bikram yoga, or any variation, without his  
10 permission. Plaintiff OSYU was formed in response to these threats. Each of OSYU's  
11 members named in the Amended Complaint has done and continues to do at least one of  
12 the acts Bikram claims constitute copyright infringement. See Amended Complaint at ¶  
13 27.

14 Throughout 2002, Defendant, through his attorneys, sent cease and desist letters to  
15 numerous businesses engaged in teaching Bikram yoga and variations. See Declaration of  
16 Elizabeth Rader ("Rader Decl"), Exh. C. One of OSYU's founding members is Sandy  
17 McCauley, owner of Yoga Loka in San Rafael, California. After Yoga Loka declined to  
18 affiliate with YCOI, Bikram began "badmouthing" Yoga Loka. Declaration of Sandy  
19 McCauley ("S. McCauley Decl.") at ¶ 8. One of McCauley's yoga students came back  
20 from Bikram's teacher training bringing her the message from Bikram "You tell her I'm  
21 going to sue her." *Id.*

22 On or about June 5, 2002, Yoga Loka received a cease and desist letter addressed  
23 to Sandy and her husband, Bill. See Amended Complaint at ¶ 28 and Exhibit B.; Calder  
24 Decl. at ¶ 6 and Exh. A; S. McCauley Decl. at ¶ 9. This letter, from Defendant's outside  
25 intellectual property counsel, Jacob Reinbolt, asserts that the McCauleys are infringing  
26 Defendant's copyrights by "distributing, selling and otherwise exploiting copies of the  
27 Copyrighted Works" and infringing his trademarks by "mixing Bikram Yoga with other  
28 styles to create your own blend, by teaching others to become Bikram Yoga teachers, by

1 teaching classes without the complete Dialogue, by teaching advanced classes, and by  
2 using teachers who have not been certified by Bikram.” The letter goes on to make  
3 numerous demands and states that “Bikram has every intention of seeking compensation  
4 for any revenue lost by him, or gained by your, as a result of your sales, distribution, and  
5 any other exploitation of classes that do not strictly use the Dialogue, of variations of  
6 Bikram Yoga, and of “Teacher Training.” See Amended Complaint at ¶ 22 and Exh. B.  
7 The McCauleys were upset by the allegations and threats in the letter and immediately  
8 made plans to consult an attorney. Calder Decl., ¶ 6; S. McCauley Decl. at ¶ 9.

9 On July 29, 2002, Charles Tweedy, a lawyer for the McCauleys, responded to the  
10 June 5 cease and desist letter. See Ungar Decl., Exh. M. He explained that “my clients  
11 have, in the past, sold authorized copies of trademarked works of your client, [*Bikram’s*  
12 *Beginning Yoga Class* and videos] which they have obtained through distributors, but at  
13 no time have they infringed on any copyrighted work or trademarks alleged in your  
14 letter.” *Id.* The letter does not deny that the McCauleys are teaching both Bikram Yoga  
15 and other styles; has taught individuals to become Bikram Yoga teachers so they can  
16 teach at Yoga Loka, teaches classes without the complete Dialogue, and uses teachers  
17 who have not been certified by Bikram. Sandy McCauley has not acceded to the demands  
18 in the cease and desist letter and continues to do some of the very activities complained of  
19 the letter. S. McCauley Decl. at ¶ 4, 10-12.

20 On or about June 17, 2002, Bikram sued Kim Morrison and Mark Morrison, (“the  
21 Morrisons”) the owners of Yoga Studio, a Yoga teaching facility located in Costa Mesa,  
22 California, alleging copyright infringement, trademark infringement, trademark dilution  
23 and other causes of action. See Amended Complaint at ¶ 20; Calder Decl. at ¶ 9.

24 In September 2002, a magazine called Business 2.0 published an article entitled  
25 *Yogis Behaving Badly*, about Defendant’s and other yogis’ aggressive business tactics and  
26 intellectual property claims, including some colorful quotes from Defendant. See Calder  
27 Decl. at ¶ 12 and Exh. C.

1 On February 5, 2003, YCOI issued a press release and posted it on its website  
2 where it remains today. The release states, in pertinent part.

3 "With great pleasure we would like to announce that Bikram recently  
4 secured federal copyright registration under 17 U.S.C. Section 410 for his  
5 original work of authorship in his asana sequence of 26 postures and 2  
6 breathing exercises.... In addition to exact copying of the sequence, the  
7 copyright prohibits others from creating 'derivative' works of the  
8 sequence. Virtually all modifications or additions to the sequence will  
9 constitute copyright infringement, including: the unauthorized use of even  
10 a small number of consecutive postures; the addition of different postures  
11 or breathing exercises to the sequence or portions of the sequence; the  
12 teaching or offering of the sequence with or without the Dialogue; or by  
13 the addition of extra elements to the sequence, like music. Bikram will be  
14 entitled to receive an award of statutory damages of up to \$150,000 per  
15 infringement and can also recover his attorneys' fees from infringers in  
16 lawsuits concerning copyright infringement of the sequence."

17 See Amended Complaint at ¶ 21; also available at <http://www.bikramyoga.com>.

18 The press release, along with the cease-and-desist letters, the threats and plans  
19 described in the media and the suit against the Morrisons, firmly convinced a group of  
20 yoga instructors that they had to do something to protect their rights and livelihoods.  
21 Calder Decl. at ¶¶ 16. Around February 2003, Sandy McCauley, Vanessa Calder, Bill  
22 McCauley and Jimmy Barkan, founders of OSYU, turned to Mr. Harrison, who had  
23 performed legal services for Yoga Loka previously, for assistance with forming a non-  
24 profit corporation and legal advice concerning Defendant's copyright claims and threats,  
25 resulting, ultimately in his representing OSYU in this action. Calder Decl. at ¶ 14.  
26 Attorney James P. Harrison is not a former student of Defendant's and has never taught  
27 yoga, nor does he ever intend to. S. McCauley Decl. at ¶ 16; Declaration of William  
28 McCauley ("W. McCauley Decl.") at ¶ 4; *see also* Calder Decl. at ¶ 28. Defendant's  
29 allegation that Mr. Harrison is "a disgruntled ex-student of Mr. Choudhury's" who wants  
to "palm off" something as Bikram yoga and is trying to avoid his contractual obligations  
is utterly unsupported by any evidence for the simple reason that it is false and just plain  
silly.

1 On February 24, OSYU was officially formed, with Vanessa Calder serving as  
2 director and secretary for three years. OSYU began holding regular conference calls. In  
3 March, 2003, Bill and Sandy McCauley, Jimmy Barkan, Kimberly Clark, Brandon  
4 Hartzell and several other studio owners participated in these conference calls. Calder  
5 Decl. at ¶¶ 16-17.

6 The Press Release, as no doubt intended, attracted media attention. An April 4, 2003  
7 Salon.com article, *Hot, Sweaty and Scandalous*, begins "Bikram Choudhury, founder of  
8 the fastest growing style of yoga in America, has copyrighted his poses and is threatening  
9 to sue anyone who teaches his 'hot' style without permission." The Salon.com article  
10 discussed the Morrison lawsuit, and reported that Defendant has sent out "hundreds of  
11 cease and desist letters." See Calder Decl. at ¶ 25 and Exh. G. It also described how  
12 Jimmy Barkan refused to stop teaching certain classes when Defendant complained. In  
13 the very next sentence, it quoted Defendant's attorneys insisting that "they can easily  
14 prove willful violation in which case they'll collect \$150,000 per infringement. For  
15 example, if a studio doesn't go by the name 'Bikram's Yoga College of India' and  
16 teaches with music, they would be charged \$300,000 for two infringements." *Id.* This  
17 article and the Business 2.0 article are readily available online, and have been widely read  
18 and discussed among Bikram yoga instructors. Calder Decl. at ¶ 12.

19 On or about June 13, 2003, the Morrison suit was settled and the Morrisons  
20 voluntarily agreed to an injunction. Because of the settlement, the Court in which the  
21 Morrison suit was pending never reached the merits of the copyright and trademark  
22 infringement claims. See Amended Complaint at ¶ 24. Defendant's website, however,  
23 describes the outcome of the Morrison lawsuit as "a significant legal victory":

24 This outcome represents a significant legal victory for Bikram, Rajashree,  
25 and the Bikram yoga community, and fully vindicates Bikram's conviction  
26 in the originality and legal enforceability of Bikram's yoga.

27 It also claims:  
28

1 This lawsuit is proof that the legal system will vindicate Bikram against  
2 those persons who exploit and adulterate Bikram Yoga for their own  
3 purposes. These persons are not yoga gurus. These persons are not  
4 interested in sharing yoga with everyone, as they may self-servingly claim.  
5 These persons are only interested in personally profiting from teaching  
6 Bikram Yoga. It is for the protection of Bikram Yoga, Bikram Yoga  
7 practitioners everywhere and the true spirit of yoga that these imposters  
8 must and will be stopped.

9 *See id.* at ¶ 25. The Morrison suit and Defendant's statements on his web site and in the  
10 press regarding his intent to use the legal system to vindicate his rights and stop the  
11 "imposters" have created apprehension throughout the yoga community.

12 Documents produced in discovery confirm that this apprehension is justified.  
13 OSYU's board member Ted Grand is in Bikram's sights because he is teaching Bikram  
14 yoga but has criticized Defendant's actions and committed the sin of having wood  
15 floors instead of carpet in his studios. Rader Decl., Exh. D. YCOI has also sent  
16 information about Sunstone Yoga, OSYU director Brandon Hartsell's studio, to  
17 Attorney John Marcoux ([guru@bycic.com](mailto:guru@bycic.com)) for action because Sunstone is offering hot  
18 yoga classes ninety minutes long that contain every posture in the Bikram series "in  
19 roughly the same order." *Id.* Exhs. 7 and 8. Defendant's enforcement employee  
20 Sara Powers wrote to a Florida yoga studio owner that she would strategize about  
21 Jimmy Barkan with Bikram, explaining that cases against people offering teacher  
22 training have to come first as "the most egregious." *Id.* at Exh. G. Defendant has  
23 attempted, with help from his lawyer John Marcoux, to use threats to force Kripalu  
24 Center for Yoga & Health to blackball Jimmy Barkan, by making explicit claims that  
25 Barkan's teaching yoga would infringe his copyrights and trademark rights. *Id.* Exh.  
26 I. John Marcoux apparently assured a competitor who complained about OSYU's  
27 director Darla Magee teaching Bikram yoga and supporting Jimmy Barkan that they  
28 (YCOI) "were going to pick 20 studios" and "deal with them next." *Id.* at Exh. J.  
29 OSYU director Kimberly Clark's lawyer received a July 29, 2003 letter from  
30 Defendant's lawyers, Akin Gump, alleging that Ms. Clark has an unauthorized Bikram

1 Yoga teacher training program, unauthorized use of the name Bikram's Yoga College  
2 of India, an unaffiliated studio, teaching derivatives such as "Silent Yoga" and use of  
3 non-Bikram-certified teachers in her studios. *Id.* at Exh. K. In short, OSYU's  
4 directors and identified members have ample reason to fear imminent suit for copyright  
5 and trademark infringement by Bikram Choudhury.

### 6 7 III. ARGUMENT

#### 8 A. OSYU Meets All the Requirements for Associational Standing 9 on Behalf of Its Members

10 Summary judgment is warranted only "if the pleadings, depositions, answers to  
11 interrogatories, and admissions on file, together with the affidavits, if any, show that there  
12 is no genuine issue as to any material fact." Fed.R. Civ.P. 56(c); *See California v.*  
13 *Campbell*, 138 F.3d 772, 780 (9th Cir. 1998). The evidence must be viewed in light most  
14 favorable to the nonmoving party. *See Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir.  
15 2000) (en banc). The moving party bears the initial burden of demonstrating the  
16 absence of a genuine issue of fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325,  
17 (1986). If the moving party fails to meet this burden, "the nonmoving party has no  
18 obligation to produce anything, even if the nonmoving party would have the ultimate  
19 burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210  
20 F.3d 1099, 1102-03 (9th Cir. 2000).

21 Defendant Choudhury contends that OSYU lacks standing to sue on behalf of its  
22 members. An organization can have standing to sue on behalf of members who are  
23 injured. *See Rodriguez v. California Highway Patrol*, 89 F. Supp. 2d 1131, 1135-36  
24 (N.D. Cal. 2000) (denying motion to dismiss, for lack of standing, claims of NAACP and  
25 LULAC based on allegations of racial profiling). "Associational standing is particularly  
26 appropriate where 'the association is seeking to represent the interests which are central  
27 to the purpose of the organization' and 'where the relief sought is some form of  
28 prospective remedy, such as declaratory judgment, which will inure to the benefit of the

1 organization's members." *Id.* at 1135, quoting *Peick v. Pension Benefit Guar. Corp.*, 724  
2 F.2d 1247, 1259 (7th Cir. 1983). An association has standing if: (1) its members would  
3 have standing to sue in their own right; (2) the interests the organization seeks to protect  
4 are relevant to the organization's purpose; and (3) neither the claim asserted nor the relief  
5 sought requires the participation of individual members of the organization in the lawsuit.  
6 *Id.*; *United Food and Commercial Workers Union Local v. Brown Group, Inc.*, 517 U.S.  
7 544, 552 (1996); *Individuals for Responsible Gov't. Inc. v. Washoe County*, 110 F.3d 699,  
8 702 (9th Cir. 1997). OSYU has identified admissible evidence sufficient to create triable  
9 issues of fact on all three parts of the associational standing test.

10 **B. OSYU Is a Real Organization Which Had Genuine Members at the Time**  
11 **of Filing**

12 The keystone of Defendant's motion is his claim that OSYU had no members at  
13 the time the suit was filed. Whether or not OSYU had members at the time of filing is a  
14 disputed issue of material fact that precludes summary judgment for Defendant. The  
15 "evidence" Defendant offers as proof that OSYU had no members as of July 9, 2003 is a  
16 document filed with the Secretary of State in connection with OSYU's incorporation as a  
17 California Non-Profit. Deft's. Memo. at 2-3. The articles of incorporation do literally  
18 state that OSYU has no members, but "members" has a very different meaning in  
19 California's corporate code than it does in the test set forth above for associational  
20 standing.

21 That a corporation has no "members" as that word is defined by the corporation  
22 law of the state in which it is incorporated does not mean it has no members for purposes  
23 of associational standing. *See Friends of the Earth v. Chevron Chem. Co.*, 129 F. 3d 826,  
24 827-29 (5<sup>th</sup> Cir. 1997) (citing *Sierra Assn. for Envt. v. Fed. Energy Reg. Comm'n.*, 744  
25 F.2d 661 (9<sup>th</sup> Cir. 1984)) (District Court should have considered other indicia of  
26 membership and found that group had standing to represent its members even though it  
27 had no "members" under the corporate law of the District of Columbia). The term  
28 "member" or "statutory member," as used on OSYU's articles of incorporation, is a

1 defined term from the California corporate code meaning any person who has the right to  
2 vote on the election of directors, dissolution, merger or disposition of all or substantially  
3 all the corporate assets. *See Advising California Non-Profit Corporations*, Rutter Group  
4 2003, Chapter 9 at 437. In other words, statutory members are analogous to shareholders  
5 in a for-profit corporation. In common parlance, however, "Nonprofit organizations  
6 often use the term "member" in referring to interested persons who are not statutory  
7 members. *See Cal. Corp. Code §§ 5332(a); 733(a) and 9332(a).*" *Id.* at 440. *See also*  
8 *Calder Decl.* at ¶ 18. This is also what "members" means in the standing cases. *Friends*  
9 *of the Earth v. Chevron Chem. Co.*, 129 F. 3d 826, 827-29. Non-profit corporations often  
10 choose not to have statutory (voting) members because member voting "may serve to  
11 politicize the organization, making it harder for the organization to accomplish its goals,  
12 and it adds an extra level of complexity by requiring the organization to diligently track  
13 memberships." *Advising California Non-Profit Corporations* at 438.

14 Accordingly, OSYU chose to have no statutory (voting) members and instead  
15 have its directors vote on significant acts of the corporation. Vanessa Calder, the first  
16 director, appointed by the founders of OSYU, signed documents stating that OSYU has  
17 no members because the California non-profit guidelines for a mutual benefit non-profit  
18 corporation says that "members" in this context means "statutory members" who are  
19 allowed to vote in an election of the Board of Directors -- like shareholders in a for-profit  
20 corporation. *Calder Decl.* at ¶ 18. OSYU's Bylaws state that the Corporation's board of  
21 directors may, in its discretion, admit individuals to one or more classes of nonvoting  
22 members with such rights and obligations as the Board of Directors finds appropriate.  
23 The founders of OSYU, and the yoga instructors who were regular participants on  
24 OSYU's conference calls were and are "associate members." OSYU contemplated that  
25 other instructors who responded to its grassroots organizing also would be associate  
26 members, under the California Non-Profit guidelines. *Calder Decl.* at ¶¶ 19-20.

27 Defendant's central argument is a red herring.

1           Once Defendant's red herring is discarded, Defendant has no other evidence for  
2 his claim that OSYU lacked members in July 2003. In contrast, the evidence is clear that  
3 OSYU had real members who have been threatened by Defendant and whose injury will  
4 be addressed by the requested relief. At its formation, OSYU had, as members, Sandy  
5 McCauley, Vanessa Calder, Bill McCauley, and Jimmy Barkan. Calder Decl. at ¶ 13-14,  
6 S. McCauley Decl. at ¶¶ 16-17. Brandon Hartsell, Ted Grand, Darla MaGee, Sharon  
7 Osher and Kimberly Clark became members as of April 15, 2003. Calder Decl. at ¶¶ 29,  
8 33, 34 and Exhibit K (declarations of board members). As a result of OSYU's mailings  
9 and open conference calls, it recruited more self-identified members as well as many  
10 more supporters. Calder Decl. at ¶¶ 22, 29, 31 and 32.

11           Defendant urges that the fact that OSYU solicited and obtained written  
12 membership applications after the November 13, 2003 case management conference  
13 somehow shows that OSYU had no members before the suit was filed. Dcft.'s Memo at  
14 7. This logic is flawed. It is true that OSYU had no reason to keep records of its  
15 membership before it heard, for the first time, Defendant's theory that OSYU was a sham  
16 organization. On the contrary, OSYU had good reason not to carefully track or tout its  
17 membership. Many of OSYU's supporters have told Vanessa Calder that they fear that if  
18 Defendant were to find out that they supported OSYU, he would punish them by  
19 removing their names from his website at <http://www.Bikramyoga.com>, or "revoking"  
20 their certification to teach Bikram yoga, or telling students not to patronize their studios,  
21 or suing them. Calder Decl. at ¶ 31. It is reasonable for an organization representing  
22 small, vulnerable entities with little resources, who fear retaliation, to protect its  
23 members' identities. *See NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958) (for state to  
24 compel the NAACP to disclose membership list would violate members' First  
25 Amendment rights because it would impair its ability to advocate where members  
26 reasonably feared economic reprisal, loss of employment and other retaliation for their  
27 membership).

1           On November 13, 2003, however, Sandy McCauley and Vanessa Calder attended  
2 the CMC in this suit, at which Bikram's then-counsel, James Lee, argued that OSYU  
3 lacks standing because no members were identified in the original Complaint. After this,  
4 Calder circulated "membership applications" to OSYU's mailing list, to try to distinguish  
5 those individuals who are supporters but preferred to remain anonymous from those who  
6 were willing to stand up and be counted as OSYU members. Most, if not all, of the  
7 responding "applicants" already considered themselves members before Calder asked  
8 them to send in their "applications." Calder Decl. at ¶ 32.

9           OSYU's Board members and associate members have all the indicia of  
10 membership necessary for standing. They support OSYU financially. Defendant  
11 misleadingly asserts that apart from a handful of checks from supporters "it appears that  
12 Mr. Harrison himself is the primary source of OSYU's financing." Def.'s Memo at 3.  
13 This is just as false as Defendant's premise that Mr. Harrison teaches yoga. Mr. Harrison  
14 has donated legal assistance but has not provided *any* financial assistance to OSYU. W.  
15 McCauley Decl. at ¶ 5. Any costs incurred by Mr. Harrison in connection with this suit,  
16 such as filing fees, copying and faxes have been or will be reimbursed by OSYU. *Id.*  
17 OSYU's only source of funds is donations from members and supporters. OSYU does  
18 not collect dues, but most of its members have made donations to support OSYU, as have  
19 many of its supporters. Calder Decl. at ¶ 36. W. McCauley Decl. at ¶ 33. That the  
20 plaintiff's bank balance is small is no reason to bar the doors to the federal courthouse to  
21 it. OSYU's board members guide and control the organization. Calder Decl. at 33.  
22 OSYU has come forward with admissible evidence that it is a real organization with real  
23 members. The Court should deny the motion for summary judgment.

24  
25           **C. OSYU's Members Have Standing in Their Own Right Because Each**  
26           **Has a Reasonable Apprehension of Suit As a Result of Defendant's**  
27           **Express Threats to Sue**

28           A plaintiff must have standing to bring an action in federal court because the  
29 federal judicial power is limited to "cases" and "controversies." *See* U.S. Const. art.III §

1 2; *Allen v. Wright*, 468 U.S. 737, 750-51 (1984); *San Diego County Gun Rights*  
2 *Committee v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). The issues of standing and actual  
3 controversy are closely related. Standing refers to the plaintiff's specific interest in the  
4 controversy. To have standing, the plaintiff must have suffered "injury in fact" that can  
5 be actual or imminent, causally connected to the actions of the defendant and likely to be  
6 addressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560  
7 (1992); *Fernandez v. Brock*, 840 F.2d 622, 625 (9th Cir. 1988); *Snake River Farmer's*  
8 *Assoc., Inc. v. Department of Labor*, 9 F.3d 792, 795 (1993). The "actual controversy"  
9 requirement of Article III is the same as the "actual controversy" requirement in the  
10 Declaratory Judgment Act, 28 U.S.C. § 2201. *Aetna Life Ins. Co. v. Haworth*, 300 U.S.  
11 227, 239-40 (1937). In cases seeking declaratory judgment, courts have concatenated the  
12 standing and actual controversy requirements and held that the "case or controversy"  
13 requirement for jurisdiction is met if the plaintiff has a reasonable apprehension of being  
14 sued by the defendant. *Societe de Conditionnement en Aluminium v. Hunter Eng'g. Co.,*  
15 *Inc.*, 655 F.2d 938, 944 (9th Cir. 1981). Accordingly, to show that jurisdiction is proper,  
16 OSYU must show that its members have a reasonable apprehension that Defendant will  
17 sue them for infringement of his intellectual property rights. *See id.*; *Hal Roach Studios*  
18 *Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555-56 (9th Cir. 1990); *Newmark v.*  
19 *Turner Broad. Network*, 226 F. Supp. 2d 1215, 1219 (C.D. Cal. 2003). In determining  
20 whether an individual has a reasonable apprehension of being sued for intellectual  
21 property infringement, the courts look at the circumstances from the individual's point of  
22 view. *Societe de Conditionnement En Aluminium*, 655 F.2d at 945. If the individual is  
23 actively using the purported intellectual property at issue, and has alleged that it will  
24 continue to do so, the showing of apprehension need not be substantial to show an actual  
25 controversy and support jurisdiction. *Hal Roach Studios*, 896 F.2d at 1556 (finding  
26 jurisdiction where copyright owner told licensee it would have no rights after expiration  
27 of license, and licensee intended to continue selling and distributing the copyrighted  
28 works). Defendant's employees' statements to third parties about the scope of

1 Defendant's intellectual property rights and intent to enforce them are relevant to the  
2 declaratory judgment plaintiff's state of mind. *Societe de Conditionnement En*  
3 *Aluminium*, 655 F.2d at 944 (finding that communication to third party could reasonably  
4 be viewed as threat of litigation). Defendant's statements and positions in other lawsuits  
5 that specific activities constitute copyright infringement also are relevant where the  
6 declaratory judgment plaintiff engages in those same activities. *Newmark*, 226 F. Supp.  
7 2d at 1220. Previous suits brought by the defendant are relevant because they  
8 demonstrate the defendant's "will to protect copyrights through litigation." *Id.* at 1220.  
9 In short, in deciding whether OSYU has standing, via its members, and whether there is a  
10 case or controversy supporting jurisdiction, the Court can and should consider all the  
11 circumstances that could contribute to any member's real and reasonable apprehension of  
12 suit. These circumstances overwhelmingly support subject matter jurisdiction and  
13 OSYU's standing.

14 Defendant argues, in his motion for judgment on the pleadings or for summary  
15 judgment, that no individual OSYU member would have standing to sue in his or her own  
16 right. Def't.'s Memo at 6 and 11-13. But OSYU offers evidence that each of its members  
17 is in reasonable apprehension that they will be sued if they continue the activities that  
18 Bikram claims infringe his intellectual property and each of the members named in the  
19 Complaint has done and continues to do at least one of the acts Bikram claims constitute  
20 copyright infringement. Amended Complaint at ¶ 27. Defendant sent a message to  
21 Sandy McCauley with one of her students who attended his teacher training: "You tell  
22 her I'm going to sue her." S. McCauley Decl. at 8.

23 For example, Sandy McCauley has not acceded to the demands in Defendant's  
24 cease and desist letter and continues to do activities alleged in that letter to constitute  
25 infringement, such as occasionally apprenticing instructors in Bikram's Basic Yoga  
26 Method and employing teachers not certified by Defendant, including Vanessa Calder, to  
27 teach Bikram's Basic Yoga Method at Yoga Loka. Calder Decl. at ¶ 7-8; S. McCauley  
28 Decl. at 10-12.

1 Defendant suggests that the July 29, 2002 letter from the McCauleys' lawyer to  
2 Jacob Reinbolt is a denial that she is training teachers or teaching without the dialogue or  
3 other styles of yoga or employing teachers not certified by Defendant. This claim is  
4 contradicted by the letter itself as well as by Sandy McCauley. S. McCauley Decl. at ¶10.  
5 Attorney Reinbolt's June 5, 2002 letter is unusual. The statement that the McCauleys are  
6 "distributing, selling and otherwise exploiting copies of the Copyrighted Works" would  
7 be read by any reasonable lawyer as alleging that the McCauleys are selling counterfeit or  
8 pirated copies of the book, *Bikram's Beginning Yoga Class* or of Defendant's videos.  
9 Many yoga studios offering Bikram yoga sell authorized copies of the books or videos,  
10 contributing to Defendant's wealth. Mr. Tweedy's response to this confusing letter rather  
11 reasonably denies that the McCauleys are distributing or selling any unauthorized  
12 copyrighted works. Mr. Reinbolt's theory, as OSYU now understands it -- that *teaching*  
13 *Bikram's Basic Yoga System* infringes copyright in the book or videos -- is novel and  
14 contrary to black letter copyright law, and therefore confusing. The McCauley's denial  
15 that any of their activities constitute copyright or trademark infringement does not  
16 undermine the allegation of injury. Rather, it supports it.

17 OSYU's other members named in the Amended Complaint have standing as well.  
18 Each learned of Defendant's public threats against all the "imposters" in the media and on  
19 YOIC's website. Each learned of the suit against the Morrisons. The yoga grapevine  
20 buzzes with rumors of who will be sued next. As set forth above, Defendant and his  
21 employees and lawyers have repeatedly told third parties that Brandon Hartsell, Jimmy  
22 Barkan, Darla Magee and Kimberly Clark will be sued or "dealt with" or that their  
23 activities are unauthorized and constitute copyright and trademark infringement. *See*  
24 *Rader Decl., Exhs. E-K*. Such statements are relevant evidence supporting reasonable  
25 apprehension. *Societe de Conditionnement en Aluminium*, 655 F.2d at 944; *Newmark v.*  
26 *Turner*, 226 F. Supp. 2d at 1220. It is also relevant that OSYU's members know, from  
27 the media and from YOIC, that Defendant has extraordinary financial resources he can  
28 use to finance large scale litigation using his team of law firms. In the *Yogis Behaving*

1 *Badly* article he bragged of spending \$500,000 in legal fees in a month to stop people  
2 doing “illegal things.” Calder Decl., Exh. C. The Court should look at all the  
3 circumstances from the individual’s point of view when assessing reasonable  
4 apprehension. *Societe de Conditionnement*, 655 F.2d at 945. These circumstances, at  
5 minimum, create an issue of material fact with respect to standing, precluding summary  
6 judgment .

7 Defendant urges that OSYU has not alleged any injury that would be addressed  
8 by the relief sought, because, he asserts, members trained by him are bound, by oral  
9 promises or by personal injury waivers they signed in order to participate in the training  
10 sessions, not to teach yoga except in accordance with his rules and restrictions. Def’t’s  
11 Memo at 13-14 and Choudhury Decl. at ¶¶ 2-3. This mischaracterizes the suit. Leaving  
12 aside the weakness of defendants’ proposed breach of contract defenses, this suit does not  
13 ask the Court to rule that any specific yoga instructor can teach yoga without being liable  
14 for breach of contract. This lawsuit only seeks a ruling that specific acts do not  
15 themselves infringe any valid copyrights or trademarks of Defendant. See Amended  
16 Complaint at 14-15 (Prayer for Relief). These rulings would address the injury  
17 complained of, which is the threat of suit for copyright or trademark infringement.  
18 Accordingly, whether or not some of OSYU’s members may be bound by a supposed  
19 contract to abstain from certain legal acts is not a material issue of fact. If it were, it  
20 would be disputed. See S. McCauley Decl. at 10.

21 Nothing in the relief OSYU seeks would preclude Defendant from suing for  
22 breach of the personal injury waivers or other supposed contracts he has failed to produce  
23 or the alleged oral promises. This Court should not dismiss OSYU’s intellectual property  
24 claims on the pleadings, or on summary judgment, based on Defendant’s unexamined  
25 testimony (on which virtually no discovery has been taken) that some members of OSYU  
26 have promised not to ignore his rules and restrictions, regardless of whether Bikram Yoga  
27 is protected by any copyright or trademark. A declaratory judgment need not resolve all  
28

1 the issues in an entire controversy. *Harris v. United States Fid. & Guar. Co.*, 569 F.2d  
2 850, 852 (5<sup>th</sup> Cir. 1978).

3 At any rate, it is undisputed that OSYU member Vanessa Calder, identified in the  
4 Amended Complaint, was not trained by Defendant and never made any promises or  
5 entered into any contracts with him that could conceivably be construed to require her  
6 compliance with his rules and restrictions. See Rader Decl., Exh B. Ms. Calder has  
7 taught, and continues to teach, Bikram's Basic Yoga Method, without his Dialogue, and  
8 without his certification or permission. See Amended Complaint at ¶ 29; Calder Decl. at  
9 ¶ 8. She is one of the "teachers not certified by Bikram," teaching at Yoga Loka,  
10 complained of in the June 5, 2002 cease and desist letter sent to Sandy McCauley.  
11 Vanessa Calder therefore would have standing to bring this suit in her own right, even if  
12 every other member were somehow found at trial to lack injury or to have unclean hands.  
13 Her standing alone would be enough to support OSYU's standing.

14  
15 **D. The Interests OSYU Seeks to Protect in this Suit Are Germane to  
OSYU's Corporate Purpose**

16 OSYU's purpose is communicating and defending the idea that no form, style or  
17 routine of Yoga is proprietary and that Yoga cannot be owned, transferred, franchised,  
18 trademarked or copyrighted. Calder Decl. at ¶ 21. OSYU's purpose is also to provide a  
19 common voice and allow for pooling of resources to oppose the litigious position Bikram  
20 Choudhury is taking against the yoga community by his attempted enforcement of  
21 copyrights and trademarks and to resist the ownership of any yoga style, thereby ensuring  
22 its continued natural unfettered practice for all to enjoy and further develop. Calder Decl.  
23 at ¶ 21.

24 The "germaneness" test is easily met. See *Presidio Golf Club v. Nat'l. Park Serv.*,  
25 155 F.3d 1153, 1159 (9<sup>th</sup> Cir. 1998) (courts have generally found the germaneness test to  
26 be undemanding); *California Sportfishing Protection Alliance v. Diablo Grande, Inc.*,  
27 209 F. Supp. 2d 1059, 1066-67 (E.D. Cal. 2002) (same; suit under clean water act is  
28

1 germane to purpose of protecting aquatic environment). Here, the relief requested – a  
2 judgment that teaching Bikram yoga, referring to it by name, and teaching variations do  
3 not infringe any valid intellectual property right of Defendant – is entirely consistent with  
4 OSYU's stated purpose.

5 Defendant seems to argue, in through-the-looking-glass fashion, that the fact that  
6 OSYU's purpose includes seeking legal adjudication of his copyright and trademark  
7 threats somehow precludes, rather than supports, a finding of germaneness. Deft.'s  
8 Memo at 2. But Defendant's cases do not even support the premise that an association  
9 cannot be formed for the purpose of seeking a declaratory judgment. In *Animal Lovers*  
10 *Volunteer Association v. Weinberger*, relied on by defendant, the fact that the  
11 organization had no history predating the litigation was not the basis for the court's denial  
12 of standing. 765 F.2d 937, 939 (9<sup>th</sup> Cir. 1985) (Animal rights group lacked standing to  
13 challenge the Navy's plan to shoot goats on Navy property). The Court simply found that  
14 the members of the organization had not demonstrated an interest in preventing cruelty to  
15 goats that was different from that of the public at large. *Id. Project Sentinel v. Evergreen*  
16 *Ridge Apartments*, 40 F. Supp. 2d 1136 (N.D. Cal. 1999) does not even address the issue  
17 of germaneness. In that case, the court held that the plaintiff, which was suing on behalf  
18 of itself (not its members), had not alleged any *injury* from alleged racial discrimination,  
19 other than its own litigation expenses. Here, OSYU's members are all yoga instructors  
20 who are engaged in the very activities that Defendant claims constitute copyright  
21 infringement for which he intends to sue. They are the very teachers Defendant labels  
22 "imposters who must be stopped." The injury they have alleged is the threat of suit for  
23 copyright and trademark infringement for the acts they have already done and continue to  
24 do. As explained above, this injury is sufficient for standing in a suit for declaratory  
25 judgment concerning the scope and validity of claimed intellectual property rights.

26 **E. Individual Participation Is Not Necessary to Resolve the Pure Legal**  
27 **Issues of Copyright Validity and Trademark Validity or Scope**

1 OSYU is not here seeking a declaration that none of its members has ever done  
2 anything actionable to Bikram Choudhury. OSYU does not seek a declaration that any  
3 individual member can teach yoga without breaching any alleged promise to Defendant.  
4 The relief OSYU seeks is very narrow: judgment that teaching certain facts and physical  
5 exercises does not, in itself, infringe any valid intellectual property rights of Defendant.  
6 OSYU has no contract with Defendant to breach. "Unclean hands" of individual named  
7 OSYU members is simply not relevant to the allegations in the case. At any rate,  
8 Defendant's allegations of "unclean hands" if they were material, would create issues of  
9 fact, precluding summary judgment. Defendant has only attached a handful of waivers  
10 signed by certain OSYU members when they paid Defendant to train them to teach  
11 Bikram yoga. These do not support Defendant's position. Moreover, Plaintiff has had  
12 virtually no discovery on this issue. Finding lack of standing and granting summary  
13 judgment at this juncture, on the basis of Mr. Choudhury's declaration, would be error.  
14 Even if Defendant had offered a scintilla of admissible evidence that his former students  
15 owe contractual obligations -- it is undisputed that Vanessa Calder never entered into a  
16 contract with Defendant. The Court should reject the "unclean hands" argument.

17  
18 **F. Declaratory Relief Would Not Be "Unfair" to Defendant Because His**  
19 **Threats Constitute Grounds for Standing and He Will Have Full**  
20 **Opportunity to Litigate the Issues**

21 Defendant's insistence that allowing this suit for declaratory judgment to proceed  
22 would be unfair to him rings hollow given his repeated public threats of suit, numerous  
23 cease-and-desist letters, and the 2002 litigation against the Morrisons and their family  
24 business. Defendant is eager to wield the threat of copyright and trademark litigation as a  
25 to intimidate small studio owners, but when they join together to demand actual legal  
26 adjudication of his extraordinary, novel claims, he cries "unfair." By his persistent  
27 threats, cease-and-desist letters, media campaign and misrepresentation of the U.S.  
28 Courts' role in his "vindication" of his claimed intellectual property rights, Defendant

1 has placed "the Sword of Damocles" over the heads of OSYU's members. *IMS Health,*  
2 *Inc. v. Vality Tech., Inc.*, 59 F.Supp.2d 454, 462 (E.D. Pa. 1999).

3 Defendant's express and implied charges of copyright infringement against  
4 members of OSYU create an "actual controversy." *O'Hagins, Inc. v. M5 Steel Mfg., Inc.*,  
5 276 F.Supp.2d 1020, 1025 (N.D. Cal. 2003) (there is "clearly an actual controversy"  
6 where express charges of infringement have been made); *Diagnostic Unit Inmate Council*  
7 *v. Films, Inc.*, 88 F.3d 651, 653 (8th Cir. 1996); see also *Arrowhead Indus. Water, Inc. v.*  
8 *Ecologchem, Inc.*, 846 F.2d 731, 736-37 (Fed. Cir. 1988) ("after the [Declaratory  
9 Judgment] Act . . . competitors were no longer restricted to an in terrorem choice between  
10 the incurrence of a growing potential liability for patent infringement and abandonment of  
11 their enterprises: they could clear the air by suing for a judgment that would settle the  
12 conflict of interests."). Plaintiff seeks declaratory judgment that Defendant's claimed  
13 copyright in the Bikram Basic Yoga System would be invalid as a matter of law, and his  
14 copyrights in other works describing the Bikram Yoga cannot be enforced to prevent  
15 teaching. A copyright is either valid or it is not, and its scope is a matter for the Court to  
16 decide. If Defendant's purported copyright in a system is found to be invalid, he cannot  
17 enforce it against either OSYU's present members or anyone else. This would not be an  
18 "unfair" outcome, it would be that required by copyright law.

19 Plaintiff and Defendant have at least an equal interest in the relief requested from  
20 this court. Defendant has falsely claimed that a 2003 settlement agreement "fully  
21 vindicates Bikram's conviction in the originality and legal enforceability of Bikram's  
22 Yoga." Amended Complaint at ¶ 25. In fact, only a judicial opinion or order can offer  
23 such vindication. Further, there is a public interest in "certainty and prompt decision,  
24 particularly where potential competition may be suppressed unnecessarily" by  
25 questionable intellectual property claims, and in avoidance of "excessive and  
26 unproductive 'guerilla warfare' litigation." *Windmoller v. La Querre*, 284 F. Supp. 563,  
27 565 (D. D.C. 1968); accord *Societe de Conditionnement en Aluminium v. Hunter*  
28 *Engineering Co.*, 655 F.2d 938, 943 (9th Cir. 1981). Testing of the validity of intellectual

1 property rights benefits the public by separating invalid intellectual property claims from  
2 valid ones. Those “with economic incentive to challenge” validity should be facilitated in  
3 doing so, otherwise “the public may continually be required to pay tribute to would be  
4 monopolists without need or justification.” *Lear v. Adkins*, 395 U.S. 653, 670 (1969).  
5 Because declaratory relief regarding copyright validity would not be unfair, but instead  
6 would settle the existing controversy between the parties and promote the public interest,  
7 the Court should not decline jurisdiction.

8 **G. Bikram’s Licensees Are Not Necessary Parties in a Suit to Adjudicate**  
9 **the Validity and Scope of Intellectual Property**

10 Defendant contends that Rule 19 requires that “literally hundreds” of his non-  
11 exclusive licensees be joined to the suit because they have a legal “interest” in the  
12 copyright rendering their presence “necessary.” Def’t’s Memo at 18. But it is well-settled  
13 that non-exclusive licensees have no legal interest in intellectual property owned by  
14 another, and therefore are neither necessary nor proper parties to a suit involving the  
15 property’s owner. Defendant does not cite a single case involving either intellectual  
16 property or licensees because these cases are in direct conflict with his dubious claim.

17 “[T]he rights of the [intellectual property] licensee are based upon the rights of the  
18 owner or licensor” and not independent or adverse interests. *Ultrapure Sys., Inc. v. Ham-*  
19 *let Group*, 921 F. Supp. 659, 665 (N.D. Cal. 1996) (“[w]here the license is non-exclusive  
20 the licensee does not have standing to bring an [trademark] infringement action”). A non-  
21 exclusive intellectual property license merely protects the licensee against a claim of  
22 infringement by the owner; the licensee gains no rights against third parties. *Ocasek v.*  
23 *Hegglund*, 673 F. Supp. 1084, 1087 (D. Wyo. 1987) (a non-exclusive copyright licensee  
24 is “neither a necessary nor even a proper party to an infringement suit” because it is not “a  
25 party in interest”), accord *Bourne Co. v. Hunter Country Club, Inc.*, 990 F.2d 934, 937  
26 (7th Cir. 1993) (non-exclusive licensee “is neither the legal nor the beneficial owner of  
27 the copyright and has no interest in the copyright”). The non-exclusive licensee “thus,  
28 has no standing to bring suit or even join in a suit” involving the owner. *Ortho Pharm.*

1 *Corp. v. Genetics Inst., Inc.*, 52 F.3d 1026, 1031 (Fed. Cir. 1995) (patent); *see also Upper*  
2 *Deck Authenticated, Ltd. v. CPG Direct*, 971 F. Supp. 1337, 1349 (S.D. Cal. 1997) (right  
3 of publicity); 3 *Nimmer on Copyright* § 12.02(B). This is true even if the licensee suffers  
4 greater injury from harm to the intellectual property than does its owner. *Ortho Pharm.*,  
5 52 F.3d at 1031. The non-exclusive licensee “has only a personal and not a property  
6 interest” in the intellectual property. *Everex Sys. v. Cadtrak Corp.*, 89 F.3d 673, 679 (9th  
7 Cir. 1996), *quoting Gilson v. Republic of Ireland*, 787 F.2d 655, 658 (D.C. Cir. 1986);  
8 *Harris v. Emus Records, Corp.*, 743 F.2d 1329, 1334 (9th Cir. 1984) (“a license is not an  
9 interest in a copyright”); *Hulex Music v. Santy*, 698 F. Supp. 1024, 1029 (D. N.H. 1988)  
10 (joinder of licensing agent is “inappropriate either permissively or as an indispensable or  
11 necessary party”).

12 Ignoring these unhelpful cases, Defendant relies on the declaration of John  
13 Marcoux, one of the lawyers on his team of law firms working to enforce his purported  
14 copyrights and trademarks. Mr. Marcoux, whose e-mail address is guru@bycic.com, is  
15 the same lawyer Defendant had draft a threat letter to Nilam Meyerer, of Kripalu Center,  
16 asserting that Kripalu would be contributing to infringement of his copyrights and  
17 trademarks if it allowed Jimmy Barkan to teach yoga there. Rader Decl., Exh. I.  
18 Defendant signed Mr. Marcoux’s draft letter<sup>1</sup> without even bothering to correct  
19 Marcoux’s misspelling of Barkan’s name throughout the letter. He is the same lawyer  
20 apparently tasked by Bikram with enforcement against Brandon Hartsell and Sunstone  
21 yoga. *Id.*, Exh. E. He seems to be the same “John” who assured a Houston studio owner  
22 who complained about OSYU’s Darla MaGee that Bikram’s Yoga College was “going to  
23 pick 20 studios that are wreaking havoc in their communities and deal with them next.”  
24 *Id.*, Exh. J. But Attorney Marcoux presents himself to this Court as just another Bikram  
25 Certified Teacher and studio owner, and urges that he and hundreds of “legitimate”  
26 teachers like him will lose business if OSYU members are allowed to teach yoga using

27  
28 <sup>1</sup> Apparently Mr. Marcoux is not admitted to practice law in Illinois or California.

1 Bikram Choudhury's trademarks. Of these supposed hundreds of legitimate teachers,  
2 however, only the sworn testimony of Bikram's copyright and trademark enforcement  
3 lawyer is offered in support of Defendant's motion.

4 Defendant's hundreds of licensees, including Mr. Marcoux, are non-exclusive and  
5 therefore can have no legal interest in his copyrights. They cannot sue for infringement of  
6 the copyright nor can they defend its validity. Only the actual copyright owner—  
7 Defendant can do so. The joinder of hundreds of non-exclusive licensees to this suit  
8 would be unnecessary and, moreover, improper. Defendant's argument that plaintiff's  
9 suit cannot proceed without them must be rejected. All necessary and proper parties are  
10 already before the Court.

#### 11 12 **IV. CONCLUSION**

13 OSYU is a real organization which had real members at all times. These members  
14 have a real and reasonable apprehension of suit for copyright infringement as a result of  
15 Defendant's express threats to sue any yoga instructor who teaches anything like "his"  
16 yoga system without his permission and adherence to his strict rules. In addition to his  
17 general threats publicized in a media blitz, Defendant has made dozens of specific threats  
18 against yoga instructors, and already sued two. The relief sought in this suit is based on  
19 well- settled copyright and trademark law, not on facts particular to OSYU's members.  
20 There is nothing unfair about a declaratory judgment action under these circumstances.  
21 The Court should deny Defendant's motion in its entirety.

22  
23 Dated: March 24, 2004

Respectfully submitted,

24  
25 BY: /s/ Elizabeth H. Rader \_\_\_\_\_  
26 Elizabeth H. Rader  
27 559 Nathan Abbott Way  
28 Stanford, CA 94305-8610  
Telephone: (650) 724-0517

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

James P. Harrison  
Attorney at Law  
980 9th Street, 16<sup>th</sup> Floor  
Sacramento, CA 95814  
Telephone: (916) 492-9778

*Attorneys for Plaintiff*  
OPEN SOURCE YOGA UNITY