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UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

NATIONAL ABORTION FEDERATION (NAF), Plaintiff, vs. THE CENTER FOR MEDICAL PROGRESS; BIOMAX PROCUREMENT SERVICES, LLC; DAVID DALEIDEN (aka "ROBERT SARKIS"); and TROY NEWMAN, Defendants.	Case No. 3:15-cv-3522 (WHO) Judge William H. Orrick, III DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION Hearing Date: December 18, 2015 Time: 10:00 a.m.

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INTRODUCTION

Plaintiff's Motion for Preliminary Injunction raises the question whether a private confidentiality agreement can justify enjoining the disclosure of evidence of criminal activity obtained through investigative journalism on matters of national public interest. For the reasons stated below, including both the First Amendment and the numerous fatal deficiencies in the two state-law claims on which Plaintiff relies, the correct answer is no. The putative confidentiality agreements on which NAF relies are unenforceable to suppress disclosure of information about widespread tolerance for and willingness to engage in criminal activity among practitioners of late-term abortion, as well as desensitization toward the highly developed human fetus—issues of paramount public concern. NAF's request for an injunction should be denied.

In September 2013, the National Abortion Federation ("NAF") became aware of a start-up company called BioMax Procurement Services, LLC, which offered to pay abortion clinics for fetal tissue. NAF representatives encouraged BioMax to attend and exhibit at NAF's Annual Meeting in April 2014 in San Francisco. In response to a tentative e-mail inquiry from BioMax about pricing and availability of exhibit space at the next meeting, NAF responded by sending a prospectus containing what NAF now claims is its most secret information: the exact date, time, and location of its next Annual Meeting.

BioMax representatives attended the 2014 NAF Annual Meeting and told dozens of NAF members and staff that its business plan was to pay abortion clinics for fetal tissue—and pay *more* than its competitors. From 2014 to 2015, it made the same proposal to abortion providers and clinic owners in several other venues. Consequently, BioMax became popular and respected in the abortion community.

But BioMax was not what NAF thought it was. BioMax was a test company launched by the Center for Medical Progress ("CMP"), as part of its journalistic venture, the Human Capital Project. The goal of the Human Capital Project was to investigate, document, and expose abortion providers' attitudes toward and involvement in selling fetal body parts for research and other purposes. The means employed by CMP were standard for investigative reporting: the creation of

a new identity; props and costumes to fit the role; the promise of a financial benefit in order to engage the targets of the investigation; hidden cameras and recorders; and, of course, the concealment of one's true purpose. The goal was also the same: not to obtain money, property, goods, or services, but to gather information about illegal and unethical practices. As another district court in this Circuit recently held, using such deceptive tactics to procure information in undercover investigations is not "fraud" and is fully protected by the First Amendment. *See Animal Legal Defense Fund v. Otter*, ____ F. Supp. 3d ____, 2015 WL 4623943, at *3, *5-6 (D. Idaho Aug. 3, 2015).[1]

CMP's investigation uncovered extensive evidence in the abortion industry of willingness to engage in criminal practices, including the sale of fetal body parts for profit and the alteration of abortion methods to procure fetal body parts for research, as well as evidence of de-sensitization toward the highly developed human fetus by practitioners of late-term abortion.

NAF has spun this investigative journalistic endeavor into an eleven-count complaint containing allegations ranging from racketeering and fraud to trespass. Despite months of rhetoric about CMP's putative "fraud" and "crime spree," however, for its preliminary injunction motion, NAF relies on only two claims: breach of contract and violation of California Penal Code § 632.

Plaintiff cannot show a likelihood of success on these claims, nor can it show a threat of irreparable injury on the basis of the actions of third parties unrelated to Defendants who are strangers to this lawsuit. Moreover, NAF's requested relief is both unsupported by the evidence and contrary to the public policy against restraining publication of matters of enormous public interest.

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[1] *See also Med. Lab. Mgmt. Consultants v. ABC, Inc.*, 306 F.3d 806, 813 (9th Cir. 2002) (reporters investigating potential violation of federal regulations posed as employees of fictitious pap smear lab and secretly recorded meeting in Plaintiff's offices; "[Plaintiff]'s only knowledge of the three was based upon [Defendant]'s statement that she was a cytotechnologist interested in starting her own laboratory and the other two ABC representatives would be involved in the computer and business administration aspects of [Defendant]'s laboratory"); *Desnick v. ABC, Inc*., 44 F.3d 1345, 1354-55 (7th Cir. 1995) (journalists investigating practices of ophthalmology clinic posed as patients for purposes of gaining access to and recording for broadcast; "[t]he only scheme here was a scheme to expose publicly any bad practices that the investigative team discovered, and that is not a fraudulent scheme").

FACTUAL BACKGROUND

A. The Center for Medical Progress: Its Goals and Methods

In 2013, David Daleiden founded CMP as a California not-for-profit corporation formed for the purpose of monitoring and reporting on medical ethics and advances with an especial concern for contemporary bioethical issues that impact human dignity, such as induced abortion and aborted fetal tissue and organ harvesting. To this end, CMP seeks to educate and inform the public and thereby serve as a catalyst for reform of unethical and inhumane practices. CMP's investigative venture is titled the Human Capital Project. Declaration of David Daleiden, attached as Exhibit 1 ("Daleiden Dec."), ¶ 3.

The goal of the Human Capital Project was to investigate and inform the public, law enforcement, and policymakers about current practices surrounding the procurement, transfer, and use of fetal tissue.[2] *Id.* These practices include the sale of fetal tissue, the altering of abortion procedures to obtain fetal tissue for research, the commission of partial birth abortions, the acquisition of fetal tissue without maternal consent, and the killing of babies born alive following abortion procedures, all of which are violations of federal and/or state law. *See, e.g.*, 42 U.S.C. § 289g-2(a), (d)(1) (making it a federal felony to "knowingly acquire, receive, or otherwise transfer any fetal tissue for valuable consideration"); 42 U.S.C. § 289g-1 (making it illegal under federal law to "alter[] the timing, method, or procedures used to terminate the pregnancy . . . solely for the purposes of obtaining the tissue"); 18 U.S.C. § 1531(a), (b) (making it a federal crime to perform partial-birth abortions); 1 U.S.C. § 8 (providing that the term "person" in all federal statutes includes babies born alive after abortion procedures); Cal. Health & Saf. Code § 125320(a).

In the process of gathering information about these illegal activities, Daleiden and CMP became aware of and gathered information on other issues surrounding these practices, issues that are a topic of discussion and debate among abortion providers themselves at their gatherings. Daleiden Dec., ¶ 4. These issues include the difficulties of disposing of fetal tissue, both legally

[2] In this context, "fetal tissue" refers to body parts of developed human fetuses, such as livers, brains, lungs, and the like, as well as intact fetal cadavers.

and economically; the fear of late-term abortion providers that babies will be born alive following an abortion procedure; [redacted] the fact that, contrary to public perception created by abortion advocates, women having late-term abortions rarely do so for reasons of health or fetal anomaly; the stigma abortion providers, particularly late-term abortion providers, frequently feel is attached to their work; the mental and physical toll that both the stigma and their work exact from them; and the perceived harms caused by laws regulating abortions and abortion providers and how these laws can be circumvented. *See id.* Given the ongoing public interest and controversy surrounding late-term abortion practices and the sale of fetal tissue for profit, there is enormous and legitimate public interest in these issues.

In the course of his investigation, Daleiden also witnessed and documented the de-sensitizing and traumatizing effect of performing late-term abortions on the abortion providers and those who work with them, as evidenced most dramatically in their firsthand descriptions of abortion procedures and the disposition of fetal tissue and organs. *See id.*, ¶ 5. These descriptions reflected, in many instances, a degree of callousness toward the highly developed human fetus; while in other instances, they reflected a powerful ambivalence of late-term abortion providers toward their practice.

Prior to and in the course of this investigative project, Daleiden gathered information from many sources, including medical journal articles, transcripts of legislative hearings, and websites for tissue procurement companies. Daleiden Dec., ¶ 6. Daleiden also spoke with scientists, researchers, abortion providers, and current and former tissue procurement specialists, among others. *Id.* He also attended seven scientific and industry conferences and had several in-person meetings under the assumed name of Robert Sarkis of BioMax Procurement Services, LLC. *Id.*

In carrying out the Human Capital Project, neither Daleiden nor CMP had the intention of harassing, intimidating, or exposing NAF members to physical threats or harm. *Id.*, ¶¶ 29-30. NAF has presented no evidence of any such intent.

Further, neither Daleiden nor CMP ever attempted to learn any personal information, such

as a home address or personal contact information, about any NAF member, NAF meeting attendee, or any other abortion provider. *Id.*, ¶ 29. Neither Daleiden nor CMP has disclosed any such personal information to others. *Id.* NAF has presented no evidence to the contrary.

Neither Daleiden nor CMP disclosed to anyone other the investigators the date and location of the 2014 and 2015 NAF meetings, nor have they disclosed the date and location of any NAF meeting subsequent to those. *Id.*, ¶ 31. NAF has not pointed to any evidence to the contrary, and in fact, [redacted]

In the course of carrying out the Human Capital Project, in addition to his own reading and research, Daleiden consulted with attorneys on various legal issues. Daleiden Dec., ¶ 7. These issues included the legality, or lack thereof, of the abortion and fetal tissue procurement practices he learned about, and the legality of his own methods of investigation, including the limits of nondisclosure agreements. *Id.*

B. Attendance at NAF's Annual Meetings.

In the fall of 2013, two investigators attended the conference of the Association of Reproductive Health Professionals (ARHP) as representatives of "BioMax Procurement Services, LLC." Daleiden Dec., ¶ 8. At that time, BioMax was not registered with the California Secretary of State and did not have a website, flyers, or signage. *Id.* The representatives did not have exhibit space or name tags but were merely attendees. *Id.*

At a reception on the first evening of the conference, the investigators met [redacted] and [redacted] of the National Abortion Federation. *Id.*, ¶ 10. Less than four minutes into the conversation, [redacted] invited the investigators to attend and exhibit at the next NAF Annual Meeting, which she informed them would be in San Francisco the following April. *Id.* One of the investigators told [redacted] that BioMax planned to give clinics some of the fees that it received from researchers for providing fetal tissue—an action that would be plainly illegal. *Id.* [redacted] responded that their members would be very interested in learning about that and strongly encouraged them to exhibit at the NAF meeting. *Id.* She explained that they would meet

"a lot of the same people" at the NAF meeting as were at the ARHP conference, but the NAF meeting was "just bigger." *Id.* [redacted] told the investigators to "stay in touch with us because our exhibitor prospectus comes out at the end of the year." *Id.* [redacted] and [redacted] provided their business cards, and [redacted] said she would put the BioMax representatives in touch with the NAF employee in charge of the exhibitor space at the NAF meetings. *Id.*

Following up on this invitation, in November 2013, Daleiden e-mailed [redacted] and [redacted] referencing the conversation at the ARHP conference. Daleiden Dec., ¶ 11; [redacted] thanked him for the e-mail and copied [redacted] on her reply, saying that Ms. [redacted] could provide all the information needed to register for a booth. Daleiden Dec., ¶ 11; [redacted] In December, Daleiden e-mailed [redacted] and asked about pricing and availability for exhibit space for the April meeting. Daleiden Dec., ¶ 11; [redacted] responded on January 2, 2014, by sending the 10-page 2014 NAF Annual Meeting Exhibitor Prospectus, which contained the dates, times, and exact location of the April meeting. Daleiden Dec., ¶ 11; [redacted]

Daleiden completed and returned the application for BioMax to be an exhibitor at the April 2014 NAF Annual Meeting. Daleiden Dec., ¶ 11. CMP paid the applicable fees, totaling $3,235, using a debit card. *Id.* These fees, according to the Exhibitor Agreement, ¶ 3, were nonrefundable after March 21, 2014. App'x Ex. 3. Daleiden did not show the Exhibitor Agreement to anyone, including attorneys. Daleiden Dec., ¶ 12. However, through his prior discussions with attorneys, Daleiden had gained an understanding that no nondisclosure agreement is valid in the face of criminal activity. *Id.* Daleiden also believed, based on his examination of other confidentiality agreements, that the wording of the nondisclosure portions of the Exhibitor Agreement was too broad, vague, and contradictory to be enforced. *Id.*

In April 2014, Daleiden and two investigators traveled to the NAF Annual Meeting in San Francisco. *Id.*, ¶ 13. Upon registration, they were presented with the Confidentiality Agreement. *Id.*; App'x Ex. 5-7. At no time prior to this had NAF informed Daleiden or anyone from BioMax that he or other exhibitors would be required to sign this document to gain access to the Meeting,

nor were they informed in advance that other conditions or restrictions would be imposed on their admission to the Meeting they paid nonrefundable fees to attend. Daleiden Dec., ¶ 13. As with the Exhibitor Agreement, the vagueness of the wording of the nondisclosure portions of the agreement led Daleiden to believe it was not enforceable, particularly as to disclosing evidence of illegal activity. *Id.*

At the 2014 meeting, Daleiden and two investigators engaged in many conversations with other attendees, including NAF personnel. *Id.*, ¶ 14. At every opportunity, Daleiden and the investigators would describe BioMax's plan of financially "rewarding" and "thanking" clinics for providing fetal tissue. *Id.* Despite the plainly illegal nature of BioMax's stated business plan (which was an investigatory ruse), [redacted] *Id.* [redacted] *Id.*, ¶ 15 [redacted] *Id.* [redacted] As noted above, it is a felony under federal law [redacted] *See* 42 U.S.C. § 289g-2(a), (d).

After the 2014 Annual Meeting, Daleiden and CMP continued to contact abortion providers and attend abortion provider conferences, promoting BioMax as a tissue procurement company that pays abortion clinics for providing fetal tissue. In so doing, they became known to many in the abortion industry. [redacted] At no time did industry participants raise concerns about BioMax's manifestly illegal stated business plan; rather, BioMax and its representatives were welcomed with open arms throughout the industry. Daleiden Dec., ¶ 14.

Attending the 2015 NAF Annual Meeting was not a priority for the Human Capital Project, and Daleiden let the deadline for registering pass without taking any action. Daleiden Dec., ¶ 16. [redacted]

At the 2015 NAF Annual Meeting, Daleiden and two other investigators were greeted by [redacted] Daleiden Dec., ¶ 17. She and other NAF employees gave Daleiden and the other investigators their nametags and conference materials without requiring them to present identification or sign the confidentiality agreement. *Id.* [redacted] 42 U.S.C. § 289g-2(a), (d).

In the course of both NAF Annual Meetings, Daleiden and the other investigators recorded numerous hours of conversations with other attendees. Daleiden Dec., ¶ 18. All of the conversations with individuals were recorded in exhibit halls, hallways, and reception areas, where not only other attendees but also hotel staff were regularly present. *Id.* Hotel staff were also sometimes in the room during formal presentations. *Id.*, ¶ 19; *see also* [redacted]

[redacted]

Many of the formal presentations at the NAF meetings were accredited for continuing medical education credits. [redacted] Declaration of V. Saporta, Doc. 3-34, ¶ 3. Many formal presentations contained information, both verbal and written, that is publicly available, such as printouts and citations to publications, discussions and descriptions of laws and policies, and information available on the Internet. Daleiden Dec., ¶ 20. Publicly available information was also distributed on exhibitor tables. *Id.*

C. Other Meetings.

In May 2014, Daleiden contacted Deborah Nucatola to arrange a meeting. Daleiden Dec., ¶ 21. [redacted] *Id.* Daleiden already knew of Dr. Nucatola before the NAF Annual Meeting. *Id.* The business card she gave him contained no more contact information than what was publicly available. *Id.* Daleiden had many opportunities to meet her in other venues and did in fact meet her at three other conferences in 2014 and 2015, other than NAF meetings. *Id.*

In May of 2015, Megan Barr of StemExpress contacted BioMax to set up a phone meeting between BioMax's CEO and StemExpress's CEO. *Id.*, ¶ 22. BioMax did not seek this meeting; StemExpress did.[4] *Id.* Daleiden was well aware of StemExpress and its involvement in buying and selling fetal tissue well before either NAF Annual Meeting. *Id.* Indeed, it was through investigating StemExpress beginning in 2013 that Daleiden had gained much of his knowledge about fetal tissue procurement business practices. *Id.* Daleiden had also communicated directly with StemExpress prior to the 2015 NAF meeting, finding that it was very open to dealing with

[4] NAF erroneously states that Daleiden followed up via e-mail to Barr (Doc. 225, at 11:8), a statement contradicted by Appx. Ex. 68, which shows that Barr initiated the e-mail exchange after the meeting. Moreover, Barr's declaration under penalty of perjury contains statements about the dinner meeting she attended with Daleiden that are flatly contradicted by the video itself. *Compare* Appx. Ex. 67, ¶¶ 14-15 *with* Appx. Ex. 70.

others interested in providing or obtaining fetal tissue. *Id.* Thus, Daleiden's remarks following the dinner with Cate Dyer (Doc. 225, at 11:12-17[5]) expressed his amazement, not at how NAF opened doors for BioMax, but at how eager Cate Dyer was to enter into a business arrangement with BioMax, demonstrating how vetted they were because they "know the space," *i.e.*, they knew many abortion providers and knew how to speak their language and the language of tissue procurement providers. Daleiden Dec., ¶ 23.

D. Results of the Undercover Investigation.

In carrying out the Human Capital Project, Daleiden and CMP uncovered and exposed significant evidence of unlawful activity in the abortion industry. This evidence included widespread tolerance for, and open willingness to participate in, activities that are clearly illegal under federal law and the law of most states, such as the sale of fetal tissue for profit and the alteration of abortion methods to procure fetal tissue specimens. For example, a sampling of recordings and other materials from NAF's Annual Meetings, currently restricted from disclosure by the TRO, show the following:

[redacted]

[5] NAF's quotation of the recording connects two remarks that were in fact a minute apart.

[redacted]

[redacted]

[redacted]

[redacted]

Moreover, Daleiden and the other investigators also documented evidence of remarkable de-sensitization in the attitudes of industry participants toward highly developed fetal life—yet, at the same time, occasionally admitting severe moral qualms about destroying highly developed human fetuses. In addition to evidence uncovered in other portions of the Human Capital Project, recordings at the NAF meetings reveal the following:

[redacted]

[redacted]

To date, Daleiden and CMP have not disclosed publicly or caused be disclosed publicly any

of this information or the documents or recordings obtained at the NAF meetings. Daleiden Dec., ¶ 24. In May 2015, Daleiden provided to law enforcement in El Dorado County, California, [redacted] *Id.* In June or July of 2015, Daleiden gave short video clips to law enforcement personnel in Texas. *Id.* CMP and Daleiden also responded to the congressional subpoena. *Id.* Other than these instances and a short written report to CMP donors (App'x Ex. 26), Daleiden and CMP have made no other disclosures of recordings or documents from NAF meetings. Daleiden Dec., ¶ 24.

E. CMP Releases Videos from the Human Capital Project.

On July 14, 2015, CMP released two videos of Daleiden's lunch meeting with Deborah Nucatola, Medical Director of Planned Parenthood Federation of America (PPFA). Daleiden Dec., ¶ 25. One video, lasting well over two hours, contained the entire conversation with Nucatola. *Id.* The other video was a shorter summary version of the highlights from the conversation.[6] *Id.* This video contained statements from Nucatola reflecting a clear willingness to profit from the sale of fetal tissue for research, and admitting to alteration of abortion methods to procure fetal tissue. It also contained statements reflecting an extraordinary level of callousness toward the harvest of human body parts, as Dr. Nucatola casually discussed harvesting human livers while sipping wine and eating salad.

This video triggered enormous public interest on all sides of the abortion debate. It dominated national headlines and sparked a vigorous congressional debate that continues to this day. Public reactions included widespread shock, not only at the obvious willingness to engage in criminal activity, but also at the evident de-sensitization toward the highly developed human fetus reflected in the video. Even longtime abortion rights supporters, such as Hillary Clinton, described the video as "obviously . . . disturbing." Eliza Collins, *Hillary Clinton: Planned Parenthood videos*

[6] While NAF erroneously claims that the claims that the shorter versions of the CMP videos were edited in a misleading manner, it is telling that NAF opposes the release of even full length, unedited investigative footage. Thus, NAF's real objection is to the public and government actors becoming aware of the *content* of the videos, rather than the manner in which CMP presents that content.

'disturbing', attached as Exhibit 30.

Two days later, PPFA President Cecile Richards issued a statement apologizing for the "unacceptable . . . tone and statements" of a "staff member," which, Richards claimed, did not reflect Planned Parenthood's "top priority" of providing "compassionate care." *See* Press Release issued by Cecile Richards, President of Planned Parenthood Federation of America on July 16, 2015, attached as Exhibit 31.

On July 21, 2015, CMP released two more videos—an unedited 73-minute video, and a shorter highlights summary—from a lunch meeting with another Planned Parenthood "staff member," Dr. Mary Gatter, President of the PPFA Medical Director's Council and Medical Director of Planned Parenthood Los Angeles. Daleiden Dec., ¶ 26. Daleiden had met Gatter at a Society of Family Planning conference in October 2014. *Id.* Again, as in the other videos, the Gatter video contained numerous statements reflecting Gatter's evident willingness to engage in the sale of human fetal tissue for profit (*e.g.*, joking that "I want a Lamborghini"), and it included a powerful display of her de-sensitization toward the human fetus.

Again, CMP's release of the Gatter video provoked enormous public interest. As with the Nucatola video, public reaction included shock at both the evident willingness to engage in criminal activity, and the desensitization toward the human fetus reflected in the video.

CMP continued to release other videos, always releasing full videos simultaneously with the shorter versions. Daleiden Dec., ¶ 27. One video was of a site visit to Planned Parenthood Rocky Mountains, where Savita Ginde is the medical director. *Id.* Dr. Ginde had met Daleiden at a Society of Family Planning conference in 2014, and Dr. Ginde later invited him to visit the clinic to discuss a possible business relationship. *Id.* Again, the videos contained evidence of dramatic de-sensitization toward human beings in the womb. The videos continued to provoke enormous public interest and spark public and political debate.

Additionally, CMP released portions of a documentary entitled "The Human Capital Project" based primarily on an interview of a former employee of a fetal tissue procurement company, Holly O'Donnell, relating her experiences and observations, interspersed with clips from

covertly taped conversations with abortion providers and tissue procurement specialists that corroborate or illustrate Ms. O'Donnell's statements. Daleiden Dec., ¶ 28.

In the aftermath of the release of these videos, NAF has expended considerable resources scouring the Internet for evidence that its members have suffered any legally cognizable harm attributable to Defendants. [redacted] Other than hyperbolic comments on comment threads and social media, NAF has presented no admissible evidence that any threat was ever communicated directly to any NAF member or abortion provider. [redacted]

ARGUMENT

"A plaintiff seeking a preliminary injunction must show that: (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in her favor, and (4) an injunction is in the public interest." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) ("*Garcia II*") (quotation omitted). "The Supreme Court has emphasized that preliminary injunctions are an extraordinary remedy never awarded as of right." *Id.* (quotation omitted). Here, all four of the relevant factors strongly favor denying NAF's request for a preliminary injunction.

I. NAF Is Not Likely to Succeed on the Merits of Its Claims.

The most important factor in considering whether to grant a preliminary injunction is the likelihood that the plaintiff will succeed on the merits. *Id.* Here, NAF has made no plausible showing of likelihood of success on the merits of the two claims it relies on: breach of contract and violation of Penal Code section 632.

A. NAF is not likely to succeed on its claim for breach of contract.

In arguing that it likely to succeed on the merits of its breach of contract claims, NAF deliberately treats the Exhibitor Agreements, Doc. 225-6, and the Confidentiality Agreements, Doc. 225-8, as if they were interchangeable. This is incorrect. The two agreements have different terms

and were executed – or not executed – under different circumstances. NAF is unlikely to succeed on the merits of its breach of contract claims for either set of contracts.

1. The Confidentiality Agreements are unenforceable as a matter of law because they are not supported by consideration.

NAF cannot enforce the Confidentiality Agreements, because they are not supported by consideration. It is beyond dispute that a contract is unenforceable unless it is supported by adequate consideration. *Chicago Title Ins. Co. v. AMZ Ins. Servs., Inc.*, 188 Cal.App.4th 401, 423 (2010). It is similarly indisputable that a commitment to perform a pre-existing legal or contractual obligation cannot constitute the consideration sufficient to support a binding contract. *See, e.g.*, *Auerbach v. Great Western Bank*, 74 Cal.App.4th 1172, 1185 (1999) ("[D]oing or promising to do something one is already legally bound to do cannot constitute the consideration needed to support a binding contract."); Cal. Civ. Code § 1605 (defining consideration as "[a]ny benefit conferred . . . upon the promisor . . . to which the promisor is not [already] lawfully entitled"); Cal. Civ. Code § 3391 (providing that specific performance cannot be enforced in the absence of adequate consideration).

Here, the consideration provided by NAF to BioMax under the Exhibitor Agreement executed in advance of the meetings included the right to enter the NAF meetings. *See* Doc. 225, at 4-5; App'x Ex. 3. Thus, when some of the BioMax representatives executed the Confidentiality Agreements on their arrival at the meetings,[7] NAF already had a legal obligation to permit them to access the NAF meetings. But the Confidentiality Agreements did not provide any benefits to the representatives other than access to the NAF meetings. *See* App'x Ex. 5. Because the only benefit provided under the Confidentiality Agreements was NAF's promise to comply with its pre-existing contractual obligations, the Confidentiality Agreements are not supported by any consideration and thus are unenforceable. *Chicago Title*, 188 Cal.App.4th at 423; *Auerbach*, 74 Cal.App.4th at 1185.

Further, only the Confidentiality Agreement placed any restrictions on video and audio

[7] Three of the BioMax representatives did not execute Confidentiality Agreements at the 2015 NAF meeting, and thus this discussion is irrelevant as to them at that meeting. Daleiden Dec., ¶ 17.

recording.[8] Thus, NAF cannot prevail on its breach of contract claim based on either recording or disclosure, because the Confidentiality Agreements are not enforceable and/or were not executed.[9]

2. NAF cannot prevail on its claims that Defendants breached the Exhibitor Agreement.

a. NAF cannot prevail on its claim that BioMax breached the Exhibitor Agreement by misrepresenting itself.

NAF first claims that Defendants breached Paragraph 15 of the Exhibitor Agreement, requiring exhibitors to represent themselves and their business truthfully and accurately, and that "in order to infiltrate NAF's annual meetings without raising suspicions, Defendants engaged in an elaborate fraud." Doc. 225, at 15:24 – 16:1.

However, the Exhibitor Agreement stated only that the exhibitor—in the instance case, BioMax—would identify, display, and represent its "*business, products, and/or services*" truthfully and accurately to conference attendees. *See* Doc. 1-1, ¶ 15. The Exhibitor Agreement says nothing about how exhibitors represent "themselves" personally. By citing BioMax's Secretary of State registration, website, social media presence, etc., NAF apparently is claiming that the

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[8] It should also be noted that NAF's interpretation of the Confidentiality Agreements to forbid all audio and video recording is not supported by the wording of the agreement, which provides that "Attendees are prohibited from making video, audio, photographic, or other recordings of the *meetings or discussions* at this conference." Doc. 225-8, ¶ 1 (emphasis added). The most natural reading of the term "meetings" is that it refers only to formal events at NAF conferences. The text of the provision draws a distinction between "meetings" and the "conference." *Id.* NAF seeks to elide the distinction between these terms, but where contracting parties use two different terms, courts interpret those terms to give each term an independent meaning. *See Farmers Ins. Exchange v. Knopp*, 50 Cal.App.4th 1415, 1421 (1996). NAF's interpretation would render the phrase "of the meetings or discussions" entirely superfluous and inoperative by interpreting the contract to cover everything that occurred at the conference. "It is a well-established rule of statutory construction that courts should not interpret statutes in a way that renders a provision superfluous." *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 966 (9th Cir. 2013). Moreover, as noted above, Paragraph 2 of the Confidentiality Agreement uses the term "discussions" to refer only to formal presentations. Courts presume that contracts intend a word to carry the same meaning each time that word appears in the contract. *See People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 107 Cal. App. 4th 516, 526 (2003) (collecting cases). Thus, here too the term "discussion" refers only to *formal* discussions, such as panel discussions during presentations. Therefore, the no-recording provision of the Confidentiality Agreement applies, at most, to *formal* portions of the NAF meetings, not to informal or private conversations that take place at the conferences.

[9] Moreover, only the Confidentiality Agreement contains the provisions requiring signers to notify NAF if conference information becomes subject to a discovery request and to cooperate with NAF to resist or narrow any such request.

Exhibitor Agreement governs exhibitors' representations beyond the confines of NAF meetings, so that a failure to be truthful in any aspect of its business, in any forum, constitutes a breach of the Exhibitor Agreement. *See* Doc. 225, at 16:1-6. This is an absurd and overreaching interpretation of the language of the agreement. It is, moreover, an interpretation that seeks to obscure the fact that *NAF has not presented any evidence* that anyone associated with NAF, much less the staff members responsible for granting exhibitors access to its meetings, looked at BioMax's Secretary of State's registration, website, CEO's Facebook page, business cards, or any other material before approving BioMax's exhibitor application.

NAF entered into the Exhibitor Agreement with BioMax Procurement Services, LLC, not with CMP or Daleiden or Newman. BioMax's business at NAF's meetings and other meetings it attended was to assess the market for clinics and abortion providers willing to partner with it in buying and selling fetal tissue. This it did.

Moreover, Paragraph 15 of the Exhibitor Agreement provides for a specific remedy for putative misrepresentations of an exhibitor's "business, products, and/or services." It specifies that the provision of inaccurate or misleading information during the conference "is grounds for cancellation of this Agreement and/or removal of the exhibit by the Exhibitor, at the Exhibitor's expense, promptly upon notification from NAF." Doc. 1-1, ¶ 15. This provision of a specific remedy in Paragraph 15 forecloses NAF's attempt to impose a much broader remedy—*i.e.*, a gag order on Defendants' speech—for their putative violation of Paragraph 15. *See, e.g., Walsh v. Bd. of Admin.*, 4 Cal.App.4th 682, 712 (1992) ("[R]ules of construction require that we give effect to specific provisions over general provisions.").

b. The Exhibitor Agreement's confidentiality provisions are ambiguous, irrational, contradictory, and unenforceable.

In the first hearing on this matter, this Court correctly noted that Conference Information was "very broadly defined" in the Confidentiality Agreement. The same can be said of the description of information protected under the Exhibitor Agreement.

In the context of confidentiality agreements, overbreadth is a vice, not a virtue. Courts narrowly construe contractual provisions that restrict the free flow of information, particularly on

matters of public interest. *See, e.g., Wildmon v. Berwick Universal Pictures*, 803 F. Supp. 1167, 1171, 1177-78 (N.D. Miss. 1992), *aff'd without op.* 979 F.2d 209 (5th Cir.) (narrowly interpreting a contract provision restricting the dissemination of an interview, and explaining that the contract "should be read in a way that allows viewership and encourages debate"); *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp.2d 1127, 1137 (N.D. Cal. 2002) (relying on public-policy considerations to construe confidentiality agreements narrowly). Thus, if able to, courts should construe a non-disclosure agreement narrowly, consistent with the public's strong interest in hearing speech on matters of legitimate public concern. *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967).

Moreover, courts "must interpret a contract in a manner that is reasonable and does not lead to an absurd result." *Roden v. AmerisourceBergen Corp.*, 186 Cal. App. 4th 620, 651 (2010); *see also* Cal. Civ. Code § 1643 (requiring that a contract receive "such an interpretation as will make it . . . reasonable").

The Exhibitor Agreement provides, in pertinent part:

> In connection with NAF's Annual Meeting, Exhibitor understands that any information NAF may furnish is confidential and not available to the public. Exhibitor agrees that all written information provided by NAF, or any information which is disclosed orally or visually to Exhibitor, or any other exhibitor or attendee, will be used solely in conjunction with Exhibitor's business and will be made available only to Exhibitor's officers, employees, and agents. Unless authorized in writing by NAF, all information is confidential and should not be disclosed to any other individual or third parties.

Doc. 225-6, ¶ 17. NAF construes this language to mean that any piece of information that is available in any form at any Annual Meeting is "confidential" and therefore subject to the restrictions on disclosure to third parties. According to NAF, this includes everything from the contents of formal presentations to the identity of individual attendees and their remarks in informal conversations. This imprecise and overbroad interpretation should be rejected. *See* Cal. Civ. Code § 3390 ("An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable" cannot be specifically enforced); *Weddington Prods., Inc. v. Flick*, 60 Cal. App. 4th 793, 816 (1998) (holding that an agreement "must not only

contain all the material terms but also express each in a reasonably definite manner").

The implications of NAF's interpretation are manifestly unreasonable. NAF claims strict control over, *e.g.*, the dissemination of information provided to doctors during any of the many accredited continuing medical education sessions. Although required by law to take these classes to maintain and improve their ability to serve their patients, doctors may not repeat anything they learned to other medical professionals without NAF's written permission and without ensuring that the information will be kept in confidence by the person who is told.[10] Such a restriction could easily hamper a doctor's ability to provide appropriate, timely care, if he cannot communicate the best course of treatment for a patient without first getting written permission from NAF. A doctor could also not tell a colleague about newly-published research or publicly available resources if she learned that information at an educational session at a NAF meeting. Attendees may not tell anyone about laws and regulations they learned about.

The Exhibitor Agreement, as interpreted by NAF, would also hamper the very business and networking opportunities that exhibitors presumably thought they were gaining when they paid thousands of dollars to exhibit at the Meetings. For example, if an exhibitor discussed his services with a conference attendee, the information exchanged in the conversation would fall within the scope of the agreement and be subject to NAF's control. To disclose the content of the conversation to a third party (e.g., in the case of Stem Express, discussing what abortion clinic could supply fetal tissue with the researchers who would receive the tissue), the parties would first need to obtain NAF's written consent.

More importantly, however, this interpretation is manifestly untenable in light of the remainder of the first sentence of section 17: "and not available to the public." No exhibitor could "understand" that all the information from the meeting is "not available to the public" when 1) much of the information from NAF meetings, even in formal presentations, clearly is available to the public, and 2) neither NAF nor its Exhibitors have any way of knowing how much other

[10] Doctors and clinics are included among the exhibitors at NAF meetings.

information that circulates informally at NAF meetings is available to the public. See Statement of Facts, Section B, *supra*. The Agreement, as interpreted by NAF, is thus fatally flawed.

Moreover, NAF claims that the Exhibitor Agreements (and the Confidentiality Agreements) are intended to protect interests that are found nowhere in the language of the Agreements. Specifically, NAF represented to this Court that "these are not contracts that were designed to protect some narrow trade secret concept of confidentiality. These are contracts that were designed to protect people's privacy, designed to protect them from harassment, designed to protect them from death threats." Transcript of Sept. 1, 2015 Hearing, attached as Exhibit 32, at 25:5-9. [redacted]

Far from being evident from the wording of the Exhibitor Agreements, this construction, which NAF has reiterated in several filings, is nowhere to be found on the face of the documents. To quote NAF's own brief, "The parties' undisclosed intent or understanding is irrelevant to contract interpretation." Doc. 225, at 18:22-24; *see also Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.,* 109 Cal.App.4th 944, 956 (2003). Neither agreement says anything about protecting the privacy, safety, security or identity of NAF members or attendees.[11] If the primary purpose of the agreements is to prevent exhibitors and attendees from revealing the identities of other attendees and/or other personal details about them that could compromise their safety or security, the agreements completely miss the mark. No reasonable person who read and executed those agreements would understand that their purpose was to prevent an attendee from later telling a third party, "I saw Dr. Smith at a NAF meeting last April, and he told me his new clinic is doing well." Ironically, NAF relies on an affidavit from Jennifer Dunn, whose publicly available Curriculum Vitae lists as a "Select Presentation" "Disposition of Fetal Remains under State Law, Panel on Fetal Disposal Choices and Restrictions, NAF Annual Meeting, San Francisco, 2014." C.V. of Professor Jennifer Dunn, attached as Exhibit 33.

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[11] The Confidentiality Agreement defines the protected "NAF Conference Information" as "all information distributed or otherwise made available at this conference by NAF or any conference participants through all written materials, discussions, workshops, or other means." Doc. 1-2, ¶ 2.

For these reasons, the agreements are not only poorly suited but grossly overbroad. NAF interprets the agreements to severely restrict the dissemination of publicly available information gained at NAF meetings and information intended to "enhance the quality and safety" of abortion services, in the service of a completely unrelated end, i.e., preventing NAF members "from being harassed and smeared." Doc. 225, at 20:14-15. Rather than saving the Exhibitor Agreement by imposing this hidden rationale on it, NAF further demonstrates that the Agreement is incurably defective.

Understandably, NAF avoids discussing the specific language of the Exhibitor Agreement, not even quoting the language in its motion. NAF has not offered any construction of the actual language of the agreement that would point to a narrower, more reasonable interpretation. NAF might, for example, argue that the words "and not available to the public" were intended as a limitation on what information is "confidential" under the Agreement. It might borrow a definition of "confidential information" from trade secret law, and say that the intent is to cover information that is both proprietary in nature and not available to the public. It might make a distinction between information obtained at formal presentations versus that gained in informal conversations, as explained in the following section. It might even rely on its theory that the agreements are intended to protect privacy and safety and say that "confidential information" refers to personal and identifying information. Instead, NAF stands by its irrational interpretation of these agreements to mean that "all information" learned at the meetings is "confidential" and "not available to the public," and thus subject to the non-disclosure provisions.

Additionally, NAF claims that its agreements, which only apply to NAF meetings, somehow cover conversations held months after any NAF meeting, at other locations. This patently unreasonable reading of the contracts is untenable and further illustrates their overbroad, malleable nature.

Because NAF drafted the Exhibitor Agreement, which constitutes a contract of adhesion, the agreements must be construed against NAF and in favor of Defendants. A contract of adhesion is "a standardized contract, which, imposed and drafted by the party of superior bargaining

strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Perdue v. Crocker Nat'l Bank*, 38 Cal.3d 913, 925 (1985). NAF does not and cannot contest that the Exhibitor Agreements constitute standard form contracts that were presented on a take-it-or-leave-it basis as non-negotiable conditions of attending NAF's conferences. *See* Doc. 225, at 4-5; Doc. 131, ¶¶ 66, 68, 70, 74, 96. As non-negotiable contracts of adhesion dictated by parties having superior bargaining power, under the *contra proferentem* canon, the Exhibitor Agreements must be construed against NAF and in favor of Defendants. *See, e.g.*, *Rebolledo v. Tilly's, Inc.*, 228 Cal. App. 4th 900, 913 (2014) (internal quotation marks omitted) ("[A]mbiguities in standard form contracts are to be construed against the drafter.").

In sum, the Exhibitor Agreement cannot be enforced because NAF's interpretation is unreasonable and would lead to absurd results.

c. Other provisions of the Exhibitor Agreement demonstrate the overbreadth and unreasonableness of NAF's interpretation.

Moreover, even if it were enforceable, the Exhibitor Agreement would apply, at most, only to information provided by NAF itself, not by conference attendees in informal conversations. As noted, the Exhibitor Agreement restricts disclosure only of information that "NAF may furnish," and "information provided by NAF." Doc. 225-6, ¶ 17. Courts must interpret contractual language consistent with "the doctrine of noscitur a sociis," which mandates "that a word takes its meaning from the company it keeps." *Blue Shield of Cal. Life & Health Ins. Co. v. Superior Court*, 192 Cal. App. 4th 727, 740 (2011). "Under this principle, courts will adopt a restrictive meaning of a listed item if acceptance of a broader meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list." *Id.* Applying that principle here, the phrase "written information provided by NAF" informs the interpretation of the immediately following phrase "or any information which is disclosed orally or visually." Doc. 225-6, ¶ 17; *see Blue Shield*, 192 Cal. App. 4th at 740. Providing information in a written medium connotes formality, such as through brochures, agendas, lecture notes, presentations, and similar materials. Thus, the confidentiality provisions of the Exhibitor Agreement would apply at most to *formal* oral and visual disclosures, such as disclosures in

workshops and presentations—not informal conversations with conference attendees. Further, courts "must interpret a contract in a manner that is reasonable and does not lead to an absurd result." *Roden*, 186 Cal.App.4th at 651; *see also* Cal. Civ. Code § 1643 (requiring that a contract receive "such an interpretation as will make it . . . reasonable"). Interpreting the phrase "information which is disclosed orally or visually" to include every informational statement made at NAF meetings—both formal and informal, both professional as well as private or personal—would lead to unreasonable and untenable results, as discussed above.

Moreover, NAF's overreaching interpretation would create an inexplicable disparity between information provided by third parties in *written* form and information provided in *oral* or *visual* form. The former would receive no protection under the Exhibitor Agreement, because the clause covers only "written information *provided by NAF*." Doc. 225-6, ¶ 17. On the other hand, under NAF's interpretation, oral or visual communications would receive full protection. No principled basis supports this differential treatment. Again, at most, the confidentiality provisions of the Exhibitor Agreement apply only to information provided in formal contexts by NAF, not to information disclosed in informal contexts or from other conference attendees.[12]

Furthermore, for the reasons stated below, NAF's request for a preliminary injunction based on the contract would constitute an unconstitutional prior restraint under the First Amendment;

[12] A similar analysis would apply to the Confidentiality Agreements, if they were in force (which they are not). Under the doctrine of *noscitur a sociis*, the terms "written materials" and "workshops" inform the interpretation of "discussions" and "other means." *Blue Shield*, 192 Cal. App. 4th at 740. The terms "workshops" and "written materials," as well as the phrase "information distributed," plainly refer to formal disclosures through meeting handouts, formal presentations, formal workshops, and similar events. These implications of formality also apply to the other items in the same list, that is, "discussions" and "other means. Further, the second sentence in Paragraph 2 of the Confidentiality Agreement suggests that the first sentence refers only to information disclosed in formal presentations, not informal discussions. The second sentence states that "NAF Conference Information is provided to Attendees to help enhance the quality and safety of services provided by NAF members and other participants." Doc. 225-8, ¶ 2. This would be an awkward and unnatural way to describe many of the informal conversations that take place between conference participants, but it readily applies to the content of formal presentations, workshops, etc. Thus, reading the two sentences together, "NAF Conference Information" refers only to the content of formal presentations, not informal conversations between participants. *See AB Grp. v. Wertin*, 59 Cal. App. 4th 1022, 1035 (1997) (explaining that the various provisions of a contract must be read together).

NAF has not made a sufficient showing of a knowing and intelligent waiver of First Amendment rights by any or all Defendants; and the confidentiality provisions of NAF's contracts are unenforceable in this case as a matter of public policy. *See infra* Parts I.C, IV. For all these reasons as well, NAF is unlikely to prevail on its breach of contract claim.

B. California Penal Code § 632 does not authorize injunctive relief against the disclosure of undercover recordings.

NAF also premises its request for a preliminary injunction on its claim under California Penal Code § 632. *See* Doc. 225, at 22. NAF's § 632 claim lacks merit for two reasons. First, as California courts have repeatedly explained, § 632 does not prohibit publication or disclosure of recordings made in violation of the statute, and thus § 632 does not authorize the injunctive relief that NAF seeks. Second, NAF has failed to identify any recordings of "confidential communications" within the meaning of § 632, and thus NAF is not likely to succeed on the merits of its claim.

1. Section 632 does not prohibit publication of recordings made in violation of the statute, and thus the statute does not authorize NAF's requested injunctive relief.

The Court should deny NAF's requested preliminary injunctive relief, because the conduct that NAF seeks to have restrained clearly does not violate California Penal Code § 632. By its plain terms, § 632 prohibits only "eavesdrop[ping]" and non-consensual "record[ing]" of confidential communications; it says nothing about the disposition of recordings made in violation of the statute. *See* Cal. Penal Code § 632(a). For this reason, California courts have uniformly and repeatedly held that "Penal Code section 632 does not prohibit the *disclosure* of information gathered in violation of its terms." *Lieberman v. KCOP Television, Inc.*, 110 Cal.App.4th 156, 167 (2003) (emphasis added). "Although a recording preserves the conversation and thus could cause greater damage to an individual's privacy in the future, *these losses are not protected by section 632*. Instead, section 632 protects only the speaker's right to know and control the firsthand dissemination of the conversation as it is occurring." *Kight v. CashCall, Inc.*, 200 Cal.App.4th 1377, 1393 (2011) (internal citations omitted; emphasis added); *see also Coulter v. Bank of Am.*, 28

Cal.App.4th 923, 930 (1994) ("Section 632 prohibits *recording* a confidential communication without consent of all parties. It says nothing about publishing the communication to a third party.").

Thus, it is indisputable that no *publication or disclosure* of already-recorded materials could violate § 632. But NAF's requested injunctive relief relates to "publishing or otherwise disclosing" already-recorded materials. Doc. 225, at i. NAF does not seek to enjoin any ongoing or future eavesdropping or recording. *Id.* Thus, the conduct that NAF seeks to restrain would not violate § 632. *See Lieberman*, 110 Cal.App.4th at 167; *Kight*, 200 Cal.App.4th at 1393. And if the conduct does not violate § 632, then the statute does not authorize injunctive relief to restrain that conduct. *See* Cal. Penal Code § 637.2(b) (authorizing injunctive relief only "to enjoin and restrain any violation of this chapter"). Thus, NAF's request for preliminary injunctive relief based on § 632 has no basis in law.

2. NAF has failed to identify any "confidential communications" within the meaning of § 632, and thus it has failed to show any violations of the statute.

NAF's § 632 claim also lacks merit because NAF has failed to identify any recordings that constitute "confidential communications" within the meaning of California Penal Code § 632. Section 632 does not prohibit all undercover recordings. Instead, § 632 proscribes non-consensual recording of a conversation *only if* that conversation constitutes a "confidential communication." *See* Cal. Penal Code § 632(a) (imposing criminal sanctions on any person who "eavesdrops upon or records" any "confidential communication"). "[A] conversation is confidential under section 632 if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded." *Flanagan v. Flanagan*, 27 Cal.4th 766, 776-77 (2002). "[A] communication is not confidential when the parties may reasonably expect other persons to overhear it." *Lieberman*, 110 Cal.App.4th at 168. Moreover, the statute specifically provides that the category "confidential communication" "excludes a communication made in a public gathering . . . or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." Cal. Penal Code § 632(c).

NAF has not identified a single recording that fits within the statutory definition of "confidential communication." *See* Doc. 225, at 22. Instead, NAF contends that *every* presentation and conversation at its 800-attendee meetings constitutes a "confidential communication." *Id.* To support this remarkable proposition, NAF relies exclusively on "the extensive security measures NAF is forced to take, and the Exhibitor Agreements and NDAs that must be signed to gain admittance to its meetings." *Id.* But these considerations do not show that the individuals recorded at NAF's meetings had "an objectively reasonable expectation that the conversation is not being overheard or recorded." *Flanagan*, 27 Cal.4th at 776-77.

First, the Confidentiality Agreement, the only agreement that prohibits recording, could not have given attendees a reasonable belief that their conversations at the conference would not be overheard. Section 632 prohibits recordings only if conversation participants reasonably believe that their conversations will be *neither* recorded *nor* overheard. *Flanagan*, 27 Cal.4th at 777. The Confidentiality Agreement may have provided some expectation that conversations at the conference would not be recorded. *See generally* Docs. 3-7, 3-8. But nothing in the Confidentiality Agreement affects whether third parties can *overhear* conversations at the meetings. *See id.* The Confidentiality Agreement has no bearing on whether conversations at the NAF meetings could be overheard by third parties, and "a communication is not confidential when the parties may reasonably expect other persons to overhear it." *Lieberman*, 110 Cal.App.4th at 168; *see also Matter of John Doe Trader Number One*, 894 F.2d 240, 243-44 (7th Cir. 1990) (holding that a party had no reasonable expectation of privacy under the federal Wiretap Act in the Chicago Mercantile Exchange despite Exchange rules that expressly prohibited recordings, and characterizing the party's purported expectation of privacy as "naïve rather than reasonable"). Thus, NAF's reliance on the Confidentiality Agreement is misplaced.

Second, the "security measures" implemented by NAF also could not have given conference attendees a reasonable belief that their conversations would not be overheard. NAF's security measures all essentially boil down to methods of limiting conference access to NAF members and others vetted by NAF. *See generally* Doc. 225, at 3-5. Putting aside the fact that

numerous individuals who were present at NAF meetings had not signed any contract with NAF, these attendance-limiting measures have no effect on whether a third party—whether another attendee or venue staff—can overhear conversations. Whether a third party can overhear a conversation has nothing to do with whether that person has been vetted by NAF. Even at a limited-attendance event, the reasonable expectation that third parties might overhear a conversation precludes the conversation from being "confidential." *Turnbull v. Am. Broadcasting Cos.*, No. CV-03-3554-SJO, 2005 WL 6054964, at *6 (C.D. Cal. Mar. 7, 2005) (noting that where two people talked openly in a closed actors' workshop and were aware that another person was within earshot, the conversation was not confidential). Indeed, the Seventh Circuit has rejected almost precisely this argument under the analogous federal Wiretap Act. *See Matter of John Doe Trader Number One*, 894 F.2d at 243 (rejecting argument that person had reasonable expectation of privacy based on "the security surrounding the Exchange and its membership requirements").

NAF relies entirely on *Sanders v. ABC, Inc*., 20 Cal.4th 907 (1999), to argue that the communications between BioMax representatives and NAF attendees were confidential. *See* Doc. 225, at 22. But NAF plainly misrepresents the holding of that case. In *Sanders*, an undercover journalist working for ABC surreptitiously recorded a tele-psychic in an employee workroom where one or two other employees could have overheard the conversation. The employee sued ABC, alleging claims for (1) violation of § 632, and (2) the common-law tort of invasion of privacy by intrusion. *Sanders*, 20 Cal.4th at 912-13. A jury returned a verdict rejecting the Section 632 claim on the ground that the parties to the conversation "may reasonably have expected that the communications may have been overheard" by coworkers. *Id.* at 913. This judgment in favor of the *defendant* on the Section 632 claim was not challenged on appeal. *Id.* Rather, the California Supreme Court held that the possibility of overhearing—while fatal to the Section 632 claim—did not necessarily bar recovery on the invasion-of-privacy claim. *Id.* at 914. But NAF does not assert an invasion-of-privacy tort as a basis for injunctive relief, so *Sanders* provides no support for its position. On the contrary, the trial-court judgment in *Sanders* reaffirms that, even within a relatively secluded workplace, the possibility of being overheard by coworkers defeats a Section

632 claim. Moreover, *Sanders* stated that "we do not hold or imply that investigative journalists necessarily commit a tort by secretly recording events and conversations in offices, stores or other workplaces. Whether a reasonable expectation of privacy is violated by such recording depends on the exact nature of the conduct and all the surrounding circumstances." *Id.* at 911. *Sanders* also expressly declined to reach any First Amendment defense. *Id.* at 923.

NAF's reliance on *Sanders* is also misplaced because, as explained by the Ninth Circuit, "the expectation that a communication shared with, or possibly overheard by, a limited group of persons will nonetheless remain relatively private and secluded from the public at large [] is reasonable *only to the extent that the communication conveys information private and personal to the declarant*." *Med. Lab.*, 306 F.3d at 814 (emphasis added). Here, the recorded discussions were professional and commercial, not personal, in nature.

NAF fails to identify a single recording that purports to involve a "confidential" communication within the meaning of Section 632. Thus, even if injunctive relief were available, NAF's § 632 claim fails on the merits.

C. NAF's requested preliminary injunction would constitute an unconstitutional prior restraint on speech, in violation of the First Amendment.

1. NAF is asking this court to impose an unconstitutional prior restraint on Defendants' speech.

The Court should deny NAF's requested preliminary injunction, because it would constitute an impermissible prior restraint on speech, in violation of the First Amendment. "[P]rior restraints . . . are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "Prior restraints are the essence of censorship, and our distaste for censorship reflecting the natural distaste of a free people is deep-written in our law." *Id.* at 589 (Brennan, J., concurring) (internal citations and punctuation omitted). "Any prior restraint on expression comes to [the court] with a heavy presumption against its constitutional validity." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (internal quotation marks omitted). "Indeed, the Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial." *Proctor &*

Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 227 (6th Cir. 1996).

NAF's requested preliminary injunction constitutes a quintessential prior restraint. "Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993). The First Amendment tolerates such prior restraints on speech only to advance the most fundamental, weighty, and immediate interests. A prior restraint must relate to speech that "threaten[s] an interest more fundamental than the First Amendment itself." *Proctor & Gamble*, 78 F.3d at 227. "[P]rior restraints even within a recognized exception to the rule against prior restraints will be extremely difficult to justify." *Neb. Press Ass'n*, 427 U.S. at 592 (Brennan, J., concurring).

Courts have consistently rejected interests at least as compelling as those asserted by NAF as insufficient to justify a prior restraint on speech. In *New York Times Company v. United States*, 403 U.S. 713 (1971), the Supreme Court held that serious threats to national security, foreign relations, and the lives of American troops in Vietnam could not justify an injunction preventing the publication of stolen classified documents. *Id.* at 714. As Justice Blackmun's dissent observed, the disclosures at issue threatened "the death of soldiers, the destruction of alliances, . . . prolongation of the [Vietnam] war and of further delay in the freeing of United States prisoners." *Id.* at 763 (Blackmun, J. dissenting) (internal quotation marks omitted). Yet, despite the weighty nature of these threatened harms, the Court held that they still could not justify a prior restraint on the publication of stolen classified documents. *Id.* at 714.

Courts also have held that interests in personal privacy and reputation do not warrant prior restraints on speech. For example, in *Organization for a Better Austin v. Keefe*, the Court rejected the notion that "an invasion of privacy" could justify a prior restraint against circulating pamphlets claiming that a real-estate agent was orchestrating de facto segregation. 402 U.S. at 419-20. Moreover, under the First Amendment, "[t]he right of privacy does not prohibit any publication of matter which is of public or general interest." *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001) (internal quotation marks omitted). Similarly, reputational harm cannot justify prior restraints on

speech. *See, e.g.*, *Thompson v. Hayes*, 748 F. Supp. 2d 824, 831 (E.D. Tenn. 2010) (holding that plaintiffs reputational interests could not justify injunction against speech); *Saad v. Am. Diabetes Ass'n*, Case No. 15-10267, 2015 WL 751295, at *2 (D. Mass. Feb. 23, 2015) (similar).

NAF alleges that Defendants unlawfully obtained the materials that the injunction would cover—a contention that Defendants vigorously dispute. *See* Doc. 66-1. But even if NAF could show unlawful activity, that would not justify a prior restraint. "If [Defendants have] breached [their] state law obligations, the First Amendment requires that [NAF] remedy its harms through a damages proceeding rather than through suppression of protected speech." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers) (holding that injunction against television broadcast constituted unconstitutional prior restraint, even if the creation or publication of the video were unlawful). "[A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them . . . beforehand." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). "The First Amendment thus accords greater protection against prior restraints than it does against subsequent punishment for a particular speech." *Neb. Press Ass'n*, 427 U.S. at 589 (Brennan, J., concurring).

Likewise, NAF's tenuous assertion of risk of physical harms to its members cannot justify a prior restraint. As discussed above, NAF has not pointed to any concrete or imminent threats of physical harm attributable to Defendants, only speculative possibilities that unidentified third parties might engage in unspecified violence. The First Amendment permits prior restraints "only where the evil that would result from the reportage is both great and *certain*." *CBS*, 510 U.S. at 1317 (emphasis added). "[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." *N.Y. Times Co.*, 403 U.S. at 725-26 (Brennan, J., concurring). As Judge Reinhardt recently explained regarding the controversial film *Innocence of Muslims*: "If allegations of grave and irreparable danger to national security were insufficient to allow suppression of the Pentagon Papers, then threats to persons involved in making *Innocence of Muslims* could not justify the suppression of speech of great national import in this case either." *Garcia v. Google, Inc.*, 786 F.3d 727, 731 (9th

Cir. 2015) (Reinhardt, J., dissenting from initial denial of emergency rehearing en banc) ("*Garcia I*") (internal citation omitted).

More fundamentally, NAF cannot hold Defendants' speech hostage to threats made by third parties unaffiliated with Defendants. "As lawful political speech, the public's access to [Defendants' speech] could not constitutionally be restricted based on others' reaction to the speaker's message." *Id.* It is indisputable that speech cannot "be punished or banned, simply because it might offend a hostile mob." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 135 (1992).

NAF's novel theory, if widely accepted, would have a devastating impact upon the freedoms of speech and the press. In essence, NAF contends that the publication of newsworthy information can be enjoined, without violating the First Amendment, whenever some member of the general public may react in an inappropriate or unlawful manner upon learning of the information. This theory would impose a widespread chilling effect upon the reporting of any illegal or unethical conduct, which is a vitally important function of the press. As the Reporters Committee for Freedom of the Press has previously noted in this case, "any prior restraint on speech that is issued by a court has the potential to significantly affect the First Amendment rights of the news media and the public at large. The ramifications of having such a restraint in place go well beyond the unique facts of this dispute." Doc. 109-1, at 1.

NAF's allusion to "four incidents of arson at abortion care facilities" also falls far short of the stringent standard required to justify a prior restraint on speech. Doc. 225, at 14. NAF has made no effort to show any evidence of a causal link between Defendants' speech and those incidents, but merely speculates as to their cause. *See id.* Such speculation is clearly insufficient. "[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." *N.Y. Times Co.*, 403 U.S. at 725-26 (Brennan, J., concurring). Moreover, as noted above, the possible actions of third parties unrelated to Defendants cannot justify censoring Defendants' core political speech. *Forsyth Cnty.*,

505 U.S. at 135.[13]

2. NAF fails to make a "clear and compelling" showing of any knowing, voluntary, and intelligent "waiver" of First Amendment rights.

Even if the Court were to interpret the non-disclosure agreements to cover the recordings and other materials at issue here, those agreements did not constitute knowing, voluntary, and intelligent waivers of Defendants' First Amendment rights. "First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent." *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993). A finding that a party has waived its First Amendment rights must be "clear and compelling." *Curtis Publ'g*, 388 U.S. 130 at 145. "[I]n the civil no less than the criminal area, courts indulge every reasonable presumption against waiver [of constitutional rights]." *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972) (internal quotation marks omitted). "As the Supreme Court has often cautioned, waiver of a constitutional right must be construed narrowly." *Williams v. Ala.*, 341 F.2d 777, 781 (5th Cir. 1965).

First, as discussed above, the language used in the purported non-disclosure provisions of NAF's contracts is, at best, ambiguous and unclear. *See supra* Part I.A. These putative confidentiality provisions fail to satisfy the strict requirements for waivers of First Amendment rights. "[A] waiver of constitutional rights in any context must, at the very least, be clear." *Fuentes*, 407 U.S. at 95. "To be enforceable, the waiver provision['s] . . . language must be

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[13] NAF half-heartedly suggests in a footnote that its requested preliminary injunction would not constitute state action and thus would not implicate the First Amendment. This assertion plainly lacks merit. First, NAF seeks an injunction to enforce a state statute as well as a private contract; this plainly involves state action. *Paul v. Watchtower Bible & Tract Soc'y*, 819 F.2d 875, 880 (9th Cir. 1987) ("State laws whether statutory or common law, including tort rules, constitute state action."). Second, unlike an award of money damages, a court-issued injunction constitutes state action even if premised on a purported breach of contract. "[A]n injunction constitutes state action" and thus necessitates "a First Amendment analysis." *Gathright v. City of Portland*, 439 F.3d 573, 576 n.2 (9th Cir. 2006). "Injunctions directly compel or forbid a party's actions, and thus may be seen as placing the [enjoining] court's imprimatur behind the substance of the [contract] to that extent." *Ohno v. Yasuma*, 723 F.3d 984, 1000 (9th Cir. 2013); *see also Shelley v. Kraemer*, 334 U.S. 1, 19 (1948); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001). As *Ohno* observed, court procedures can constitute state action—and thus implicate constitutional limitations—even if the underlying merits of the claim do not. *Ohno*, 723 F.3d at 997.

unambiguous and unequivocal, leaving no room for doubt as to the intention of the parties." *A.H.D.C. v. City of Fresno*, No. CV-F-5498, 2000 WL 35810723, at *6 (E.D. Cal. Aug. 31, 2000) (internal punctuation omitted). As discussed above, there are compelling reasons to believe that the confidentiality provisions of the Exhibitor and Confidentiality Agreements are unenforceable and do not prohibit Defendants' contemplated future speech. At a minimum, the relevant contractual language is too uncertain and ambiguous to effect any waiver of First Amendment rights. *Id.* at *7 (declining to enforce waiver of First Amendment rights where "the language of the waiver provision is not clearly apparent").

Second, the non-disclosure agreements constitute contracts of adhesion. The non-disclosure agreements are "standardized contract[s], which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject [them]." *Sterlin v. Supercuts, Inc.*, 51 Cal.App.4th 1519, 1532 (1997). Courts generally will not enforce purported contractual waivers of constitutional rights "where the contract is one of adhesion." *Fuentes*, 407 U.S. at 95 (internal quotation marks omitted); *see also A.H.D.C.*, 2000 WL 35810723, at *7.

Third, unrebutted evidence shows that Daleiden did not understand the meaning of the non-disclosure agreements and did not believe them to constitute an enforceable waiver of constitutional rights. On reviewing the Exhibitor Agreement, Daleiden found its terms to be confusing and contradictory. Daleiden Dec., ¶ 12. Where a contracting party plainly does not understand the meaning of the agreement, any purported waiver of constitutional rights cannot be "knowing, voluntary and intelligent." *Leonard*, 12 F.3d at 889. Moreover, when he executed the non-disclosure agreements, Daleiden reasonably believed that any confidentiality obligations contained in the agreements were unenforceable to the extent that his investigation would uncover evidence of criminal activity. Daleiden Dec., ¶ 12. It is undisputed that CMP's purpose was to be able to observe and document evidence of criminal activity at NAF and among NAF members. Daleiden Dec., ¶ 3. For the reasons stated below, moreover, Daleiden's belief about the unenforceability of the non-disclosure agreement as applied to criminal activity was correct. *See*

infra Part IV.B. Thus, Daleiden did not believe that executing the non-disclosure agreements would relinquish any constitutional rights. Accordingly, NAF has not pointed to any "clear and convincing evidence that the waiver [was] knowing, voluntary and intelligent." *Leonard*, 12 F.3d at 889.

Moreover, even if there had been a "waiver" in this case, any such waiver would be plainly unenforceable as a matter of public policy, as discussed below. *See infra* Part IV.B.

D. NAF is not likely to succeed against Defendant Troy Newman.

Although NAF is not likely to succeed on the merits of its contract and Section 632 claims against any of the Defendants for the previously stated reasons, there are additional reasons why NAF has failed to demonstrate a likelihood of success against Defendant Troy Newman. NAF cannot sidestep its burden of proof with respect to Defendant Newman by simply pointing to the fact that he is a CMP board member and then asserting that any potential injunction against CMP would extend to him by virtue of Federal Rule of Civil Procedure 65(d)(2). NAF could have sued CMP alone, knowing that any potential injunction against CMP would extend to CMP's officers, but instead chose to also sue Newman and expressly include him in each of its claims. If NAF's only basis for the purported liability of Newman on its contract or recording claims is the fact that he is a CMP board member, NAF should expressly say so and dismiss its claims against him as a needless redundancy.

As Defendant Daleiden explained in his deposition—a transcript of which NAF has previously filed with the Court—[redacted] Although Newman has noted that anyone can easily obtain

undercover recording equipment, App'x Exh. 14, Doc. 225-17 at 4, [redacted]

Notably, NAF has *not* presented evidence that Troy Newman:

- sent emails to NAF on behalf of CMP or BioMax regarding the 2014 or 2015 NAF annual meetings,
- attended the 2014 or 2015 NAF annual meetings,
- recorded any individuals at the 2014 or 2015 NAF annual meetings,
- signed any contract with NAF,
- paid any consideration to NAF on behalf of CMP or BioMax,
- engaged in any follow-up meetings or communications with individuals that he made contact with due to their attendance at the 2014 or 2015 NAF annual meetings,
- has disclosed the dates or locations of any future NAF meetings,
- is a principal who exercises extensive control over the actions of the individuals who signed NAF agreements and/or recorded at NAF meetings, or
- issued any threats of violence to abortion providers or NAF in response to the release of the CMP videos.

Rather than providing a valid evidentiary basis to support a preliminary injunction against Defendant Newman, NAF instead makes irrelevant and inaccurate claims to support its characterization of Newman as an "extremist" and a "radical." Doc. 225. at 5. For instance, NAF cites various investigative activities of Operation Rescue—an organization of which Newman is the President that is not a party in this case—that are wholly unrelated to this litigation. Putting aside the irrelevance of these activities to the present litigation, NAF's own exhibits illustrate that Operation Rescue's lawful investigative activities have shed light on various illegal and unethical acts of abortion providers. NAF's Exhibit 19, excerpts from a book co-authored by Newman, states that Operation Rescue "[has] caught abortion clinic workers admitting that they are willing to conceal child rape, unlicensed workers illegally practicing medicine, and even evidence of an elaborate, bi-state late-term abortion scheme." Doc. 225-22 at 17. Another excerpt of the book that NAF has submitted recounts how Operation Rescue helped to expose what a Kansas City detective described as a "house of horrors," an abortion clinic at which "roaches were crawling across the counters" and "aborted fetuses were placed in Styrofoam cups next to TV dinners in the

refrigerator." Doc. 225-22 at 5. In discussing ways that readers can do their own investigative journalism through phone calls, the book states, "*[i]f it is legal to do so in your state*, we highly recommend that you record the call." Doc. 225-22 at 15 (emphasis added); *see also* Troy Newman & Cheryl Sullenger, Abortion Free: Your Manual for Building a Pro-Life America One Community at a Time (2014), attached as Exhibit 34.

Similarly, while NAF decries the existence of a website called AbortionDocs.org, NAF's Exhibit 21 includes the statement, "AbortionDocs.org is dedicated to providing documentation on abortion facilities and providers so the public can see for themselves the abuses that take place inside American abortion facilities by reading original documents. Those documents, including criminal indictments, reports of failed health inspections, medical board disciplinary orders, and other documents are available on this searchable website." Doc. 225-24 at 2.

Also, NAF attempts to mislead the Court into believing that Newman and Operation Rescue support vigilante acts of violence against abortion providers, which even *NAF's own evidence* shows is patently false. NAF's Exhibit 18, taken from Operation Rescue's website, states, "Operation Rescue was among the first to denounce the murder of late-term abortionist George Tiller in 2009 . . . . Operation Rescue explicitly denounces violence in any form as a means of ending abortion." NAF Exh. 18, at 3. NAF's Exhibit 2, a speculative article from the pro-abortion *Ms. Magazine*, acknowledges, "Immediately after Roeder killed Dr. Tiller, Newman issued a statement saying, 'We deplore the criminal actions with which Mr. Roeder is accused. . . . Operation Rescue has diligently and successfully worked for years through peaceful, legal means [to stop abortion].'" NAF Exh. 2, 225-5, at 3.

Additionally, NAF President Vicki Saporta's declaration erroneously claims that Defendant Newman "has called the murder of an abortion provider a 'justifiable defensive action,'" Saporta Decl., Doc. 3-34 at ¶ 9, without providing any citation for where that alleged statement came from.

[redacted]

[redacted] but advocating for a criminal defendant's right to present whatever defenses he deems appropriate as a matter of due process is a far cry from expressing one's personal agreement with the validity or morality of such defenses. In fact, a Christian theological study co-authored by Newman, "Their Blood Cries Out," which NAF produced during discovery and selectively quotes in its brief, NAF Br. at 5, makes this very point. Troy Newman & Cheryl Sullenger, Their Blood Cries Out (2003 revised ed.), attached as Exhibit 35, pp. 49-50 ("The civil government alone . . . has the God-given power of the sword, to take the life of the judicially guilty without incurring bloodguilt. The individual . . . does not have this authority . . . . [The state] can only take a guilty human life for specific capital offenses and then only through due process."). NAF conveniently omits parts of Newman's study that directly refute NAF's false claim that Newman is an "extremist" and "radical" who supports vigilante acts of violence, such as the following passage:

> Civil justice – that is, the justice that civil rules are to execute in behalf of the land as a whole – *is not something that an individual on his own can accomplish*. *Families and churches do not have the authority to execute anyone* or convene courts for civil justice. It is the civil authorities as representatives of the land that are given the task of avenging capital crimes (Romans 13). . . . Individuals, families, or churches operating on their own cannot establish justice on behalf of the civil authorities – that is, on behalf of the land. When those other than the civil government act in a way that usurps the responsibility of civil government, it does not cleanse the innocent blood *but adds to it*.

Id., p. 88 (emphasis added).

In light of the foregoing, NAF has failed to establish *any* of the four "essential elements" of its breach of contract claim against Newman: "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." *Reichert v. Gen. Ins. Co.*, 68 Cal. 2d 822, 830 (1968). NAF has not identified (1) a contract that it purportedly entered with Newman, (2) any "performance or excuse for nonperformance" of a contract obligation that NAF purportedly owed to Newman, (3) how Newman allegedly breached a contract with NAF, and (4) how Newman's alleged breach damaged NAF. NAF has not produced any exhibitor or non-disclosure agreement bearing Newman's signature, nor has it shown that Newman paid any consideration to NAF in relation to any contract, attended any NAF meeting, or recorded any individual in a manner that breaches any NAF agreement. Although NAF bears the

burden to establish *all four* of the essential elements of a contract claim, here it cannot establish even one of those elements against Newman.

NAF's bare-bones attempt to rope Newman into being bound by various contracts that he never signed is without merit. NAF's entire argument on this point is as follows:

> BioMax, the 'front organization' for CMP, was and is the agent and alter ego of CMP and Daleiden. (*See* Part II.D, *supra*.) The contracts may be enforced against Defendants on that basis, too. *Monaco v. Liberty Life Assur. Co.*, No. 06-07021, 2007 U.S. Dist. LEXIS 31298, *12 (N.D. Cal. Apr. 17, 2007) (denying motion to dismiss contract claim against nonsignatories based on alter ego and agency theories).

Doc. 225, at 16. In *Monaco*, the court held that the plaintiff had met the lenient notice pleading standard for purposes of withstanding a motion to dismiss in light of numerous allegations that a wholly owned subsidiary company was the alter ego, and agent, of its parent company. *Monaco v. Liberty Life Assur. Co.*, No. 06-07021, 2007 U.S. Dist. LEXIS 31298, *11-21 (N.D. Cal. Apr. 17, 2007). Of course, the standard for obtaining a preliminary injunction is much more difficult than the standard for surviving a motion to dismiss for failure to state a claim. Here, NAF has fallen far short of proving that Newman, as an individual defendant, is a principal in an agency relationship who exercises extensive control over the individuals who signed contracts with NAF and/or recorded conversations, or that those individuals are his alter ego.

The lack of any breach of contract by Newman not only defeats NAF's claim against him on the merits, it also defeats NAF's request for a preliminary injunction against him. NAF's arguments on the three other injunction factors all hinge on NAF's contract claim, Doc. 225 at 23-25, and the lack of success on the merits against Newman on the contract claim bolsters the overall lack of any basis for a preliminary injunction against him.

Moreover, although "First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent," *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993), NAF has provided no evidence, let alone *clear and convincing* evidence, that Newman has knowingly, voluntarily, and intelligently waived his First Amendment rights.

Although NAF asserts that individuals who have signed NAF exhibitor or non-disclosure agreements have waived their First Amendment rights by doing so, Newman is not a party to any NAF contract. NAF has not pointed to any particular act by Newman through which he purportedly waived his First Amendment rights, and in the sensitive area of fundamental freedoms, courts should not lightly conclude that a person's constitutional rights have been waived by *the acts of someone else*. NAF has failed to justify a prior restraint against Newman.

Finally, NAF's California Penal Code § 632 claim against Newman is meritless. Section 632 makes it a crime (other than in certain circumstances) for a person to "eavesdrop[] upon" or "record" a "confidential communication" "by means of any electronic amplifying or recording device" without the consent of all parties to that communication. Here, NAF has not proven that Newman even *attended* the 2014 or 2015 NAF annual meetings or any follow-up meetings with individuals met at a NAF annual meeting, let alone proven that Newman *eavesdropped upon or recorded* any conversation (confidential or otherwise) at these events. NAF does not even attempt to explain how Newman could possibly have violated Section 632 without recording or eavesdropping upon any confidential conversation. As such, this claim provides no basis for a preliminary injunction against Newman.

II. NAF Has Failed to Show that It Is Likely to Suffer Irreparable Harm in the Absence of a Preliminary Injunction.

NAF is not likely to suffer irreparable harm in the absence of a preliminary injunction.[14] NAF relies, virtually exclusively, on the purported risk of threats, harassment, and violence by *unrelated third parties* in support of its claim of irreparable harm. *See* Doc. 225, at 11-15, 23. NAF does not, and cannot, cite any evidence that any Defendant has been involved in any threats

[14] Despite its attempt to create irreparable harm contractually, NAF still bears the burden of demonstrating actual harm. *Winter v. Natural Res. Def. Council* 555 U.S. 7, 22 (2008); *Smith, Bucklin & Assocs., Inc. v. Sonntag*, 83 F.3d 476, 481 (D.C. Cir. 1996); *Laidlaw, Inc. v. Student Transp. of Am., Inc.*, 20 F. Supp. 2d 727, 766 (D.N.J. 1998); *La Jolla Cove Investors, Inc. v. Goconnect Ltd.*, 11CV1907 JLS (JMA), 2012 U.S. Dist. LEXIS 62948, at *11 (S.D. Cal. May 4, 2012) (quoting *Riverside Publ. Co. v. Mercer Publ. LLC,* No. C11-1249, 2011 U.S. Dist. LEXIS 85853, at *8 (W.D. Wash. Aug. 4, 2011)).

or harassment; rather, NAF contends that Defendants' speech will provoke unrelated third parties to commit such actions. But in the context of free speech claims, the actions of unrelated third parties do not constitute irreparable harm, as a matter of law. In considering whether to prohibit speech, "the government may not give weight to the audience's negative reaction." *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Co. Sheriff Dep't*, 533 F.3d 780, 789 (9th Cir. 2008). This rule ranks among the "bedrock First Amendment principles." *Id.* at 790; *see also, e.g., Cox v. Louisiana*, 379 U.S. 536, 550 (1965) (holding that the government could not restrict speech based on "fear of violence . . . based upon the reaction" of third parties); *Bacheller v. Maryland*, 397 U.S. 564, 567 (1970); *Forsyth Cnty*, 505 U.S. at 134 ("Listeners' reaction to speech is not a content-neutral basis of regulation. Speech cannot be . . . punished or banned, simply because it might offend a hostile mob."). Indeed, First Amendment jurisprudence is quite clear that it is not permissible to restrict even speech that *deliberately* encourages criminal activity, absent a clear and present danger of imminent lawless action. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

Thus, NAF presents a classic heckler's veto argument. NAF effectively seeks to hold Defendants' speech hostage to the hyperbolic comments of anonymous Internet commenters who are strangers to this lawsuit. *See* Doc. 225, at 11-15. But "the First Amendment does not permit a heckler's veto." *Center for Bio-Ethical Reform*, 533 F.3d at 788. Because Defendants' speech addresses a controversial topic of paramount public importance, NAF cannot hold Defendants' First Amendment rights hostage to anonymous hecklers. "It is remarkable that this late in our history we have still not learned that the First Amendment prohibits us from banning free speech in order to appease terrorists, religious or otherwise, even in response to their threats of violence." *Garcia I*, 786 F.3d at 730.

In addition, to obtain a preliminary injunction, NAF must "prove a 'causal connection' between the irreparable injury [it] faces and the conduct [it] hopes to enjoin." *Garcia II*, 786 F.3d at 748 (Watford, J., concurring in the judgment). NAF must show that silencing Defendants "would likely eliminate (or at least materially reduce) the risk" faced by NAF and its members. *Id.* As explained in Part I.C.1 above, NAF has made no attempt to show a causal link between any

concrete acts of violence and Defendants' speech, nor has NAF made any attempt to show that censoring Defendants will materially reduce the risks of harm faced by NAF and its members.

Moreover, NAF's pervasive reliance on anonymous internet postings fails to establish irreparable harm. Anonymous internet postings of political hyperbole—however inflammatory or offensive—constitute an extremely common, if unfortunate, feature of public discourse. For example, NAF has frequently cited anonymous statements putatively offering $10,000 for the death of Dr. Nucatola, which were posted by an anonymous user of the Fox Nation website, "Joseywhales." *See* http://politicalconundrum.lefora.com/topic/19425341/WHY-IS-FOX-NATION-HARBORING-THIS-WANNABE-MURDERER (last visited Sept. 21, 2015) (collecting screen shots of "Joseywhales" comments). According to his/her online Fox Nation profile, "Joseywhales" is a prolific commenter who has posted 70,000 comments and 190,000 "likes" of comments on this website in the past three years. *See* Declaration of Corrine Konczal, attached as Exhibit 2, ¶ 19. At various times, "Joseywhales" has also posted comments putatively offering $10,000 for the deaths of Baltimore District Attorney Marilyn Mosby and San Francisco Sheriff Ross Mirkarimi. *Id.* The hyperbole of such anonymous online cranks does not justify silencing speech on matters of enormous public interest.

In fact, posting hyperbolic "death threats" on the Internet and through social media has become an ubiquitous feature of online discourse. For example, in the past few years, individuals have received online "death threats" and "harassment," virtually identical to those of which NAF complains, as a result of (among many other things) (1) making a derogatory joke about Star Wars on late-night television, *see* Exhibit 36; (2) fumbling a punt snap in a college football game, *see* Exhibit 37; (3) playing an unpopular character on TV's "Breaking Bad," *see* Exhibit 38; and (4) failing to perform in NFL games to the satisfaction of fantasy-football players, *see* Exhibit 39. As with the "Joseywhales" threats, such incredibly common online hyperbole has little real import. *See* Jim Pagels, *Death Threats on Twitter Are Meaningless. You Should Ignore Them*, SLATE.COM, attached as Exhibit 40 (noting that social-media death threats are typically "frivolous incidents" that are "entirely toothless").

Moreover, the threats discussed in these articles were communicated directly to the targets via social media. By contrast, none of the comments NAF presented as evidence were communicated directly to anyone. [redacted] Given the fact that CMP's videos triggered nationwide protests against Planned Parenthood in light of their illegal and unethical conduct, it is unsurprising that [redacted]

[redacted]

In sum, NAF has presented no evidence of a legally cognizable injury that has occurred or is likely to occur as a result of any of Defendants' past or future speech. Thus, the Court should deny NAF's request for a preliminary injunction.

III. NAF's Requested Preliminary Injunction Would Impose Significant and Irreparable Harm on Defendants, and Thus the Balance of Equities Counsels Against a Preliminary Injunction.

The Court should deny NAF's requested preliminary injunction because it would impose significant and irreparable harm on Defendants. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Neb. Press Ass'n*, 427 U.S. at 609 (Brennan, J., concurring in the judgment) ("Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss in the immediacy, the impact, of speech." (quotation omitted)). "Restoring First Amendment freedoms after a lengthy period of unconstitutional judicial censorship does not cure the problem." *Garcia I*, 786 F.3d at 732.

NAF's requested preliminary injunction would censor Defendants' speech on matters of paramount and legitimate public interest. That censorship alone constitutes a severe and irreparable injury. *Elrod*, 427 U.S. at 373. Moreover, the timing of that censorship further exacerbates the harm. "The timeliness of political speech is particularly important." *Id.* at 374 n.29. The United States Congress is currently debating whether and how to respond to the illegal and unethical practices uncovered by CMP's investigative journalism. *See* Seung Min Kim, *Senate GOP Presses Ahead with Planned Parenthood Defunding*, http://www.politico.com/story/2015/11/senate-planned-parenthood-defunding-215989. And the issues raised by the investigation have influenced the 2016 presidential campaign. *See*, *e.g.*, *Tom Lombardo & Theodore Schleifer*, *Fiorina, Christie Take Aim at Planned Parenthood at GOP Debate*, http://www.cnn.com/2015/09/16/politics/republican-debate-planned-parenthood-fact-check. Preventing Defendants from speaking now—while these issues are at the center of public

debate on matters of critical public interest—cannot be remedied by permitting them to speak later.

For its side of the balancing, NAF offers nothing but a repetition of its conclusory statements that its members will be "subject to grave injury if an injunction does not issue." Doc. 225 at 24:10-11. However, the "grave injury" that NAF describes boils down to possibly being subject to negative public attention. While NAF would have this Court believe, based solely on the declaration of NAF President Vicki Saporta, that most or all NAF members go to great lengths to keep their identities secret,[15] there is ample documentary evidence that this is not the case. [redacted] *see also id.*, Nov. 25, 2015 Tweet by NAF, attached as Exhibit 42; Robin Abcarian, *An Abortion Doctor Speaks out about a Woman's Right to Choose*, LOS ANGELES TIMES, attached as Exhibit 43. Indeed NAF itself regularly features the names and photographs of its members in its publicly available Annual Reports. *See, e.g.*, 2010 NAF Annual Report, attached as Exhibit 44.

IV. The Public Interest Strongly Favors Permitting Defendants to Speak on Matters of Paramount Public Interest and Concern.

A. A Preliminary Injunction would be contrary to the public interest favoring the free flow of information of public concern.

The public interest strongly favors disclosure of the results of CMP's investigation. NAF's requested preliminary injunction would constitute a dramatic assault on ***the public's*** First Amendment right to receive information about matters of significant and legitimate public concern. "It is now well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). "This freedom (of speech and press) necessarily protects the right to receive." *Id.* (ellipses omitted) (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)). "[T]he right to receive ideas is a necessary predicate to the recipient's

[15] NAF has failed to provide any legal basis for its suggestion that abortion providers are protected by any greater common law or statutory right of privacy than individuals in other fields of employment.

meaningful exercise of his own rights of speech, press, and political freedom." *Bd. of Edu. v. Pico*, 457 U.S. 853, 867 (1982). "The right of citizens to inquire, to hear, to speak, and to use information is a precondition to enlightened self-government and a necessary means to protect it." *Garcia I*, 786 F.3d at 730 (quotation and ellipsis omitted).

"The constitutional guarantee of free speech serves significant societal interests wholly apart from the speaker's interest in self-expression. By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information." *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (plurality) (quotation and internal citation omitted). "The vitality of civil and political institutions in our society depends on free discussion." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). "The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes." *Id.*

Here, the general public and the political branches of government have extraordinary interests in access to the materials that NAF seeks to censor. Speech about abortion—including late-term abortion, the killing of a well-developed human fetus, and financial gain from the sale of fetal body parts—"has always rested on the highest rung of the hierarchy of First Amendment values." *Evergreen Ass'n v. City of New York*, 740 F.3d 233, 249 (2d Cir. 2014). CMP's investigative study has generated enormous and legitimate public interest on these issues. CMP's videos have provoked interest, not only in the abortion industry's evident tolerance for criminal activity, but in the callousness with which industry participants discuss the dismemberment of highly developed human fetuses and the collection of their human parts—human organs, human limbs, and human cadavers—for research purposes. This callousness has provoked even strong supporters of abortion rights—such as Hillary Clinton—to describe the videos as "obviously . . . disturbing." Ex. 30.

The Supreme Court has recognized the public interest in combating the risk of dehumanization that is inherent in late-term abortion. *See Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (holding that the government could ban an abortion procedure "laden with the power to

devalue human life"); *Stenberg v. Carhart*, 530 U.S. 914, 962 (2000) (Kennedy, J., dissenting) ("A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life."). Because of the legitimate public interest in the risks of desensitization and the callousness toward human life, the public has a maximal interest in viewing a video (for example) [redacted] *See supra* Statement of Facts, Part D; *see also Perricone v. Perricone*, 292 Conn. 187, 688 (2009) (stating that waivers of First Amendment rights are not enforceable when the suppressed speech relates to "the public health and safety"). The public should be allowed to watch such videos and judge for itself whether late-term abortion, and fetal-tissue "donation," are worth the intangible costs to their participants and society.[16] "Widespread and uncensored access to [CMP's videos] [i]s critical so that the public could view the film[s], make its own judgment about [their] role and significance, and debate the appropriate response of a pluralistic society . . . ." *Garcia I*, 786 F.3d at 731.

Moreover, the public has a strong interest in receiving information regarding the criminal activity and willingness to engage in criminal activity that CMP has uncovered. The public has the right to view and evaluate for itself, for example, statements of abortion providers that [redacted] and that [redacted] *See supra* Statement of Facts, Part D. An agreement that "requires the suppression of criminal behavior" is not enforceable, *Perricone*, 292 Conn. at 688,

[16] This public interest can hardly be gainsaid even by abortion supporters, in light of the fact that PPFA President Cecile Richards issued a public apology for the "unacceptable" tone and statements of Deborah Nucatola. Ex. 31. Moreover, in this litigation, NAF has been extremely anxious to bring to this Court's attention the fact that Daleiden's counsel Catherine Short referred to abortion providers as "contract killers." See, e.g., Doc. 225 at 5:26 – 6:2. Clearly, NAF considers the question of whether abortion doctors are rightly described in terms that suggest a willingness to callously take human life to be one of considerable significance.

and courts regularly acknowledge the strong "public interest in the enforcement of the criminal law." *Standefer v. United States*, 447 U.S. 10, 25 (1980); *see also infra* Part IV.B. Censoring Defendants' speech about the likely criminal conduct of NAF or its members significantly undermines this strong public interest. Thus, the Court should deny NAF's request for a preliminary injunction.

B. Any putative "waiver" of First Amendment rights is unenforceable as a matter of public policy, due to the public's First Amendment right to receive information of paramount public interest, including information concerning criminal activity.

Even if there had been a "waiver" of First Amendment rights, any such waiver would be plainly unenforceable as a matter of public policy. Public policy prohibits the enforcement of agreements not to speak on matters of paramount public interest and concern, including the commission of criminal activity.

"A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." RESTATEMENT (2D) OF CONTRACTS § 178(1) (1979). *See also U.S. ex rel. Green v. Northrop Corp*., 59 F.3d 953, 962-68 (9th Cir. 1994) (refusing to enforce a contractual waiver that would prevent filing of qui tam claims as contrary to public policy); *Seibert v. Gene Security Network, Inc*., No. 11–cv–01987–JST, 2013 WL 5645309, at *7-8 (N.D. Cal. 2013) (holding that confidentiality obligations could not be enforced for reasons of public policy).

Thus, a waiver should not be enforced "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396 (9th Cir. 1991) (quoting *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987)) (holding that Davies had knowingly waived his right to participate in the political process, but holding that waiver unenforceable as a matter of public policy). Waivers of First Amendment rights are not enforceable when they infringe "the right to speak on matters of public concern," or would "require[] the suppression of criminal behavior"

Perricone, 292 Conn. at 220 (quoting *Leonard*, 12 F.3d at 891). NAF's proposed injunction would stifle both of these interests.

First, NAF's contracts are unenforceable to the extent that they would prevent Defendants from speaking publicly on matters of enormous public interest and importance. There is no doubt that the "public debate over the morality and efficacy of contraception and abortion" is the sort of "expression on public issues [that] has always rested on the highest rung of the hierarchy of First Amendment values." *Evergreen,* 740 F.3d at 249. This interest implicates the First Amendment rights of the public at large, as well as those of Defendants: "It is now well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). "This freedom (of speech and press) necessarily protects the right to receive." *Id.* (ellipses omitted) (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)). "[T]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982). There is no question that "speech on matters of public concern…is at the heart of the First Amendment protection," or that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values . . . ." *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (internal quotations and citations omitted). As discussed above, the recordings and information gathered in CMP's investigative study are of tremendous public interest, since they portray members of the abortion industry discussing the harvesting of fetal organs in moments of great candor—often revealing a disturbingly callous attitude toward highly developed human fetuses.

In addition, as discussed above, NAF's contracts are plainly unenforceable to the extent they would prevent disclosure of criminal activity and willingness to engage in criminal activity. *See, e.g., Fomby-Denson v. Dep't of the Army*, 247 F.3d 1366, 1375-78 (Fed. Cir. 2001) (citing numerous authorities supporting the public policy against contracts, like the NAF contracts here, purporting to require the concealment of evidence of criminal activities); *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 853-54 (10th Cir. 1972) ("It is public policy in Oklahoma and everywhere to encourage the disclosure of criminal activity.").

To the extent that the NAF agreements require the suppression of evidence of criminal activities, including felonies, they violate the clear public policy of California. *See, e.g., Hagberg v. Cal. Fed. Bank FSB*, 32 Cal. 4th 350, 355, 360 (2004) (noting that a California statute reflects "important public policy" and "is intended to "assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing" (citations omitted)); *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 872, n.5 (1989) (noting "the important public policy of encouraging the reporting of *suspected* crimes by ordinary citizens") (emphasis added); *see also In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127, 1137 (N.D. Cal. 2002) ("To the extent that this [confidentiality] agreement can be read to prohibit an employee from providing any information about any wrongdoing by JDSU, it is plainly unenforceable.").

NAF's arguments on the public policy issue are without merit. *See* NAF Br. at 20-21. First, NAF relies upon a generalized public interest in the protection of abortion providers' privacy and safety, again, elevating a completely unexpressed purpose of the Exhibitor Agreement to be its central feature. Doc. 225, at 2. However, NAF cites no authorities in support of an "abortion provider exception" to the general principle that waivers of First Amendment rights may be void for public policy. For instance, California law makes it unlawful to "knowingly, for valuable consideration, purchase or sell embryonic or cadaveric fetal tissue for research purposes," Cal. Health & Saf. Code § 125320(a), and the legislature did not make an exception to this prohibition for abortion providers. Likewise, the fact that NAF's meetings concern abortion serves to heighten, not reduce, the legitimate public interest in these activities. *See Bernardo v. Planned Parenthood Fed'n of Am.*, 115 Cal.App.4th 322, 358 (2004) (holding that there is legitimate public interest in speech about abortion because "abortion is one of the most controversial political issues in our nation").

Second, NAF's argument that recognizing a public policy exception would interfere with its freedom of association under the First Amendment, Doc. 225, at 20, has no merit. Because there is no state action in CMP's investigative study or its subsequent publications, CMP's private actions

do not implicate NAF's First Amendment rights—unlike NAF's lawsuit, which seeks state action in the form of a court injunction against *Defendants'* valid First Amendment interests. *See George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996). Moreover, as NAF has itself acknowledged, "there is no such thing as a First Amendment right to promote unlawful activity or associate for the purposes of effectuating a crime." Doc. 178-4, at 3 (under seal) (citations omitted). Recognizing that public policy does not countenance NAF's attempt to suppress evidence of criminal acts does not implicate NAF's right to freely associate for lawful purposes.

Third, NAF argues that "were Defendants' arguments accepted, businesses would be powerless to enforce confidentiality agreements to stop the dissemination of trade secrets," Doc. 225 at 20, but it is established law that the public-policy exception applies to such agreements. *See, e.g., Alderson v. United States*, 718 F. Supp. 2d 1186, 1200 (C.D. Cal. 2010) ("Courts have consistently refused to enforce post-employment confidentiality agreements that sought to prevent a former employee from revealing harmful information about the employer's illegality." (citations omitted)); *McGrane v. Reader's Digest Ass'n*, 822 F. Supp. 1044, 1045, 1052 (S.D.N.Y. 1993) ("Courts are increasingly reluctant to enforce secrecy arrangements where matters of substantial concern to the public—as distinct from trade secrets or other legitimately confidential information—may be involved. . . . Disclosures of wrongdoing do not constitute revelations of trade secrets which can be prohibited by agreements binding on former employees.").

Fourth, NAF's claim that "courts and litigants would be powerless to prevent the disclosure of confidential discovery obtained under Protective Orders routinely entered into in the Northern District of California" under Defendants' public policy argument, NAF Br. at 20, lacks merit because the information of vital public interest in this case, including evidence of criminal activities, was not obtained *through the civil discovery process*, but rather through an investigation that preceded the filing of this case.

Finally, *Cafasso v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047 (9th Cir. 2011), is clearly distinguishable. In *Cafasso*, the court concluded that a Cafasso failed to plead a valid False Claims Act (FCA) claim against her former employer. *Id.* at 1057-58. After learning that her

position was going to be eliminated, Cafasso copied many of her former employer's files in an attempt to bolster an FCA claim, but she never gave the files to a government procurement fraud officer, and there was "no evidence Cafasso needed to remove copies of the files to avoid destruction of evidence in support of her FCA claim." *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, No. CV 06-1381, 2009 U.S. Dist. LEXIS 43154, at *38-40 (D. Ariz. May 21, 2009). Since Cafasso admitted that her appropriation of employer files violated a confidentiality agreement, 637 F.3d at 1061, the pertinent contract issue was whether "to adopt a public policy exception to enforcement of [confidentiality agreements] that would allow relators to disclose confidential information in furtherance of an FCA action." *Id.* at 1062. The court saw "some merit in the public policy exception that Cafasso proposes," *id.*, but declined to decide the issue, holding that the individual's broad appropriation of files was unreasonable in this case. *Id.*

Cafasso is irrelevant to the case at hand. *Cafasso* involved no matters of legitimate public interest. Further, in *Cafasso*, there was no evidence of any violations of criminal law, whereas here there is ample evidence of the commission of various crimes by NAF members and NAF meeting attendees. *Cafasso* did not involve the application of the longstanding public policy against suppression of speech on matters of paramount public concern or concealment of criminal activity. Rather, it raised, without deciding, a novel public policy question specific to FCA litigation. *Id.* Outside the context of FCA cases, the California Supreme Court has held that a contract under which an employer's consideration was an agreement to not report an employee's criminal activities was void. *Bowyer v. Burgess*, 54 Cal. 2d 97, 99-100 (1960). Moreover, even within the context of FCA claims, this Court observed after *Cafasso* that "[s]everal courts, some relying on the Ninth Circuit's openness to the public policy exception [re: FCA claims] . . . *have adopted just such an exception*." *Siebert v. Gene Security Network, Inc.*, Case No. 11-cv-01987, 2013 U.S. Dist. LEXIS 149145, at *24-25 (N.D. Cal. Oct. 16, 2013) (citing cases) (emphasis added); *see also United States ex rel. Green*, 59 F.3d at 962-69 (holding clause of settlement agreement barring former employee from exposing employer's violations of federal law through a FCA suit unenforceable on public policy grounds).

In sum, the public interest weighs heavily in Defendants' favor.

V. NAF's Requested Relief Is Vague, Overbroad, and Not Supported by the Evidence or the Law.

NAF enumerates five separate items of requested injunctive relief, all of which are vague, overbroad, not supported by the evidence or law, and contrary to public policy. Doc. 225, at i.

The first instance of overbreadth appears in the use of the term "third party." The history of this case shows that NAF considers "third party" to include law enforcement, state officials, Congressional committees, and similar governmental bodies. Thus, NAF interprets the agreements to prohibit disclosing evidence of criminal activity not just to the general public but to government bodies, contrary to public policy. The Court should reject this interpretation. *See supra* Part IV.B.

As to the five items of requested relief:

1) Plaintiff asks the court to preliminarily enjoin the same conduct covered in the Temporary Restraining Order with respect to disclosing recordings taken at and information learned at any NAF meetings. This court earlier stated,

> "In issuing the TRO, I concluded that there was an imminent threat that the defendants intended to release information that was covered by the agreements with NAF and that would not be of such public importance to outweigh enforcement of the waiver of NAF's privacy interests. For example, the defendants could publish information that they obtained at a NAF meeting that discloses NAF's internal structure, certain individual's roles with within NAF, or NAF's members' addresses and other personal information. That information would almost certainly be covered by the waivers that the defendants signed."

Doc. 128, at 2-3. The Court now knows that Defendants did not obtain, or even seek to obtain, any NAF members' addresses or other personal information. As far as obtaining at a NAF meeting any information disclosing NAF's "internal structure," NAF is a 501(c)(3) whose annual tax returns are a matter of public record. Moreover, its own website contains information about its structure and personnel, including Annual Reports with details about its Annual Meetings. *See* Ex. 44. In sum, the burden of proof should be on NAF to specify any instance of private information about NAF's organization that Defendants might publish that would require the court to balance that information against the public interest in disclosure, but NAF has not met this burden.

Indeed, in light of the complete lack of private or proprietary information about NAF or

private information about its members or meeting attendees found in any information obtained by investigators at the NAF meetings, and the strong showing of public interest in the information CMP did obtain, this Court should require NAF to specify the particular recordings and documents or portions thereof it believes contain information that should be subject to the preliminary injunction.

NAF will undoubtedly claim a safety interest in preventing disclosure of the identities of its members and their presence at the Annual Meeting. First, however, the recordings and other documents overwhelmingly do not reveal who is a NAF member and who is merely an attendee. Moreover, it cannot be seriously contended that the third-party harassment, intimidation and violence NAF discusses in its brief (Doc. 225, at 2-3) are directed at individuals because they are NAF members/meeting attendees, as opposed to being directed at them because they are abortion providers. Thus, to the extent an individual is already publicly known to be an abortion provider, disclosing that he attended a NAF meeting would not subject him to any additional danger or harassment. Again, to the extent NAF has a legitimate interest (which Defendants do not concede) in preventing disclosure that a particular person was at a NAF meeting because that itself might disclose a previously-unknown connection with abortion, there are far narrower ways of accomplishing that goal than imposing a blanket injunction requiring the suppression of all the information that CMP obtained.

2) There is no evidence that the Defendants have ever published or threatened to publish the dates or locations of any future NAF meetings. Indeed, NAF did not even inquire into this area in discovery.

3) As to disclosing the names, addresses or any other contact information of any NAF members or attendees learned at any NAF annual meeting, there is no evidence -- nor has NAF even contended -- that Defendants ever disclosed the addresses or other contact information of any NAF member or attendee. *See* Daleiden Dec., ¶ 29. Again, this was not a subject of inquiry in NAF's discovery. As to names, the fact that the Defendants may have first learned the name of an abortion provider or other NAF member at a NAF meeting does not mean that the individual was

making any efforts to keep his or her name out of public view, much less that his or her identity was in fact not publicly available. The requested relief is overbroad.

4) As to prohibiting the disclosure of non-NAF meeting recordings of people who had previously attended NAF meetings, NAF lacks standing to request relief on behalf of its individual members—let alone non-member "attendees." NAF's original complaint pleaded associational standing as to its Section 632 claim, but not its contract claim. *See* Doc. 1, ¶¶ 134-39, 174. CMP's anti-SLAPP motion pointed out that this allegation of associational standing plainly destroyed diversity jurisdiction and thus undermined this Court's subject-matter jurisdiction. *See* Doc. 66-1, at 17. As a result, NAF withdrew all allegations of associational standing in its First Amended Complaint. *See* Doc. 131. In particular, NAF no longer pleads or asserts associational standing as to either the contract claim or the Section 632 claim. *See id.* ¶¶ 193-200, 220-24. As a result, NAF lacks standing to assert the rights of its members as putative "third-party beneficiaries" of its contracts—they must assert their own putative rights.

Moreover, even if NAF had standing to assert this request for relief, it would be plainly meritless. The contracts provide no basis to enjoin disclosure of conversations occurring wholly outside NAF meetings. The Exhibitor Agreement explicitly delimits its coverage to materials provided "[i]n connection with NAF's Annual Meeting," and applies only to information that "NAF may furnish" at that meeting. Doc. 1-1, ¶ 17. Likewise, the Confidentiality Agreement purports to restrict disclosure only of "information distributed or otherwise made available *at this conference*." Doc. 1-2, ¶ 2 (emphasis added). Neither document purports to place any restrictions on disclosure of conversations with NAF members or attendees occurring months later. NAF fails to provide any such interpretation of its own contracts (it provides no argument at all), and any such interpretation would be both overbroad and absurd.[17]

5) Finally, as to prohibiting attempts to gain access to any future NAF meetings. NAF has failed to present any evidence that Defendants threaten any such action. Again, this was not a

[17] NAF's § 632 claim, for the reasons set out in Section I(B) *supra*, cannot support this claim for relief.

subject of inquiry in NAF's discovery.

Moreover, no evidence presented by NAF in its motion entitles NAF to a special privilege of not being subject to further investigative journalistic projects by Defendants or someone acting in concert with them. There are many lawful methods to gain access to NAF meetings. CMP contends it engaged in one such method; Plaintiff disagrees. But regardless of the resolution of that issue, it does not provide a sufficient legal or evidentiary basis for precluding Defendants from ever attempting to gain access through other lawful means in furtherance of investigative projects.

CONCLUSION

For the reasons stated above, this Court should deny NAF's request for a preliminary injunction.

Respectfully submitted,

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