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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 Motion to Dissolve or Modify the Preliminary Injunction, and Motion for Clarification Hearing Date: Oct. 3, 2018, 2:00 p.m. Courtroom 2, 17th Floor

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NOTICE OF MOTION

TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on October 3, 2018, at 2:00 PM in Courtroom 2 of the Honorable William H. Orrick III at the United States District Court for the Northern District of California, 17th Floor, 450 Golden Gate Ave., San Francisco, CA 94102, Defendants the Center for Medical Progress (CMP), BioMax Procurement Services, LLC, and David Daleiden will, and hereby do, move to Dissolve or Modify the Preliminary Injunction entered against them on the grounds that recent events have proven false facts put forth by Plaintiff in support of the preliminary injunction, and that circumstances have changed such that it is no longer in the parties' or the public's interest to maintain the preliminary injunction.

FURTHER PLEASE TAKE NOTICE THAT on October 3, 2018, at 2:00 PM in Courtroom 2 of the Honorable William H. Orrick III at the United States District Court for the Northern District of California, 17th Floor, 450 Golden Gate Ave., San Francisco, CA 94102, Defendants CMP, BioMax, and Daleiden will, and hereby do, move for Clarification with respect to the Preliminary Injunction to ensure that conduct they may take would not violate it.

These motions will be based upon the attached points and authorities, the declaration of David Daleiden, all pleadings and records on file in this action, and any argument at the hearing on this matter.

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INTRODUCTION

On February 5, 2016, this Court entered a preliminary injunction against Defendants the Center for Medical Progress (CMP) and David Daleiden. Dkt. 354. Since that time, the California Attorney General charged Mr. Daleiden with fourteen felony counts of unlawful recording and one count of conspiracy to unlawfully record. *See* Dkt. 434-1. This Court also held him and CMP in contempt of court for uploading enjoined materials to an online file-hosting service to be shared with Mr. Daleiden's criminal defense counsel, and vicariously in contempt when his criminal defense counsel used those videos in his defense. Dkt. 482.

Also since this time, two of the Court's dispositive factual conclusions have been proven false: (1) that Defendants' project videos did not contain evidence of criminal wrongdoing and (2) that NAF was likely to suffer legally cognizable harm absent an injunction. Two comprehensive congressional investigations both confirmed that Defendants' investigation generally had merit, that Defendants' conclusions flowing therefrom were true, and that the material enjoined by this Court will be dispositive in holding numerous NAF members to account for criminal activity. In addition, the examples of irreparable harm to which NAF pointed have since proven not to be legally cognizable harms. Nor have additional examples materialized.

Defendants CMP and Daleiden now move for the dissolution or modification of the preliminary injunction. The enjoined materials are necessary for Mr. Daleiden's criminal defense and will be made public if used in his defense—mooting the preliminary injunction. T the same time, many of the Court's dispositive findings supporting the preliminary injunction have since been proven false, making the preliminary injunction outdated and unsupported.

Should the Court not dissolve the preliminary injunction and instead merely modify it, Defendants also move for clarification that it would not violate the modified preliminary injunction for Defendants to comment on, re-publish, or otherwise use enjoined materials that have entered the public domain after being used in Mr. Daleiden's criminal case.

FACTUAL & PROCEDURAL HISTORY

The factual history of Defendants' investigative journalism project, titled for public release the Human Capital Project, is laid out in Defendants' opposition to Plaintiff's motion for a

preliminary injunction. Dkt. 265-1. The preliminary injunction was entered in this case on February 5, 2016, and Defendants promptly appealed. Dkt. 354. It was affirmed on April 4, 2017, via a memorandum opinion. Dkt. 401. A petition for rehearing en banc was denied on May 11, 2017. Dkt. 406. A petition for a writ of certiorari was denied on April 3, 2018. Dkt. 524.

On April 5, 2016, the California Attorney General raided Mr. Daleiden's home seizing all of CMP's undercover video footage related to the Human Capital Project. Since then, the California Attorney General charged Mr. Daleiden with fourteen felony counts of unlawful recording under Cal. Pen. Code § 632, and one count of conspiracy to unlawfully record. *See* Dkt. 434-1; *The People of the State of California v. David Robert Daleiden, et al.*, No. 2502505 (Cal. Super. Ct., Mar. 28, 2017). On July 17, 2017, this Court held Defendants CMP and Daleiden in contempt for uploading enjoined materials to an online file-hosting service to be shared with Mr. Daleiden's criminal defense counsel, and vicariously in contempt for the actions of those criminal defense counsel in using those videos in his defense in the criminal case. Dkt. 482.

LEGAL STANDARD

1. Motion for a Preliminary Injunction

"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) (quotation marks omitted). A request for injunctive relief must be denied both when the plaintiff cannot show he is likely to succeed on the merits *and* when he cannot show irreparable harm. *Winter v. Nat. Res. Def. Council, Inc.*, 129 S.Ct. 365, 375-76 (2008). A court ruling on an injunction "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief[;] . . . a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987).

2. Motion to Dissolve or Modify a Preliminary Injunction

"A district court has inherent authority to modify a preliminary injunction in consideration of new facts." *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098 (9th Cir. 2002). "A party

seeking modification of an injunction bears the burden of establishing that a significant change in facts or law warrants revision of the injunction." *State v. Trump*, 871 F.3d 646, 654 (9th Cir. 2017) (quotation marks and ellipses omitted). Typically, a motion to modify or dissolve a preliminary injunction is limited to new facts or law, and consequently, "[a] motion to modify or dissolve an injunction cannot be used to challenge the imposition of the original injunction." *U.S. ex rel. F.T.C. v. Bus. Recovery Servs. LLC*, 488 F. App'x 188, 189-90 (9th Cir. 2012). "On the other hand, a modification may be so fundamental to the original injunction, or may otherwise present issues so inextricable from the validity of the original injunction, that review must include the whole package." *Gon v. First State Ins. Co.*, 871 F.2d 863, 866-67 (9th Cir. 1989). "A court abuses its discretion when it refuses to modify an injunction or consent decree in light of a significant change either in factual conditions or in law that renders continued enforcement detrimental to the public interest." *Flores v. Huppenthal*, 789 F.3d 994, 1001 (9th Cir. 2015) (quotation marks omitted).

When the preliminary injunction is one against speech, a review of the whole package is also compelled by the Constitution. *See Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974) (When a case involves free expression, "we must make an independent examination of the whole record so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."); *see also Hurley v. Irish American GLIB*, 515 U.S. 557, 567-68 (1995).

3. Motion to Clarify a Preliminary Injunction

"[A] person subject to an injunction always has the right to ask the court that is administering it whether it applies to conduct in which the person proposes to engage. If this looks like a request for an 'advisory opinion,' it is one that even a federal court can grant, in order to prevent unwitting contempts, and frequently does." *Matter of Hendrix*, 986 F.2d 195, 200 (7th Cir. 1993). "[C]ourts would not be apt to withhold a clarification in the light of a concrete situation that left parties in the dark as to their duty toward the court." *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 586 (5th Cir. 2013) (quoting *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 15 (1945)) (ellipses omitted). "At the [preliminary injunction] hearing [in this action, the Court] cautioned defense counsel that in the future, before they take it upon themselves to arguably

violate an order from this Court—even if in good faith—they should seek clarification from [the Court] first." Dkt. 354 at 16 n.18; *see also* Dkt. 482 at 19 n. 22 ("[T]he civil case defense counsel adopted the appropriate approach, seeking guidance in advance."); Dkt. 540 at 2 ("If anyone in the cases in this Court has a question about the propriety of modifying an Order of this Court, he, she or it should make a request of this Court before acting.").

LEGAL ARGUMENT

1. Likelihood of Success on the Merits

1.1. The legal reasoning in the Court's preliminary injunction order

In 2016, this Court found—based on the record before it—that it was likely that NAF would be able to show: (1) that Defendants entered into a contract with NAF (Dkt. 354 at 21:1-22:8); (2) that Defendants breached that contract (*id*. at 22:9-23:10);[1] (3) that the contract broadly covered all information learned at NAF conferences (*id*. at 23:11-26:9); (4) that the contract permits a prior restraint on speech due to Defendants' waiver of their First Amendment rights (*id*. at 27:15-29:9); (5) *that the waiver is enforceable after weighing public policy interests* (*id*. at 29:10-35:7); (6) *that NAF has suffered harm* (*id*. at 32:26-33:1, 36:14-37:6); and (7) *that liability for that harm can be imputed to Defendants* (*id*. at 37:7-12 & n.42). All seven of these findings were absolutely necessary for the Court to enter its Preliminary Injunction in this case. Since February 2016, however, significant changes have occurred with respect to the fifth, sixth, and seventh findings.

1.2. The factual reasoning in the Court's preliminary injunction order

Two of the Court's dispositive factual conclusions in the February 2016 preliminary injunction order either have been proven false, or have—in the two-and-a-half years since—failed to be supported with any evidence. First, (a), the Court preliminarily concluded that "the recordings relied on by defendants [contain] no evidence of criminal wrongdoing." Dkt. 354 at 30:14-15. Second, (b), the Court preliminarily concluded that "since defendants' release of the Project videos (as well as the leak of a portion of the NAF recordings), harassment, threats, and

[1] Of note, a detailed examination of the alleged breaches, and an explanation as to how they are inadequately pleaded, is included in Defendants' concurrently filed motion to dismiss.

violent acts taken against NAF members and facilities have increased dramatically. It is not speculative to expect that harassment, threats, and violent acts will continue to rise if defendants were to release NAF materials in a similar way." *Id.* at 32:26-33:1.

Both erroneous factual conclusions are necessary to find that (6) NAF suffered actual harm; and (7) liability for that harm can be imputed to Defendants. But in the past two-and-a-half years, many of the examples of harm NAF put forth have been disproven or repudiated, revealing that NAF has suffered no real harm. Also, in the ensuing years, Defendants' investigation has been vindicated. Therefore, Defendants cannot be liable for harm flowing from their truthful speech.

Both erroneous factual conclusions were also used by the Court as part of (5), its balancing of whether public policy interests permit the enforcement of a waiver of First Amendment rights. In addition to being proven false, additional facts have arisen which weigh heavily on the scale balancing the interests. Since February 2016, Mr. Daleiden has become the subject of a politically motivated criminal prosecution brought by the California Attorney General's office.

In sum, the repudiation of two core factual conclusions and the prosecution of Mr. Daleiden negate the Court's fifth, sixth, and seventh legal conclusions, warranting dissolution, or at least modification, of the preliminary injunction.

1.3. The Court's Conclusion That Defendants' Investigation Lacked Legitimacy And Their Conclusions Lacked Veracity, Has Been Proven False

As stated above, two congressional investigations have repudiated this Court's preliminary conclusions that Defendants' investigation lacked legitimacy and their conclusions lacked veracity. Those investigations' conclusions are outlined in the Declaration of David Daleiden, ¶¶ 6-48.

Further, in its Preliminary Injunction order, the Court stated that:

> [T]his is not a typical freedom of speech case. Nor is this a typical "newsgathering" case where courts refuse to impose prior restraints on speech, leaving the remedies for any defamatory publication or breach of contract to resolution post-publication. The context of how defendants came into possession of the NAF materials cannot be ignored and directly supports preliminarily preventing the disclosure of these materials. Defendants engaged in repeated instances of fraud, including . . . **repeated false statements to a numerous [sic] NAF representatives** and NAF members in order to infiltrate NAF and implement their Human Capital Project. The products of that Project—achieved in large part from the infiltration—thus far have **not been**

> **pieces of journalistic integrity, but misleadingly edited videos and unfounded assertions** (at least with respect to the NAF materials) of criminal misconduct. Defendants did not—as Daleiden repeatedly asserts—use widely accepted investigatory journalism techniques.

Dkt. 354 at 38:16-39:21 (emphasis added). In support of this conclusion, the Court stated that "[i]f the NAF recordings truly demonstrated criminal conduct—the alleged goal of the undercover operation—then CMP would have immediately turned them over to law enforcement." Dkt. 354 at 31:11-13. The Court also distinguished *Animal Legal Def. Fund v. Otter*, No. 1:14-CV-00104-BLW, 2015 WL 4623943 (D. Idaho Aug. 3, 2015), as not clearly holding that undercover investigative journalism was not fraudulent. Dkt. 354 at 40 n. 44.

The Court's conclusion that Defendants' project videos "have not been pieces of journalistic integrity, but misleadingly edited videos and unfounded assertions" has now been decisively refuted. Dkt. 354 at 39:17-19. As stated in the Daleiden declaration, Congress has determined that Defendants' full-length videos contain evidence of illegality, and that their shorter videos were produced to summarize that evidence. The Court also cited the Fusion GPS report, commissioned by Planned Parenthood Federation of America, for this proposition. Dkt. 354 at 15:9-13. But Planned Parenthood has since repudiated any reliance on that report. Dkt. 286 in Case No. 3:16-cv-236, at 7:20-22.

With respect to the Court's argument that "Defendants . . . repeated false statements to numerous NAF representatives" and distinguishing of the district court decision in *Animal Legal Defense Fund v. Otter*, the Ninth Circuit has now concluded that "a false statement made in order to access a[] . . . facility . . . cannot on its face be characterized as made to effect a fraud"—but rather is protected activity taken in furtherance of First Amendment rights. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194 (9th Cir. 2018); *see also* Al-Amyn Sumar, *Animal Legal Defense Fund v. Wasden and Newsgathering: More Significant Than It Appears*, COMM. LAW., Winter 2018, at 12, 13 ("*Wasden* recognized constitutional protection for newsgathering . . . [t]hat is a major expansion of the right[s] [of the press]—one that, though its precise contours are not entirely clear, has potentially important implications for other kinds of laws that impose liability for engaging in newsgathering activities."). Defendants' conduct is thus a quintessentially American exercise of the First Amendment right to freedom of the press.

Finally, with respect to the Court's question why Defendants did not simply turn their video over to law enforcement, subsequently published legal literature shows that Defendants' strategy of primarily attempting to pressure government action through publication of newsworthy stories, is commonplace—and indeed is best practice:

> In light of . . . numerous other instances of law enforcement dragging its feet when presented with clear-cut cases of [illegality in politically sensitive areas] . . . proponents of [merely reporting and not publishing evidence of illegality] are left with little ground to stand on. Their claim that law enforcement and regulatory agencies are the 'proper authorities' to whom whistleblowers ought to report [illegality] is clearly flawed.

See Sarah Hanneken, *Principles Limiting Recovery Against Undercover Investigators in Ag-Gag States: Law, Policy, and Logic*, 50 J. MARSHALL L. REV. 649, 685 (2017).

1.4. The Court's Factual Conclusion That Defendants' Videos Led to Harassment, Threats, and Violence Against Abortion Providers Has Been Proven False

In 2016, based on the record before it at that time, this Court found: (1) that "after the release of defendants' first set of Human Capital Project videos and related information in July 2015, there ha[d] been a documented, dramatic increase in the volume and extent of threats to and harassment of NAF and its members" (Dkt. 254 at 2:10-12); (2) that "the release of videos as part of defendants' Human Capital Project ha[d] directly led to a significant increase in harassment, threats, and violence directed not only at the 'targets' of CMP's videos but also at NAF and its members more generally" (*id.* at 26:2-5); and (3) that "[i]f defendants [we]re allowed to release the NAF materials, NAF and its members would suffer immediate harms" (*id.* at 37:9-10). Now, two years later, NAF has no non-hearsay-based evidence to support the above conclusions, and the hearsay-based allegations NAF previously made have been proven false.

1.4.1. The Court should not rely on hearsay at this juncture

The Court should not consider any hearsay evidence when adjudicating the present motion. Nor should this Court rely on NAF's prior hearsay submitted in support of the earlier outdated preliminary injunction. In the preliminary injunction context, a hearsay objection goes to weight, not admissibility. "The urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to

testify at trial. The trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial." *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). But "NAF does not believe any additional discovery is required to resolve . . . NAF's contract claim." Dkt. 538 at 8:15-20. The public policy behind permitting the introduction of hearsay evidence to support a motion for a preliminary injunction does not apply here because NAF believes it already possesses all of the non-hearsay evidence it needs.

1.4.2. The Court lacks jurisdiction with respect to NAF member harms

For purposes of determining whether a district court has diversity jurisdiction, the basic rule is that all plaintiffs must be of different citizenship than all defendants. *Strawbridge v. Curtiss*, 7 U.S. 267, 267 (1806). For purposes of determining diversity, it is not the citizenship of the named parties but of the real parties in interest that is determinative. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460-61 (1980). Therefore, with respect to associations asserting the interests of their members, the citizenship of each of their members must be considered. *See*, *e.g.*, *Nat'l Ass'n of Realtors v. Nat'l Real Estate Ass'n, Inc.*, 894 F.2d 937, 940 (7th Cir. 1990) ("Since it is the members of NAR who are the real parties in interest so far as the claim for damages on their behalf is concerned, it is their citizenship that counts for diversity purposes."); *Zee Med. Distrib. Ass'n, Inc. v. Zee Med., Inc.*, 23 F. Supp. 2d 1151, 1156 (N.D. Cal. 1998) ("The Court must . . . look to the citizenship of ZMDA's individual members for the purpose of determining whether complete diversity exists. Because some of these members are California citizens, and because defendant Zee Medical is a California citizen as well, complete diversity is destroyed.").

Here, NAF is "a professional association of abortion providers" whose "members include individuals, private and non-profit clinics, Planned Parenthood affiliates, women's health centers, physicians' offices, and hospitals." Dkt. 131, ¶10. NAF brought its breach of contract claim explicitly on behalf of its members—many of which are California citizens. Dkt. 66, ¶¶196, 200. NAF originally alleged that this Court had both diversity jurisdiction and federal subject matter jurisdiction. Dkt. 131, ¶24. But NAF's federal claims have since been dismissed. Dkt. 542. Without those claims, this Court lacks subject matter jurisdiction due to a lack of diversity. And if NAF were somehow able to avoid dismissal by asserting only its own interests to the exclusion of its members', the Court could not then

include the interests of those NAF members in its harm analysis when re-evaluating the propriety of the outdated and unsupported preliminary injunction.

1.4.3. NAF's examples of irreparable harm have been proven false

Plaintiff NAF's monitors the Internet to curate misleading reports on the threat of harm to abortion providers from individuals who hold the "common and respectable," "opposition to abortion" position. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993); Dkt. 59, FAC at ¶30 (listing statistics). Curiously, NAF chose not to release their 2015 statistics on "Violence and Disruption" until April 2016—two months after this Court made its preliminary injunction findings. *See* Daleiden Decl., Ex. 11, p.1. Those statistics, along with Planned Parenthood's corroborating reports, show that there was no significant increase in *actual threats of harm* allegedly attributable to Defendants. Daleiden Decl., Exs. 11-16. This is outlined in the concurrently filed Declaration of David Daleiden, ¶¶ 49-67.

In addition to instances of violence, however, NAF's statistics include instances of "disruption," which primarily consist of First Amendment protected speech.[2] The "disruption" statistics do significantly increase post-release of Defendants' investigation, but that actually cuts against NAF's arguments. Because of Defendants' investigation, there was an 800% increase in protected speech about abortion. Various jurists have suggested that courts should not weigh protected speech about abortion as a basis for judicial intervention. *Cf. Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. 2361, 2388 (2018) (*NIFLA*) (Breyer, J., dissenting) ("[T]he majority's decision [] mean[s] that speech about abortion is special"); *McCullen v. Coakley*, 134 S. Ct. 2518, 2545 (2014) (Scalia, J., concurring) (The majority "treat[s] abortion-related speech as a special category").

First, it is bald viewpoint discrimination to "facilitate speech on only one side of the abortion debate." *McCullen*, 134 S. Ct. at 2534. It would be highly improper for the Court to hold that Defendants' First Amendment advocacy must be restrained because it has been *too successful*, inspiring many other people to engage in their own protected speech about abortion. Second, the highly debated and"[]controversial" nature of abortion means that speech about abortion merits special protection and

[2] In contrast to "violence," which includes unprotected speech such as "threats of harm."

cannot even be regulated in the commercial speech context. *NIFLA*, 138 S. Ct. at 2366. Finally, Defendants' speech does not burden others' constitutional abortion-related rights. Providing truthful information about abortion practices *per se* cannot impose an undue burden on others' ability to access abortion. *NIFLA*, 138 S. Ct. at 2384 (Breyer, J., dissenting) (citing *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 882 (1992)). Because Congress has now determined that Defendants' allegations were true, it would be improper for the Court to hold that third-parties' repetition of Defendants' speech infringes different third-parties' ability to access abortion.

In light of these precedents and the unique nature of abortion-related speech generally, it would be improper for the Court to consider NAF's "disruption" statistics, except to support the proposition that the Court should step back and not attempt to interfere with the national debate on abortion that the statistics show is occurring.

1.5. Mr. Daleiden's politically motivated criminal prosecution tilts the balancing of public interests in his favor

1.5.1. Background of the Court's balancing of public interests

Prior restraints on speech have only been permitted in four contexts, one of which is where the parties engage in a knowing and voluntary waiver. *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993). But in this context—which this Court found applied here—the courts "will not enforce the waiver if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.* at 890 (quotation marks and citation omitted). This is because "[p]rior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss[,] a loss in the immediacy, the impact, of speech. Indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 609 (1976) (quoting A. BICKEL, THE MORALITY OF CONSENT 61 (1975)) (ellipses omitted).

As stated above, the Court found that public policy supported applying an alleged waiver (fifth legal conclusion). In so doing, the Court balanced: (1) evidence of illegality in the enjoined materials (Dkt. 30:14-19); (2) evidence of a de-sensitization in the attitudes of abortion industry participants (*id.* at 31:14-32:4); (3) California's explicit interest in protecting abortion providers by hiding information

about them (*id.* at 32:10-33:3); and (4) the constitutional right to privacy and how that right regulates governmental action relating to abortion (*id.* at 1:28-2:3, 39:5-6).

The Court initially found that (1), (3), and (4) favored the injunction because there was no evidence of illegality in the enjoined materials—a conclusion which has since been proven false. *See* Daleiden Declaration. This new factual development—in addition to refuting (1) directly, also affects (3). The statutes the Court cited provide that the purpose of hiding information about the abortion industry in general, and abortion providers specifically, is to ensure access to "the provision of legal reproductive health care services." Cal. Gov't Code § 6215(c). But on the other hand, California does not have an interest in ensuring access to the provision of unethical reproductive health care services that violate state and federal law. *See* Cal. Pen. Code § 423.6(c) (The California Freedom of Access to Clinic Entrances Act "shall not be construed . . . [t]o interfere with the enforcement of any federal, state, or local laws regulating the performance of abortions or the provision of other reproductive health services."). Thus, since it has been determined that the enjoined videos do contain evidence of illegality, those statutes no longer support the injunction.

How (4), the constitutional right to privacy, might affect the balancing of interests was not briefed by any of the parties. This factor actually, however, cuts against any injunction against speech because, as stated above, speech about abortion is special. *NIFLA*, 138 S. Ct. at 2366; *id.* at 2388 (Breyer, J., dissenting); *McCullen*, 134 S. Ct. at 2534. In light of its special nature, it is simply incorrect to view the constitutional regulation of abortion as lending support to an injunction against speech regarding abortion. In fact, the opposite is true: the constitutional paradigm precludes courts influencing the national debate by imposing regulations on speech.

In addition to these factors, the Court must now balance (5) the additional factor of Mr. Daleiden's right to defend himself against criminal charges for unlawful recording, and (6) the fact that Mr. Daleiden's defense of himself will cause materials to enter the public domain.

1.5.2. Mr. Daleiden has a Sixth Amendment right to have his criminal defense counsel publicly defend him

Countering negative publicity about a criminal defendant is not merely a permissible activity for a criminal defense attorney; it is a necessary part of a vigorous defense. *See Gentile v. State Bar of*

Nevada, 501 U.S. 1030 (1991). *Gentile* involved a state bar disciplinary proceeding where Attorney Gentile was sanctioned for a press conference he held to defend his client after the press had pushed out a stream of information, beginning long before his client's indictment, suggesting that his client was guilty. *Id.* at 1064 ("Petitioner's admitted purpose for calling the press conference was to counter public opinion which he perceived as adverse to his client, to fight back against the perceived efforts of the prosecution to poison the prospective juror pool, and to publicly present his client's side of the case.").

The Supreme Court stated that such a press conference was absolutely within the rights and duties of a criminal defense attorney:

> **An attorney's duties do not begin inside the courtroom door.** He or she cannot ignore the practical implications of a legal proceeding for the client. . . . [A]n attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. **A defense attorney may** pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an **attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.**

Id. at 1043 (emphasis added). Further, although Defendants could find no case discussing the parameters of the "attorney's dut[y]" to defend his client in the court of public opinion, legal literature makes clear that this ethical duty is constitutional in nature.

> **The Sixth Amendment** right to the assistance of counsel, in conjunction with due-process and fair-trial rights, would seem to **require attorneys to actively seek to counterbalance a client's negative public image.** In high-profile cases, the only way some lawyers can offer clients their Sixth Amendment right to a fair trial is to set the record straight in the media in hopes that accurate reporting will create a neutral litigation environment. In other words, **to assure a fair trial, public advocacy is an essential part of a defense strategy.**

Michael Jay Hartman, *Yes, Martha Stewart Can Even Teach Us About the Constitution: Why Constitutional Considerations Warrant an Extension of the Attorney-Client Privilege in High-Profile Criminal Cases*, 10 U. PA. J. CONST. L. 867, 879 (2008) (quotation marks and ellipses omitted; emphasis added).

Literally *thousands* of news articles have been published about Defendants' investigation into wrongdoing by NAF members, about the subsequent lawsuits, about the subsequent investigations into and admissions of wrongdoing by NAF-members, and about the politically motivated prosecution of Mr. Daleiden. Despite the fact that Defendants' investigation has been proven legitimate, many

members of the public—including residents of San Francisco County from whom the jury pool in Mr. Daleiden's criminal case would be drawn—still believe that Mr. Daleiden is "already guilty" because of this Court's preliminary injunction, because of NAF and Planned Parenthood talking points, and because of public statements by the California Attorney General.

In issuing the preliminary injunction, the Court noted that it was a first-of-its-kind injunction, but stated that "this is not a typical freedom of speech case. Nor is this a typical 'newsgathering' case where courts refuse to impose prior restraints on speech. . . . Instead, this is an exceptional case [because] . . . there is a constitutional right to abortions." Dkt. 354 at 38:16-39:6. This case is also exceptional now because of the criminal charges filed against Mr. Daleiden. The Sixth Amendment guarantees Mr. Daleiden a fair trial; this Court's now-outdated and unsupported preliminary injunction itself—along with the Court's preclusion of Mr. Daleiden's criminal defense counsel from challenging its conclusions publicly—threatens that right. In the absence of this Court's preliminary injunction, Mr. Daleiden's criminal defense team would presumably be attempting to cure the jury pool of the misimpression created by this Court's outdated conclusions—expressly contradicted by two congressional investigations—that CMP's recordings do not show evidence of criminality by NAF attendees. That is their job as his criminal defense counsel, and the preliminary injunction is preventing them from doing it, thereby depriving Mr. Daleiden of a full-throated defense.

The Court should incorporate Mr. Daleiden's Sixth Amendment Rights into its balancing of interests as a very substantial factor favoring dissolution of the preliminary injunction.

1.5.3. The Anti-Injunction Act precludes re-issuing the preliminary injunction

"A court of the United States may not grant an injunction to stay proceedings in a State court except" in three circumstances, none of which obtains in this case. 28 U.S.C. § 2283. This prohibition tying the hands of federal courts "is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process." *Hill v. Martin*, 296 U.S. 393, 403 (1935); *see Timmerman v. Brown*, 528 F.2d 811, 814 (4th Cir. 1975).

Federal courts must be equally restrained with respect to injunctions, like the preliminary injunction in this case, that tie the hands of parties to a state court proceeding: "It is settled that the prohibition of § 2283 cannot be evaded by addressing the [injunction] to the parties" instead of the

state court itself. *Atl. Coast Line R. Co. v. Bhd. of Locomotive Engineers*, 398 U.S. 281, 287 (1970); *Furnish v. Bd. of Med. Examiners of Cal.*, 257 F.2d 520, 522-23 (9th Cir. 1958) (same).“[T]he Act's prohibition on enjoining state court proceedings applies to any such proceeding pending at the time the federal court acts on the request for injunctive relief, regardless of when the state court action was filed.” *Denny's, Inc. v. Cake*, 364 F.3d 521, 531 (4th Cir. 2004); *see also Monster Beverage Corp. v. Herrera*, No. EDCV 13-00786-VAP (OPX), 2013 WL 12131740, at *10 (C.D. Cal. Dec. 16, 2013) (identifying circuit split on applicability of § 2283 depending on whether state or federal case was filed first and siding with *Denny's* and majority of circuits), *aff'd*, 650 F. App'x 344 (9th Cir. 2016).

In addition to the Anti-Injunction Act itself, the policies of comity and federalism underlying it weigh forcefully against maintaining the preliminary injunction in this case. A “[c]ourt [sh]ould exercise its discretion in light of the principles of equity, comity and federalism and refrain from granting an injunction that would effectively enjoin the state court proceeding.” *Monster*, 2013 WL 12131740, at *11; *see also Rizzo v. Goode*, 423 U.S. 362, 379 (1976) (same). “Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. . . . [T]he fundamental principle of a dual system of courts leads inevitably to that conclusion.” *Atl. Coast Line R. Co.*, 398 U.S. at 297. This is especially true here, where the NAF conference attendees whose rights NAF purports to advance here in federal court are the very complaining witnesses who successfully secured the prosecution of Mr. Daleiden in state court. Well-funded and well-connected parties who resent Mr. Daleiden's exposure of their misconduct are conducting a well-coordinated campaign to punish and silence him. This Court should not permit itself to be coopted into that campaign by enabling them to use one of their *two* heavy-handed civil lawsuits against Mr. Daleiden to handicap his defense against the criminal charges they trumped up against him.

The Anti-Injunction Act should prevent this Court from re-issuing its preliminary injunction against Defendants in the face of Defendants' motion to dissolve. Contrary to the intention of the Anti-Injunction Act, the federal injunction in this case prevents Mr. Daleiden's criminal defense counsel from defending him effectively in public by sealing from view the chief evidence of his innocence. *See Gentile*, 501 U.S. at 1043. This Court should apply the Act and its

strong interest in comity to dissolve the injunction.

1.5.4. Judge Hite's protective order supersedes the preliminary injunction

This Court has stated that "it shall not be a violation of the Preliminary Injunction or other Orders of this Court if Judge Hite requires some modification" of them. Dkt. 540 at 2. Judge Hite has already required that modification by imposing in the criminal case a protective order that supersedes the preliminary injunction. On December 6, 2017, Judge Christopher Hite issued a protective order in the criminal case. Daleiden Decl., Ex. 19. That order states:

> 1. . . . [M]aterials that portray, relate to, or mention the fourteen Does named in the complaint shall not be disclosed to anyone except the defendant, his counsel of record and any defense investigators or experts working on the case, absent further order of the Court. These materials shall be used only in preparation of the defense in this proceeding.
>
> 2. No picture, screenshot or other visual representation shall be made, exhibited, displayed or used in any fashion by the defendant of materials that portray, relate to, or mention the fourteen Does except in a judicial proceeding or as may be directly necessary in the preparation of the defense of this action.
>
> 3. . . . [M]aterials that portray, relate to, or mention the fourteen Does shall not be put on the Internet for any reason.

Ex. 19, ¶¶ 1-3; *see also* Ex. 21, Transcript of Dec. 6, 2017, hearing, 5:28-6:1 (clarification that the protective order does not merely cover the hard drive mentioned in the protective order, but rather "the protective order applies to the 14 Does as named").

Judge Hite was aware of this Court's preliminary injunction and of Mr. Daleiden's constitutional right to use enjoined videos in his defense when it issued that order. *See* Ex. 20, Transcript of June 21, 2017, hearing, 4:22-5:2 (Judge Hite taking judicial notice of preliminary injunction); Ex. 22, Transcript of Jan. 10, 2018, hearing, 16:16-18 (Judge Hite stating he already addressed constitutional issues at June 21, 2017, hearing). Yet, in issuing that protective order he specifically referenced a hard drive provided by the Attorney General to the defense containing the NAF materials, with the only restriction imposed on materials within it that "portray, relate to, or mention the 14 Does." Ex. 19. In issuing that protective order, Judge Hite expressly stated: "There will be no blanket protective order as to all the issues in this case. The Court will address any concerns by the Attorney General's Office or anyone else regarding specific requests for protective order materials on an individual basis rather than a blanket basis." Ex. 21,

4:28-5:8. That order contradicts the blanket ban imposed by the preliminary injunction.

The purpose of the protective order is to keep the complaining witnesses as "Does" in the public complaint until the preliminary hearing is held. *See* Ex. 22, 12:15-14:4 (In hearing on motion to set aside the protective order, DAG Jauron arguing that motion to set aside the protective order will be mooted by preliminary hearing), 14:20-16:9, 19:3-4, 19:19-20 (Judge Hite expressing concern about Mr. Daleiden's right to publicly challenge statements by Does about him, but overruling motion to set aside protective order because he has only imposed a "limited delay" until the preliminary hearing, and a "limited . . . restriction" on Mr. Daleiden's right to a public defense). And Judge Hite has already indicated that he will not close the preliminary hearing to the public. *See* Daleiden Decl., ¶¶ 68-76.

Any videos other than those that "portray, relate to, or mention the 14 Does" are free to be publicly released and discussed under Judge Hite's order. This includes NAF videos of witnesses who were interviewed by the California Attorney General's office and whose testimony and video are a core part of Mr. Daleiden's defense that the conversations recorded at NAF conferences were not confidential under Cal. Pen. Code § 632. This also includes NAF videos of abortion providers whose discussion of partial-birth abortion is a key part of Mr. Daleiden's Cal. Pen. Code § 633.5 defense. Judge Hite similarly excluded many other videos from his protective order.

This Court directed Mr. Daleiden to wait for Judge Hite to issue an order with respect to the videos, and he has. Dkt. 540 at 2. Thus, Defendants request that the Court dissolve its preliminary injunction on the basis that it has been superseded by Judge Hite's protective order.

1.5.5. Mr. Daleiden's criminal defense strategy hinges on use of enjoined videos

At this juncture, Mr. Daleiden's criminal defense counsel intend to make two primary defenses in his criminal case, under Cal. Pen. Code §§ 632 and 633.5. Under § 632, it is unlawful to surreptitiously record a "confidential communication." But "a conversation is [only] 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 v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 168 (2003).

Under § 633.5, it is permissible to record a "confidential communication" if the recording

was done "for the purpose of obtaining evidence *reasonably believed to relate* to the commission . . . of the crime of . . . any felony involving violence against the person." (Emphasis added); *see also People v. Ayers*, 51 Cal. App. 3d 370, 377 (1975) (exception applies to both police and private citizens). No California court has explained exactly what it means to record "for the purpose of obtaining evidence *reasonably believed to relate* to the commission" of a felony involving violence, but the Ninth Circuit has interpreted it. *Gensburg v. Lipset*, 121 F.3d 715, 1997 WL 453698 (9th Cir. 1997).[3]

In *Gensburg*, the Ninth Circuit upheld the granting of summary judgment in favor of the defendant in a case that dealt exclusively with the parameters of § 633.5:

> Even if [the surreptitious recorder] might have reason to be skeptical of [the informant's] account, he had no reason to doubt that recording her conversations with [the recordee] would "relate to" the commission by [the recordee] of the crime of extortion. It might relate by proving [the recordee] innocent, by proving her guilty, or by being indeterminate, but however the evidence turned out, it would be precisely for this statutorily permitted purpose.

Id. at *3. *Gensburg* stands for the proposition that "reasonably believed to relate" means that § 633.5 permits recording conversations for the purpose of *investigating* criminal activity, not just gathering evidence of criminal activity. *Id.* The individual who is performing the recording merely needs to reasonably believe that the recording will relate to his investigation of potential criminal activity. *Id.* He does not need to have a reasonable belief that the individuals he is recording are actually engaged in criminal activity. *Id.*

In his criminal case, Mr. Daleiden's defense counsel thus intend to play footage to establish (1) that the allegedly unlawful recordings all took place in public where there was an opportunity for the conversation to be overheard, (2) that the recordings obtained evidence of illegal activity, and (3) that there is no evidence that the recordings were made for anything other than a legitimate investigation into wrongdoing, "by proving [the NAF members] innocent, by proving [them] guilty, or by being indeterminate."

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[3] This Ninth Circuit opinion is unpublished. Defendants here cite it only for factual purposes, to explain the argument that Mr. Daleiden intends to make in his criminal case, as the opinion is properly citable in California courts. *See* Ninth Circuit Rule 36-3(c) ("Unpublished dispositions . . . may be cited to this Court or by any other courts in this circuit for factual purposes").

1.5.6. This Court's orders conflict with Mr. Daleiden's rights under California law and rule

This Court has issued a number of seemingly conflicting rulings about Mr. Daleiden's criminal case. The Court once stated that it "will not interfere with Judge Hite's determinations concerning . . . what portion of the relevant recordings should become publicly accessible or disclosed in connection with the criminal pre-trial and trial proceedings." Dkt. 482 at 20:19-21. But then this Court more recently ruled that "Judge Hite will make determinations of what is required with respect to Mr. Daleiden's due process rights in that criminal matter" and specifically stated "[d]on't independently make that decision without Judge Hite making the decision." Dkt. 298 in Case No. 3:16-cv-236, at 27:25-28:2, 28:20-21. This appears to be a reversal from this Court's hands-off approach in its ruling concerning Mr. Daleiden's testimony before a grand jury proceeding in Harris County, Texas. Dkt. 354 at 41 n.45 ("[D]efendants appropriately notified the Court that CMP was subpoenaed to testify in front of a grand jury, and explained that if Daleiden was called upon to disclose information he learned at the NAF Annual Meetings in responding to the grand jury's questions, Daleiden intended to do so absent further order from this Court. Dkt. No. 323-5. This Court did nothing to prevent Daleiden from testifying fully in front of that grand jury."); Dkt. 482 at 18 n.22 ("[C]ounsel notified me that a defendant received a grand jury subpoena from a local law enforcement agency and that they expected the testimony and responses called for might touch upon or disclose PI information. . . . No response from me was necessary").

In his criminal case, Mr. Daleiden's defense counsel intend to zealously represent him and assert his full rights under the California Penal Code, California statute, and the California Constitution. They intend to enter into evidence, in open court and in the court record, NAF conference footage that is currently enjoined in this Court, along with the summary video whose use in Mr. Daleiden's criminal defense has already resulted in a finding of contempt here. His counsel should not and, under governing law, cannot be required to ask special permission from Judge Hite or to give special advance notice to prosecutors before examining or cross-examining witnesses using any of the NAF video footage, nor are they required to do so under any known California law or rule. And they absolutely should not be required to seek an order from Judge Hite

modifying this Court's preliminary injunction, nor do they believe he would or should entertain a request to issue an order from his bench that would purport to modify a federal court's injunction.

Further, after those videos are entered into evidence, they will become part of the public domain. *Nebraska Press Ass'n*, 427 U.S. at 568 ("[O]nce a public hearing had been held, what transpired there could not be subject to prior restraint."); *see also id.* at 595–96 (Brennan, J., concurring) ("What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity.") Any purported interest in keeping the videos private will vanish. To ensure a fair trial, Mr. Daleiden's criminal defense counsel also intend to publish all of the same evidence on the internet, and make it available to the media to review, comment on, and discuss. Without doing so, there will be no public rebuttal of this Court's preliminary (and now disproven) determinations that the videos do not contain evidence of wrongdoing, and that Defendants' investigation into wrongdoing was illegitimate. To ensure a fair trial, Mr. Daleiden's criminal defense counsel need to recruit the assistance of the media in countering the propaganda pushed out by the subjects of Mr. Daleiden's investigation, and their media allies, that Defendants did not uncover evidence of wrongdoing, or that their investigation was never legitimate, or was somehow a smear campaign.

This Court should thus weigh in the balance that (1) Mr. Daleiden needs to use the enjoined materials in his defense (against criminal charges secured by Plaintiff NAF's own members and conference attendees) in open court and in the court of public opinion; and (2) there is no purpose in maintaining the injunction because all, or significant portions, of the video will soon enter the public domain. As soon as only innocuous footage (which poses no potential harm to NAF members) remains actually sealed by the preliminary injunction, the injunction will no longer be warranted or legally justifiable. This Court should therefore decline to continue the injunction at this time, securing the ability of criminal counsel for Mr. Daleiden to defend him fully.

1.6. Liability for NAF's alleged harms can no longer be imputed to Defendants

Finally, the Court's prior factual conclusions that have now been proven false were key to the Court's preliminary determination on the issue of harm. In the preliminary injunction context, the moving party has two distinct burdens with respect to harm. First, it has to show legally cognizable

harm as an element of his argument regarding likelihood of success on the merits. *Hickcox-Huffman v. US Airways, Inc.*, 855 F.3d 1057, 1062 (9th Cir. 2017) ("The essential elements of a breach of contract claim are . . . damages to the plaintiff caused by the breach."); *L. Barber Gems, Inc. v. Brink's Diamond & Jewelry N. Am.*, 43 F. App'x 164, 165–66 (9th Cir. 2002) ("In actions for breach of contract, it is essential to establish a causal connection between the breach and the damages sought. Proximate cause is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produced the injury or damage complained of and without which such result would not have occurred.") (citations, quotation marks, and brackets omitted). Second, it has to show that granting the preliminary injunction will preclude those harms from occurring. *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 981 (9th Cir. 2011) ("While being forced into bankruptcy qualifies as a form of irreparable harm, Perfect 10 has not established that the requested injunction would forestall that fate.") (citation omitted). These are two, distinct, and very different standards.

The Court's preliminary injunction contained little analysis as to whether NAF's alleged harm of third-party "harassment, threats, and violent acts" was the type of harm for which Defendants could be liable. Rather, the Court's analysis primarily focused on NAF's second burden, establishing that there was a "causal connection" between Defendants' speech and NAF's harm such that granting the injunction would remedy the harm. *See* Dkt. 354 at 31:14-33:3; 36:1-38:5.

In the newsgathering and reporting context, however, it is well-established constitutional law that a defendant cannot be liable for *reputational* damages that flow from his reporting unless the plaintiff proves defamation. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999) (citing *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)). Apparently recognizing this, the Court's preliminary injunction order takes as a given that Defendants' investigation was disingenuous, and their conclusions false. *Compare* Dkt. 354 at 18:18-21 ("Dr. Reeves explains that he has witnessed 'the terrible reaction towards the prior doctors' who were featured in CMP's videos and he expects he 'will suffer similar levels of reputational harm should a heavily edited and misleading video of me be released.'"), *with id.* at 37:7-12 & n.42 ("Defendants miss the point in their attempt to shift the responsibility to overly zealous third-parties for the . . . injury to NAF. . . . The sum of defendants' argument and evidence on this point is that they cannot be blamed for the

'hyperbolic comments of anonymous Internet commenters'. . . . But the misleading nature of the Project videos that [Defendants] have produced—reflective of the misleading nature of defendants' repeated assertions that the recordings at issue show significant evidence of criminal wrongdoing—have had tragic consequences. . . .").

A critical point here is that NAF's principal damages are reputational in nature. "From a purely analytical standpoint, the distinction between economic and reputational damages remains unsettled and is often difficult to ascertain. For instance, 'one of the obvious ways in which a defamatory remark can harm someone, particularly a business, is by causing economic losses. Such damages are not distinguishable from the damages caused by the harm to reputation but rather flow directly from the loss in reputation.' Notwithstanding this analytical uncertainty, it is evident that a party's own characterization of its damage claims is highly persuasive in determining whether the damages sought are 'reputational.'" *Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union*, 585 F. Supp. 2d 815, 822 (E.D. Va. 2008) (quoting Alan E. Garfield, *The Mischief of Cohen v. Cowles Media Co.*, 35 GA. L. REV. 1087, 1124 (2001)).

Here, the complaint makes clear that NAF's damages are reputational in nature:

> Defendants' brutally **dishonest** attacks on legitimate, life-saving practices regarding lawful tissue donation are intended to target and harass individual abortion providers and to trash their professional reputations. The **reputational harm** and physical danger that NAF members and other abortion providers face in the event that even more selectively edited, **misleading** videos are released—as Defendants have promised to do—is obvious and speaks for itself.

Dkt. 131 at 21:7-12 (emphasis added).

> Professor Dunn is now concerned that Defendants continued their illegal videotaping campaign at the annual meeting, that the comments she and other panelists made were taped, that those comments will be distorted and taken out of context, that her name will be splashed all over the internet like Defendants' other victims, and that she too will be the subject of a vitriolic smear campaign that would **injure her professional reputation**.

Id. at 39:27-40:4 (emphasis added).

> Having witnessed the terrible reaction toward Drs. Nucatola and Gatter, Dr. Reeves now fears that he too will be a victim of Defendants' smear campaign, and that he too will **suffer the same reputational harm** as Defendants' first victims.

Id. at 40:14-17 (emphasis added).

> Dr. Deborah Nucatola, the very physician Daleiden had secretly recorded two months earlier, and who would later become the victim of Defendants' outrageous **campaign to destroy her reputation** by releasing a selectively edited videotape falsely suggesting that Dr. Nucatola was profiting from fetal tissue donation programs.

Id. at 44:3-6 (emphasis added).

> Beyond the harm to NAF and its staff, its members now fear that they too will be the subject of an illegal and fraudulent campaign to **smear their professional reputations**.

Id. at 52:15-17 (emphasis added).

> As a result of Defendants' [breach of contract], Plaintiff and the intended third-party beneficiaries described above have suffered and/or will suffer economic harm and other irreparable harm caused by Defendants' breaches, including harm to the safety, security, and privacy of Plaintiff and its members, **harm to the reputation of Plaintiff and its members.** Plaintiff has been injured by the recording of NAF Confidential Information, and has incurred financial losses including expenditures on security consultants and additional security measures. Plaintiff has had to divert resources . . . **to instead mitigating the harm caused by** the theft of NAF Confidential Information and combatting **the misrepresentations disseminated by Defendants**.

Id. at 67:23-68:5 (emphasis added).

The last paragraph above specifically shows that NAF has suffered *nothing but* reputational harm. Even the "economic" harm which NAF alleges it suffered flows directly from the harm to their reputation caused by Defendants' accusations of criminality—accusations which have been determined to be true. "Under *Hustler*, and *Food Lion*, plaintiffs are not entitled to these reputational and [other] damages, resulting from a publication, without showing that the publication contained a false statement of fact"—which NAF now conclusively cannot do. *Hornberger v. Am. Broad. Companies, Inc.*, 351 N.J. Super. 577, 630 (2002) (citations omitted). Even if NAF could argue that it has suffered damage flowing solely from "the theft of NAF Confidential Information" and not the publication of that information (Dkt. 131 at 68:3-4), it is unclear what damage that would actually cause NAF, and such harm would absolutely not be irreparable. And in any event, Defendants' allegations against NAF are not false, much less delivered with actual malice, as is required to sustain reputational damages.

2. Irreparable Injury

The "irreparable injury" at issue must be legally cognizable harm for which a plaintiff can impose liability on a defendant—not merely harm generally. *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010). Here, because NAF has no legally cognizable harm for which Defendants can be held liable, *see* § 1.6, *infra*, it by definition has no irreparable injury. Moreover, since even the "causal connection" between Defendants' speech and NAF's harms has been broken, maintaining the prior restraint is plainly inappropriate. *Nebraska Press Ass'n*, 427 U.S. at 567 ("Given these practical problems, it is far from clear that prior restraint . . . would have protected Simants' rights.").

3. Balance of Equities and the Public Interest

For the same reasons as discussed in § 1.5 above, the balance of equities and the public interest favor Defendants and the dissolution of the preliminary injunction. In sum, in early 2016, this Court found that: "[t]he balance of NAF's strong showing of irreparable injury to its members' freedom of association . . . against preventing (through trial) defendants from disclosing information that is of public interest but which is neither new or unique, tilts strongly in favor of NAF." Dkt. 354 at 38:3-5. "[I]n order to fulfill its mission and allow candid discussions of the challenges its members face . . . confidentiality agreements for NAF Meeting attendees are absolutely necessary." *Id.* at 32:11-13. However, now in late 2018, significant new facts and events have changed the circumstances so much that the balance of equities tips strongly in Defendants' favor. Defendant Daleiden is now being charged with 15 felonies by the California Attorney General, based on the video recording at NAF's 2014 Annual Meeting and the alleged "conspiracy" to video record at NAF's 2014 and 2015 Annual Meetings.

Therefore, NAF's alleged "injuries" to its First Amendment "freedom of association" must now be balanced not only with Defendant Daleiden's First Amendment rights, but also with his Sixth Amendment rights. Moreover, the confusion and contradictions in the outdated 2016 order have already led to an even more confusing contempt proceeding and appeal, even as this Court promises not to interfere with the state criminal tribunal, while at the same time enjoining parties before that tribunal. This Court should admit the balance of equities has been reversed from where it stood in 2016 and dissolve the outdated and unsupported preliminary injunction.

4. Motion for Clarification

In the event this Court is not inclined to fully dissolve its outdated preliminary injunction in light of the changed circumstances, Defendants seek clarification that once material enters the public domain, their commenting on, sharing of, or otherwise using that material would not be a violation of the preliminary injunction.

Although a general maxim is that "the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law," *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991), the First Amendment right to Freedom of the Press is not absolutely hollow and does confer some substantive rights. *See, e.g.*, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194 (9th Cir. 2018); *see also* Sumar, *Animal Legal Defense Fund v. Wasden and Newsgathering: More Significant Than It Appears*, *supra*, at 12.

This includes the right to report on criminal preliminary hearings and trials:

> To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles: 'There is nothing that proscribes the press from reporting events that transpire in the courtroom.' . . . [O]nce a public hearing had been held, what transpired there could not be subject to prior restraint.

Nebraska Press Ass'n, 427 U.S. at 568 (quoting *Sheppard v. Maxwell*, 384 U.S. 384, 362-63 (1966)) (brackets and citations omitted). "A trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." *Craig v. Harney*, 331 U.S. 367, 374 (1947).

This is because:

> publication of facts surrounding [the criminal case] . . may provoke substantial public concern as to the operations of the judiciary or the fairness of prosecutorial decisions [and] . . . dissemination of the fact that indicted individuals who had been accused of similar misdeeds in the past had not been prosecuted or had received only mild sentences may generate crucial debate on the functioning of the criminal justice system.

Nebraska Press Ass'n, 427 U.S. at 605-07 (Brennan, J., concurring). Indeed, "the press may be arrogant, tyrannical, abusive, and sensationalist, just as it may be incisive, probing, and informative.

But at least in the context of prior restraints on publication, the decision of what, when, and how to publish is for editors, not judges." *Id*. at 613 (Brennan, J., concurring).

In addition, NAF's Exhibitor Agreement does not limit the disclosure of information that is publicly available. The first and last sentences of the non-disclosure provision explain that the information covered by the provision is "confidential." Dkt. 1-1, ¶17. But information is "confidential" only if it is "known only to a limited few" and "not publicly disseminated." WEBSTER'S THIRD NEW INT'L DICTIONARY, UNABRIDGED 476 (2002). Any information that is publicly known plainly is not "confidential." "[O]nce confidential information is placed in the public realm, it is no longer confidential." *Uniroyal Goodrich Tire Co. v. Hudson*, 1996 WL 520789, at *9 (6th Cir. Sept. 12, 1996) (unpublished per curiam); *see also Henry Hope X-Ray Prod., Inc. v. Marron Carrel, Inc.*, 674 F.2d 1336, 1342 (9th Cir. 1982) ("The limitation to confidential information contains the implicit temporal limitation that information may be disclosed when it ceases to be confidential."). Thus, the Exhibitor Agreement plainly does not cover publicly available information.

Therefore, Defendants believe that, as a matter of course, as soon as enjoined materials are used as evidence at Mr. Daleiden's preliminary hearing, they will enter the public domain, and that therefore the Court's preliminary injunction will be made moot, at least as to those materials. If Mr. Daleiden's criminal case is not dismissed before then, a major part of his criminal defense strategy will require the public use of those materials in a media campaign. Therefore, Defendants seek clarification from this Court, should it not decide to dissolve the preliminary injunction.

CONCLUSION

Events in the past two-and-a-half years have rendered the preliminary injunction outdated and unsupported. In light of the congressional reports vindicating Defendants' investigation and the aggressive, politically-motivated criminal prosecution of Mr. Daleiden, Defendants respectfully request that the Court dissolve its preliminary injunction. Should the Court merely modify the preliminary injunction, and not dissolve it, Defendants move for clarification that using enjoined materials that enter the public domain will not be a violation of the preliminary injunction.

/ / /

/ / /

Respectfully submitted,

August 15, 2018,

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ATTESTATION PURSUANT TO CIVIL L.R. 5.1(i)(3)

As the filer of this document, I attest that concurrence in the filing was obtained from the other signatories.

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