APPENDIX TABLE OF CONTENTS

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (JUNE 5, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL ABORTION FEDERATION,

Plaintiff-Appellee,

v.

CENTER FOR MEDICAL PROGRESS;
BIOMAX PROCUREMENT SERVICES, LLC;
DAVID DALEIDEN, AKA Robert Daoud Sarkis;
TROY NEWMAN,

Defendants,

and

STEVE COOLEY; BRENTFORD J. FERREIRA,

Respondents-Appellants.

No. 17-16622

D.C. No. 3:15-cv-03522-WHO

NATIONAL ABORTION FEDERATION,

Plaintiff-Appellee,

v.

CENTER FOR MEDICAL PROGRESS; DAVID DALEIDEN, AKA ROBERT DAOUD SARKIS,

Defendants-Appellants,

and

BIOMAX PROCUREMENT SERVICES, LLC; TROY NEWMAN,

Defendants.

No. 17-16862

D.C. No. 3:15-cv-03522-WHO

Appeals from the United States District Court for the Northern District of California William Horsley Orrick, District Judge, Presiding

Before: Johnnie B. RAWLINSON, Paul J. WATFORD, and Michelle T. FRIEDLAND, Circuit Judges.

WATFORD, Circuit Judge:

These are consolidated appeals from a district court order holding two sets of appellants in civil contempt for violating the court's preliminary injunction. We conclude that we lack jurisdiction over both appeals.

The appeals arise out of the same set of facts. David Daleiden attended the annual meetings of the National Abortion Federation (NAF) in 2014 and 2015, allegedly under false pretenses. While there, he and agents of his organization, the Center for Medical Progress (CMP), surreptitiously recorded their interactions with attendees. Daleiden and CMP subsequently published edited versions of those recordings in violation of a contractual agreement with NAF. NAF contends the edited recordings inaccurately portrayed its members as participants in the unlawful sale of fetal remains. As a consequence of these recordings being made public, NAF alleges, its member facilities became the targets of increased harassment, including death threats.

Shortly after publication of the recordings, NAF filed a civil action against Daleiden and CMP in federal district court. NAF asked the court to issue a preliminary injunction prohibiting Daleiden and CMP from, among other things, publishing any of the recordings made at NAF's annual meetings. The district court granted the requested relief. As relevant here, the preliminary injunction enjoins Daleiden and CMP from "publishing or otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF annual meetings."

Two months after entry of the preliminary injunction, the California Attorney General executed a search warrant at Daleiden's home as part of the State's criminal investigation into his activities. Daleiden retained attorneys Steve Cooley and Brentford Ferreira of Steve Cooley & Associates to represent him in the anticipated criminal proceedings. The State eventually

charged Daleiden with unlawfully recording confidential communications in a 15-count criminal complaint. *See* Cal. Penal Code § 632(a).

During the course of Cooley's and Ferreira's representation of Daleiden, recordings covered by the preliminary injunction (which we will refer to collectively as the "prohibited recordings") were made available for public viewing on the website of Steve Cooley & Associates. A webpage announcing the firm's representation of Daleiden prominently featured a three-minute-long "preview" video of edited footage from the prohibited recordings. The webpage also provided a link to a playlist of videos consisting of edited footage from the prohibited recordings that CMP had uploaded to YouTube; anyone who clicked on the link could freely view the videos. And finally, the webpage provided a link to one of the firm's court filings in Daleiden's criminal case, which in turn included a link to another of CMP's playlists on YouTube, this one containing hundreds of videos of raw footage from the prohibited recordings.

The videos disclosed through the Steve Cooley & Associates website received widespread media coverage, both through traditional and online media channels. NAF quickly brought the publication of the videos to the district court's attention, and the court ordered their immediate removal from both the website and YouTube. NAF presented evidence that Daleiden, CMP, Cooley, and Ferreira violated the terms of the preliminary injunction and asked the court to hold them in contempt. In response, the court issued an order to show cause as to why all four parties should not be held in civil contempt.

The court conducted a contempt hearing at which Daleiden, Cooley, and Ferreira appeared. Each of them refused to answer any of the court's questions about how the prohibited recordings wound up being accessible for public viewing through the website of Steve Cooley & Associates. As the basis for refusing to answer, each of them asserted either the attorney-client privilege or work-product protection.

In a detailed written order, the district court held Daleiden, CMP, Cooley, and Ferreira in civil contempt. The court found by clear and convincing evidence that all four parties had worked in concert to violate the terms of the preliminary injunction. As to Daleiden and CMP, the court determined that Daleiden had edited the videos and uploaded them to CMP's YouTube page. As to Cooley and Ferreira, the court concluded that they had disseminated the prohibited recordings on Daleiden's behalf. The court also found that Cooley and Ferreira were bound by the preliminary injunction because they knew of its existence and scope—indeed, the firm's webpage specifically referred to the injunction and what it prohibits.

Following additional briefing and evidence, the court issued a separate order setting the amount of civil contempt sanctions. The court held Daleiden, CMP, Cooley, and Ferreira jointly and severally liable to NAF for approximately $195,000. The award compensated NAF for security costs, personnel costs, and attorney's fees, which the district court found were incurred by NAF as a direct result of the violation of the preliminary injunction.

Both sets of parties—Daleiden and CMP on the one hand, Cooley and Ferreira on the other—filed separate appeals from the district court's orders imposing civil

contempt sanctions. NAF argues that we lack jurisdiction to hear either appeal, given that final judgment has not yet been entered in the underlying civil action. We agree and accordingly dismiss both appeals.

The analysis with respect to Daleiden and CMP is straightforward, so we will start with them. As parties to the underlying action, Daleiden and CMP could obtain immediate appellate review of the district court's contempt order only if the court had held them in criminal contempt. *See Bingman v. Ward*, 100 F.3d 653, 655 (9th Cir. 1996). If the court instead held them in civil contempt, as it purported to do, Daleiden and CMP would need to wait until entry of final judgment in the underlying action to obtain appellate review of the orders. *See Fox v. Capital Co.*, 299 U.S. 105, 107 (1936); *Bingman*, 100 F.3d at 655. Although the label the district court affixes to sanctions is not dispositive, *see United Mine Workers v. Bagwell*, 512 U.S. 821, 828 (1994), the contempt sanctions imposed here are plainly civil in nature. The sanctions were made payable to NAF, not the court, and they compensate NAF only for the expenses it incurred as a direct result of Daleiden's and CMP's sanctionable conduct. *See Koninklijke Philips Electronics, N.V. v. KXD Technology, Inc.*, 539 F.3d 1039, 1042 (9th Cir. 2008); *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1111 (9th Cir. 2005). The fact that the sanctions are immediately payable does not render the court's order appealable on an interlocutory basis. *See Philips*, 539 F.3d at 1045-46.

Daleiden and CMP contend that the sanctions must be deemed criminal in nature because the district court stated that it was imposing the sanctions in part to deter future violations of the preliminary

injunction. That contention is misguided for two reasons. First, deterrence is one of the purposes served by compensatory and punitive awards alike, so the district court's statement does not aid in classifying the sanction as civil or criminal. *See Bingman*, 100 F.3d at 656. And second, we determine the civil or criminal nature of a contempt sanction not by focusing on the court's subjective intentions, but instead by examining "the character of the relief itself." *Bagwell*, 512 U.S. at 828 (internal quotation marks omitted). Here, as noted, the relief awarded to NAF is purely compensatory in nature; no aspect of the award is punitive. That renders the sanctions civil rather than criminal, even if one of the purposes of the award was to deter future wrongdoing.

The jurisdictional analysis as to Cooley and Ferreira is a little more complicated, but the end result is the same. Because Cooley and Ferreira are not parties to the underlying action, a civil contempt sanction imposed against them would ordinarily be deemed a final judgment subject to immediate appeal under 28 U.S.C. § 1291. *See Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 877 F.2d 787, 789 (9th Cir. 1989). But when there is a "substantial congruence of interests" between the sanctioned non-party and a party to the action, the non-party may not immediately appeal. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 747 F.2d 1303, 1305 (9th Cir. 1984). The non-party must wait until entry of final judgment to obtain review, just like a party to the action would. The purpose of this rule is "to avoid piecemeal review and its attendant delay." *Id.* As we put it in *Kordich v. Marine Clerks Association*, 715 F.2d

1392 (9th Cir. 1983) (per curiam), "[w]e see no reason to permit indirectly through the attorney's appeal what the client could not achieve directly on its own: immediate review of interlocutory orders imposing liability for fees and costs." *Id.* at 1393.

The only question, then, is whether there is a sufficiently strong congruence of interests between the parties (Daleiden and CMP) and the non-parties (Cooley and Ferreira) to preclude the latter from obtaining immediate review. Such a congruence of interests will generally exist when the liability of both a party to the action and the non-party arises from the same course of conduct, particularly if liability has been imposed on them jointly and severally. *See id.* Allowing the non-party to seek immediate review could require an appellate court to resolve the same set of issues twice: first during the non-party's interlocutory appeal, and again when the party to the action is able to appeal from the final judgment. The judiciary's interest in conserving limited resources weighs heavily in favor of postponing appellate review until after final judgment, at which point challenges to the sanctioned parties' liability can be resolved together in one fell swoop.[1]

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[1] We have carved out one exception to this general rule, applicable when a non-party is ordered to pay sanctions immediately to a party who is likely insolvent. *See Riverhead Savings Bank v. National Mortgage Equity Corp.*, 893 F.2d 1109, 1113-14 (9th Cir. 1990). In that scenario, the sanctions award is effectively unreviewable on appeal from the final judgment, because the non-party would likely not be able to get the money it paid returned even if it were successful on appeal. *Hill v. MacMillan/McGraw-Hill School Co.*, 102 F.3d 422, 424 (9th Cir. 1996). This narrow exception, which is based on the collateral order doctrine, does not apply here.

The interests of Cooley and Ferreira are substantially congruent with those of Daleiden and CMP. The district court found that Daleiden and CMP acted in concert with Cooley and Ferreira to violate the preliminary injunction, so the liability of all of them arises out of the same course of conduct. In addition, the court imposed joint and several liability, so Cooley and Ferreira are attacking the same award imposed against Daleiden and CMP on largely the same grounds. In these circumstances, Cooley and Ferreira must wait until after entry of final judgment to obtain review of the contempt sanctions imposed against them, just as Daleiden and CMP are required to do. *See Hill*, 102 F.3d at 424-25; *Kordich*, 715 F.2d at 1393.

Cooley and Ferreira contend that our past cases dismissing appeals by non-party attorneys held in contempt are distinguishable because they involved attorneys who represented a party in the underlying action. Here, of course, Cooley and Ferreira represent Daleiden in the related state-court criminal case, not in the civil action that gave rise to the preliminary injunction. Nothing turns on that distinction, though. The purpose of the substantial congruence rule is to avoid duplicative appeals, and that harm would occur whether or not the attorney found in contempt represents a party in the underlying action. *See Cunningham v. Hamilton County*, 527 U.S. 198, 209 (1999).

We dismiss these consolidated appeals for lack of jurisdiction. As a consequence of that ruling, we also lack jurisdiction to rule on Daleiden and CMP's motion requesting reassignment to a different district judge on remand. Finally, we DENY Daleiden and CMP's motion for judicial notice because the materials

brought to our attention do not bear on our jurisdiction to hear these appeals. *See Santa Monica Nativity Scenes Committee v. City of Santa Monica*, 784 F.3d 1286, 1298 n.6 (9th Cir. 2015).

DISMISSED.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SETTING AMOUNT OF CIVIL CONTEMPT SANCTIONS (AUGUST 31, 2017)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NATIONAL ABORTION FEDERATION,

Plaintiff,

v.

CENTER FOR MEDICAL PROGRESS, ET AL.,

Defendants.

Case No. 15-cv-03522-WHO

Before: William H. ORRICK,
United States District Judge

On July 17, 2017, I issued an order finding defendants Center for Medical Progress (CMP) and David Daleiden and Daleiden's criminal counsel, Steve Cooley and Brentford J. Ferreria (respondents), in contempt for willfully violating the clear commands of the Preliminary Injunction Order (PI), Dkt. No. 354, by publishing and otherwise disclosing to third-parties recordings covered by the PI. Dkt. No. 482 at 21 (Contempt Order). In order to secure those parties' and respondents' current and future compliance with

the Preliminary Injunction Order and to compensate NAF for expenses incurred as a result of the violation of my Preliminary Injunction Order, I held CMP, Daleiden, Cooley, and Ferreira jointly and severally liable for: (i) NAF's security and personnel costs incurred as a result of the violations of the PI; and (ii) attorneys' fees incurred as a result of the violations of the Preliminary Injunction, including counsel's efforts to get websites to "take down" the PI materials and the time reasonably incurred in communicating with civil and criminal defense counsel and moving for contempt sanctions. *Id.* at 22-23. As directed in the Contempt Order, NAF has since submitted detailed records regarding its security costs and attorneys' fees and costs, and defendants/respondents have objected to those requests on both general and specific grounds. Dkt. Nos. 484, 485, 487, 488, 489, 490.

In this Contempt proceeding, my ultimate purpose is to consider the character and magnitude of "the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 304 (1947). For the reasons discussed below, I set the amount of civil contempt sanctions to be paid jointly and severally by CMP, Daleiden, Cooley, and Ferreira at $195,359.04, an amount significantly less than sought by NAF but an amount sufficient, I hope, to insure future compliance.[1]

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[1] The administrative motions to seal, Dkt. Nos. 485, 487, are GRANTED for good cause shown.

I. NAF'S Costs

A. In General

As an initial matter, defendants object to the costs NAF seeks to recover, arguing that the costs were not "reasonably" incurred and are not recoverable under NAF's breach of contract claim (the only claim NAF asserted in support of the PI). Defendants' Objections ("Objs.") [Dkt. No. 487-3] at 7-14.[2] Similar arguments were raised in defendants' response to the OSC and rejected when I issued the Contempt Order. *See* Dkt. No. 434 at 9-13. Briefly, because the purpose of the civil contempt sanctions is to compensate NAF for the expenses incurred and to encourage defendants and respondents to abide by the PI going forward, the NAF costs that I include in the civil contempt sanctions award do not have to be damages that would flow from the underlying breach of contract claim. As to "reasonably incurred," I have already considered this in connection with the Contempt Order and conclude that, in general, the costs NAF seeks to recover were reasonably incurred in response to the violations of the PI Order.

B. Specific Costs

According to the Declaration of Melissa Fowler, NAF seeks to recover four categories of costs. First, security costs paid to outside vendors amounted to $28,176.62, incurred to: (i) uncover and monitor threats made in response to the Preview video and release of PI materials; (ii) complete related research; and (iii)

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[2] Respondents Cooley and Ferreira join defendants' objections. Dkt. No. 490.

provide personal security services at a NAF-member clinic to a physician featured in the Preview video. Fowler Decl. ¶¶ 3, 4, 6 & Exs. A, C-1, C-2. Second, NAF incurred travel costs of $397.40 to send security staff to conduct an on-site assessment. *Id.* ¶ 5, Ex. B. Third, it absorbed personnel costs in the amount of $29,417.96 for staff time diverted from normal duties to address and respond to the disclosures of PI materials. Fourth, it also absorbed "other costs" in the amount of $6,327.56 for staff travel and meal expenses.

As to the monitoring and research costs ($5,150 and $1,282.50), I conclude that those costs were reasonably incurred and necessarily related to the disclosure of the PI materials. Similarly, the travel expenses ($397.40) were reasonably incurred and necessarily related to the disclosure of PI materials. As to the personnel costs ($29,417.96), I find that the monitoring done and additional security issues addressed by staff identified in the Fowler Declaration are compensable and were reasonably incurred and necessarily related to the disclosure of the PI materials. The attendance at the Contempt hearing by three NAF staff members is also reasonable and compensable, as in-person testimony may have been (although in the end was not) necessary. The $6,327.56 in "other costs" including travel time for the three staff to attend the Contempt hearing are reasonable and were necessarily incurred.

However, I will not include the costs incurred by a NAF-member clinic for security ($21,744.12) as part of the civil contempt sanctions award. In the

Contempt Order, I limited the sanctions to "NAF's security costs."[3]

Therefore, NAF's costs in the amount of $42,575.42 are included in the civil contempt sanctions award.

II. Attorney's Fees and Costs

NAF seeks compensation for $280,482.00 in attorney time and $7,297.95 in costs incurred as a result of the violation of the PI. Dkt. No. 484 at 5.

A. Hourly Rate

Defendants object to the hourly rates requested by NAF's counsel, arguing that the requested rates have not been adequately supported by declaration or citation to cases approving those rates for similarly situated counsel. Defendants suggest, instead, that NAF's counsel should be compensated at the *Laffey* matrix rates, adjusted upwards by eight percent to account for San Francisco's higher costs. Objs. at 2.[4]

As an initial matter, neither side addresses whether case law applicable to statutory fee awards applies in the context of setting sanctions for violation

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[3] I am not reaching any conclusion that a NAF-member clinic is or is not entitled to damages flowing from the underlying action. In addition to the limitation in the Contempt Order cited above, my primary task here is not to determine whether the NAF-member security costs were proximately caused by the actions of respondents, but to weigh the character and magnitude of threatened continued harm with the probable effectiveness of the sanction in order to secure compliance.

[4] Defendants also object to the characterization of the years of counsels' practice, instead relying on the NAF attorneys' dates of bar admission to set their "years" of practice. Dkt. No. 487-3 at 3.

of a Court order. I will assume that case law applies. In that context, "[t]he burden is on the fee applicant to produce evidence 'that the requested rates are in line with those prevailing in the community'" and "[i]n general, '[a]ffidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate.'" *Hiken v. Dep't of Def.*, 836 F.3d 1037, 1044 (9th Cir. 2016) (quoting *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 980 (9th Cir. 2008) and *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)).

NAF's counsel have not justified their requested rates in reference to fee awards in other cases or with affidavits demonstrating that the requested rates are reasonable for similarly situated attorneys in similar practice areas. *Hiken v. Dep't of Def.*, 836 F.3d at 1044 (the "reasonable rate should generally be guided by the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." (internal quotation omitted)). And at the same time, I have serious concerns about using rates based on the *Laffey* matrix. As I and other courts in this District have recognized, "[a]bsent some showing that the rates stated in the matrix are in line with those prevailing in this community . . . the matrix is not persuasive evidence of the reasonableness of its requested rates." *Public.Resource.org v. United States Internal Revenue Serv.*, No. 13-CV-02789-WHO, 2015 WL 9987018, at *6 (N.D. Cal. Nov. 20, 2015). Defendants have made no showing that their suggested rates (the matrix plus 8%) are in line

with the rates prevailing in this community for the legal work at issue.

Given that I lack any other evidentiary basis to set the rates, and that using higher rates would cause the sanctions to exceed the amount probably necessary to bring about compliance with the PI Order going forward, under these unique circumstances I will adopt the rates for counsel suggested by defendants; matrix plus 8%. I am not finding that the *Laffey* matrix rates are in line with what experienced attorneys in similar practices in the San Francisco area charge or have been awarded in statutory fee cases, and I recognize that reasonable attorney rates for similarly situated counsel are undoubtedly higher than those based off of the matrix. The rates awarded here will not serve as any precedent that I will use for fees awarded in the future in this case or any other. The two paralegals shall be compensated at a rate of $210/hour, a rate slightly higher than I have approved for experienced paralegals in the past. *See, e.g., James v. AT&T West Disability Benefits Program*, Case No. 12-6318, December 22, 2014 Order (awarding $195/hour). The rates approved are as follows:

Attorney/Paralegal	Requested Rate	Approved Rate
Derek Foran	$910/Partner/April 2003 admission	$503
Marc Hearron	$885/Partner/Nov. 2015 admission	$503
Maggie Mayo	$785/9th yr/Dec. 2008 admission	$427
Christopher L.	$785/9th yr/Dec.	$427

Robinson	2008 admission	
Nicholas A. Roethlisberger	$695/6th yr/Dec. 2011 admission	$359
Lena Hughes	$650/5th yr/2013 admission	$359
Alexandra E.S. Laks	$600/4th yr/Dec. 2013 admission	$348
Randy D. Zack	$540/3rd yr/Dec, 2014 admission	$348
Tom Beyer	$360/Sr Paralegal	$210
Priscilla R. Fernandez	$300/Paralegal	$210

B. Reasonable Hours

Defendants also complain about the reasonableness of the hours expended by NAF's counsel, arguing that hours should be cut for various reasons.[5]

1. Duplicative Time

Defendants argue that over 85 hours should be cut because the time billed was duplicative and

[5] According to the Declaration of Derek Foran, Foran made various reductions in the hours incurred by his firm to account for any duplication and significantly reduced his own time. Foran Decl. ¶¶ 13, 15. Foran also did not include the time incurred by more senior attorneys James J. Brosnahan and Linda Shostak. *Id.* ¶ 16. Those reductions eliminated 273 hours and $160,200 (as calculated using plaintiffs' proposed rates) in attorney time. *Id.* ¶ 17.

unnecessary.[6] As an example, defendants object to NAF seeking compensation for the time spent by four attorneys to prepare for and attend the July 11, 2017 Contempt hearing. Objs. at 5. I have reviewed the hours challenged as duplicative and conclude that the majority of the contested hours were not duplicative or unnecessary. As the time entries show, while a number of attorneys worked on the pleadings, many handled/researched different topics or had different backgrounds (appellate specialty, sixth amendment focus, etc.).

However, I agree in part with defendants that two of the attorneys' time spent preparing for an attending the contempt hearing was unnecessary (Laks and Robinson), but leave the time of the two other attorneys (Foran, who argued and Roethlisberger, who drafted significant parts of the relevant pleadings). Therefore, 3.6 hours of Laks' time should be deducted and 2.5 hours of Robinson's time should be deducted.

2. Time Spent "Conferring"

Defendants also challenge time counsel spent conferring and seek to cut 14 hours for those time entries. However, the majority of the challenged entries are for time counsel spent conferring with their client, a necessary part of their representation. The remainder of the challenged time entries are of limited time spent by the attorneys directing the research and briefing that needed to be completed. No time will be

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[6] Some of the allegedly duplicative hours (coded blue) are also challenged as paralegal work (coded pink) or work on the challenged reply brief or request for attorneys' fees (coded yellow).

reduced because there was no unnecessary or excessive conferring.

3. Time Spent on Clerical or Paralegal Tasks

Defendants challenge approximately 20 hours of time billed by attorneys that they contend should be charged at a paralegal rate given the clerical nature of the tasks. I have reviewed the challenged entries and while it is not very clear, the majority of the challenged time was for attorney Roethlisberger's "review, revise, and file" or "review, revise, and supervise filing" entries. The vast majority of that time, presumably, was spent on reviewing and revising, and not filing or supervising filing. However, I will reduce the Roethlisberger hours by 2 hours to account for any paralegal work.[7]

4. Time Spent on Preparing the Application for Attorney's Fees and Costs

Defendants challenge the time NAF's counsel spent preparing its and NAF's declarations in support of fees and costs, arguing that if I do not grant NAF's full request (of $280,482.00), then somehow NAF should not be compensated at all for the time spent seeking fees. Objs. at 4. The case law relied on by defendants does not support their argument. *Id.*[8] This time is

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[7] The other challenged entry is by attorney Laks who billed on 5/30/17 for reviewing and adding exhibits and citations in a motion. From the context of the entry, I find that this work is compensable attorney time.

[8] For example in *Comm'r, I.N.S. v. Jean*, 496 U.S. 154, 163 (1990), the Supreme Court recognized that "if the Government's challenge to a requested rate for paralegal time resulted in the

reasonable, although as discussed below, it will be excluded from the sanctions amount for other reasons.

5. Time Spent on Motion to Disqualify that was Inadvertently Included

Defendants challenge time that was apparently spent on the motion to disqualify heard by Judge Donato. NAF meant to exclude all of this time, but apparently failed to exclude 0.5 hours billed by Beyer on June 12, 2017. This time is excluded.

6. Time Spent on Unauthorized "Reply"

Finally, defendants challenge the time NAF's counsel spent on the reply brief, arguing that it was not originally allowed by the Court (because no time frame for filing a reply was provided in the initial OSC). However, I granted NAF's request to file the reply brief. Dkt. No. 468. This time is compensable.

In sum, other than the few discrete examples identified above, the time spent is reasonable. However, the purpose of the imposition of civil contempt sanctions is both to compensate NAF as a result of defendants' and respondents' contempt and to encourage defendants and respondents to adhere to the PI going forward. As part of that analysis, I consider the character and magnitude of "the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *United States v. United Mine Workers of Am.*, 330 U.S.

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court's recalculating and reducing the award for paralegal time from the requested amount, then the applicant should not receive fees for the time spent defending the higher rate." But here there has been no time expended "defending a higher rate" because no reply on the amount of fees was allowed.

258, 304 (1947). In line with that consideration, I will not include as sanctions the amount of time NAF's counsel spent compiling and submitting the fee declarations. While the time spent on the fee declarations was reasonable, I do not find that including this additional time in the amount of sanctions awarded will serve any further deterrent purpose. Therefore, none of the 15.90 hours spent on the fees application will be included.

The sum of attorneys' fees reasonably incurred by NAF in response to the violations of the PI Order and included as part of the civil sanctions award is $148,967.90.

C. Costs

Defendants object to NAF's counsel's request for $7,297.95 in costs, arguing first that there is no explanation for the line item in the cost bill for $3,482.23 in costs. Objs. at 7; Foran Decl., Ex. 2 [ECF Dkt. No. 484-2 pg. 5]. There is no explanation for the $3,482.23 charge, and it appears to be a subtotal of the prior costs. The total amount of costs incurred, according to the line items included in Exhibit 2 is $3,815.72.

Of that amount, defendants challenge the outside copying and color copying costs. However, color copies were submitted to the court in conjunction with the opening motion and the reply and the number of copies made is not excessive. Therefore, the $3,815.72 in reasonable costs incurred is included as part of the civil sanctions award.

CONCLUSION

For the foregoing reasons, the amount of civil sanctions is set at $195,359.04. In setting this amount, I have considered the magnitude of "the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 304 (1947). CMP, Daleiden, Cooley, and Ferreria are jointly and severally liable for this amount to be paid to NAF.

IT IS SO ORDERED.

/s/ William H. Orrick
United States District Judge

Dated: August 31, 2017

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (JULY 17, 2017)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NATIONAL ABORTION FEDERATION,

Plaintiff,

v.

CENTER FOR MEDICAL PROGRESS, ET AL.,

Defendants.

Case No. 15-cv-03522-WHO

Before: William H. ORRICK,
United States District Judge

Based on the evidence before me, the record in this case, the failure of defendant Center for Medical Progress (CMP), defendant David Daleiden, respondent Steve Cooley and respondent Brentford J. Ferreira to provide sufficient evidence in response, and for the reasons discussed below, I HOLD CMP, Daleiden, Cooley, and Ferreira in CIVIL CONTEMPT for multiple violations of the February 5, 2016 Preliminary Injunction (PI). As detailed below, these individuals and the entity willfully violated the clear commands

of the PI by publishing and otherwise disclosing to third-parties recordings covered by the PI.[1]

BACKGROUND

I. Preliminary Injunction

The parties and respondents are familiar with the factual and procedural history of this case. Significant to the issue of contempt, on February 5, 2016, I entered a preliminary injunction (affirming a prior existing Temporary Restraining Order), mandating the following:

> Pending a final judgment, defendants and those individuals who gained access to NAF's 2014 and 2015 Annual Meetings using aliases and acting with defendant CMP (including but not limited to the following individuals/ aliases: Susan Tennenbaum, Brianna
>
> (1) Allen, Rebecca Wagner, Adrian Lopez, and Philip Cronin) are restrained and enjoined from: publishing or otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF annual meetings;
>
> (2) publishing or otherwise disclosing to any third party the dates or locations of any future NAF meetings; and

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[1] The motions to seal, Docket Nos. 416, 433, 437, 442, 462, and 470 are GRANTED as compelling reasons justify the continued sealing of the materials at issue.

(3) publishing or otherwise disclosing to any third party the names or addresses of any NAF members learned at any NAF annual meetings.

Preliminary Injunction [Dkt. No. 354] at 42. The PI was affirmed by the Ninth Circuit. *National Abortion Federation v. Center for Medical Progress*, 2017 WL 1164450 (9th Cir. March 29, 2017).[2]

II. Criminal Investigation and Complaint

On April 5, 2016, the California Attorney General executed search warrants and seized Daleiden's computers and devices containing materials covered by the PI. Foran Decl., Ex. A. (Affidavit in Support of Arrest Warrant). A few days later, Daleiden retained Steve Cooley and Brentford J. Ferreira of Steve Cooley & Associates (SCA) to represent him in any criminal proceedings. On April 15, 2016, NAF's counsel sent a letter to the California Attorney General, notifying the AG that the seized materials are covered by the PI in this case. In July 2016, Ferreira and Deputy Attorney General (DAG) Johnette Jauron meet with the Honorable Terri Jackson of the San Francisco Superior Court to consolidate proceedings related to the search warrants and venue them in San Francisco. During that meeting, Presiding Judge Jackson ordered the DAG to provide all seized evidence to SCA so that SCA could review the evidence for materials that were privileged in connection with this civil case.

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[2] Defendants may seek *certiorari* with the United States Supreme Court; the time for filing a petition for a writ of *certiorari* has not yet run.

On March 28, 2017, the California Attorney General's Office issued a press release that it had filed a criminal complaint against Daleiden and Sandra Susan Merritt. Foran Decl., Ex. A. (Criminal Complaint). The Criminal Complaint alleges that Daleiden and Merritt illegally tape recorded 14 "Does" on various dates in California, the majority of which occurred during NAF's 2014 Annual Meeting in San Francisco. *See generally* Criminal Complaint. On the same day as the announcement, the Hon. Carol Yaggy of San Francisco Superior Court sealed the declaration in support of the arrest warrant. *Id.*

On May 3, 2017, Daleiden was arraigned and the Criminal Complaint was filed with Judge Yaggy's sealing order. On the same day, SCA filed a demurrer challenging the sufficiency of the Criminal Complaint on behalf of Daleiden. Foran Decl., Ex. D (Demurrer). Footnote 1 of the Demurrer contained a link to a YouTube "playlist" containing 337 videos "published" by CMP and labelled "San Francisco Superior Court Defense Filing." Foran Decl., Ex. E ("Defense Filing" playlist).[3] The Demurrer was accompanied by a Request for Judicial Notice (RJN) asking the Superior Court to take notice of the videos under California Evidence Code § 452. Foran Decl., Ex. F. Exhibit 1 to the RJN included the same YouTube link to the Defense Filing playlist as Footnote 1. Foran Decl. ¶ 13. 334 of the videos "published" by CMP in the YouTube Defense Filing playlist were recordings included within the scope of the PI. Foran Decl., ¶ 12. Videos 4 through 336 contain raw unedited footage taken by Daleiden

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[3] The full title of the playlist is "San Francisco Superior Court Defense Filing" and the last updated date is May 3, 2017. Ex. E.

at NAF's Annual Meetings in San Francisco and Baltimore. *Id.* & Ex. E.[4]

SCA did not seek to seal Footnote 1 of the Demurrer or Exhibit 1 to the RJN. Foran Decl., ¶ 13. The Defense Filing playlist link was described by SCA as "private" in the Demurrer, but anyone could use that link to access the playlist. Foran Decl., ¶ 12. A flash drive containing the same videos was also submitted to the Superior Court on May 3, 2017. Demurrer, Footnote 1.[5]

On May 16, 2017, the DAG sent SCA a thumb drive containing just over 20 excerpts of videos that were the basis of the Criminal Complaint. The thumb drive was password protected.

III. Further Publishing and Disclosure of PI Materials

Also on May 3, 2017, another video was uploaded to CMP's YouTube channel. This 3 minute and 9 second video was titled "Preview." Foran Decl., Ex. G. It was marked as "private/unlisted" so members of the public could not (yet) know it was there. Foran Decl. ¶ 14. The Preview video contains fifteen "clips" or segments, all or substantially all of which were taken at NAF's 2014 and 2015 Annual Meetings in San Francisco and Baltimore and covered by the PI. Foran Decl. ¶ 4.

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[4] Video 337 is the Preview video discussed below.

[5] The flash drive was maintained by the Hon. Christopher Hite (the judge assigned to the criminal proceedings) and was not accessible by the public. Foran Decl. ¶ 12. In the June 21, 2017, hearing on Daleiden's Demurrer, Judge Hite declined to take judicial notice of the videos and ordered the flash drive be removed from the court's docket. Foran Reply Decl., Ex. C (Transcript of June 21, 2007 hearing) at 5:27-6:5.

The video features CMP's logo and website in the bottom right corner and identifies the titles and affiliations/locations of eleven NAF members. Foran Decl. ¶ 5. The video concludes with a request for viewers to "share" the video, to "hold Planned Parenthood accountable for their illegal sale of baby parts" and "to learn more at centerformedicalprogress. org." *Id.* Only seven of the eleven NAF members identified in the Preview video are Does in the Criminal Complaint. Transcript of July 11, 2017 Hearing at 42:1-4.

Between May 12 and May 24, 2017, a further 2 hours and 9 minutes of PI materials were uploaded to CMP's YouTube channel. Foran Decl. ¶¶ 9-10. These 14 videos were taken at NAF's Annual Meetings in San Francisco and Baltimore, and are excerpts of recordings of each of the Does from the Criminal Complaint. Foran Decl. ¶ 10. The videos, plus three others not covered by the PI, were collected into a playlist titled "San Francisco Superior Court Defense Filing—Accusers." Foran Decl., Ex. C (hereafter "Accusers" playlist). The videos and playlist were marked as private/ unlisted. Foran Decl. ¶ 9.

On May 24, 2017, at 8:43 p.m. Eastern Standard Time ("EST"), the online blog "The Next Right Step" published a "Breaking News" story that referred to SCA's launch of a media resource page regarding SCA's representation of Daleiden. Foran Decl., Ex. H; Second Supp. Foran Decl., Ex. A. The story provided links to the SCA "Media Page" and includes links to the Criminal Complaint, Demurrer, RJN, and all the video footage "referenced" in the Criminal Complaint. *Id.*, Ex. H. On May 25, 2017, at 12:01 a.m. EST, the Preview video was published on the National Review website.

Foran Decl., Ex. J; Foran Second Supp. Decl., Ex. B. The video was embedded on the site and described as a "shocking new video" "from The Center for Medical Progress." *Id.* The National Review website also linked to SCA's Media Page where "all the video footage" referenced by the California Attorney General's office "can be found." *Id.* At 5:47 a.m. EST, the Susan B. Anthony list published the Preview video on Twitter, also describing it as a "shocking new video" attributed to CMP. Foran Decl., Ex. L. Then at 8:15 a.m. EST, the Preview video was published by another Twitter user. Foran Decl., Ex. N.

At some point on May 25, 2017, SCA's Media Page went live and was accessible to the public from the SCA website. Foran Decl. ¶ 4. NAF's counsel declares on information and belief that the page went live in "the early hours" of May 25, 2017. *Id.* The first thing on the SCA Media Page is an embedded copy of the Preview video. Foran Decl., Ex. B. The Media Page goes on to announce SCA's representation of Daleiden and acknowledges the existence of the Preliminary Injunction "preventing David from posting any videos taken at the 2014 and 2015 NAF conventions." *Id.* The SCA Media Page then linked to the Demurrer and RJN (and Exhibit 1), from which readers could see the "private" YouTube link and get to the CMP "Defense Filing" playlist, allowing access to the 337 videos (including the 144 hours of raw footage from the NAF San Francisco and Baltimore conferences). Foran Decl. ¶ 11. The 14 Does from the Criminal Complaint were also identified on the SCA Media Page. *Id.* Finally, viewers were provided a link to access the Accusers playlist containing the "video-recordings related to

interviews" with the Does. *Id.*; *see also* Foran Decl. ¶ 9.

IV. Take Down Order

NAF's counsel became aware of the disclosures of the PI material around 8:30 a.m. on May 25, 2017, and immediately contacted defense counsel in this civil case, demanding immediate removal of the materials from YouTube and SCA's website. Foran Decl., ¶ 22 & Ex. O. Shortly thereafter, NAF's counsel contacted SCA and likewise demanded removal of all PI materials. Foran Decl., ¶¶ 23-24 & Ex. P. NAF then alerted me to the disclosures. I set a telephonic hearing for 4:00 p.m. Pacific Standard Time that day. Dkt. No. 408. Shortly before the 4:00 p.m. telephonic hearing, YouTube blocked access to the links on its site. Foran Decl. ¶ 26.

During the telephonic conference, I directed the parties that the links to PI materials on the SCA website and YouTube should "be taken down within the next 15 minutes, if they haven't been taken down already." May 25, 2017 Transcript [Dkt. No. 413] at 6:12-15:11:23-24. Shortly after the hearing, but before my written Order was issued, the list of "Doe" names and the Preview video were removed from the SCA website. Foran Decl. ¶ 28. The links to the YouTube playlists, however, remained. *Id.*

At 5:24 p.m. on May 25, 2017, my Order Directing Compliance with Preliminary Injunction and Order to Show Cause re Contempt was filed. Dkt. No. 409. Under that Order:

> To protect the integrity of the Preliminary Injunction and given the significant privacy

> concerns at stake, Daleiden is hereby ORDERED to require his counsel—Steve Cooley and Brentford J. Ferreira of Steve Cooley & Associates and all those working with or for his counsel—IMMEDIATELY to take down from their website all links to recordings covered by the Preliminary Injunction and remove all references to the identities of any NAF members who were subjects of the recordings covered by the Preliminary Injunction. Daleiden and his counsel are also ORDERED IMMEDIATELY to undertake all efforts to remove from YouTube the recordings covered by the Preliminary Injunction. If Daleiden, his counsel, or any defendant in this action or their counsel has caused any of the information covered by the Preliminary Injunction to be published or posted in any other manner since entry of the Preliminary Injunction, they are ORDERED IMMEDIATELY to take it down.

May 25, 2017 Order at 2. However, the links to YouTube playlists remained on the SCA Media Page through May 26 and 27. Foran Decl. ¶ 28. The SCA media page was taken down sometime over the following weekend. *Id.*[6]

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[6] In declarations submitted after the OSC re Contempt Hearing, Cooley and Ferreira declare that the PI materials were "taken down at approximately 4:55 p.m. on May 25, 2017." Dkt. Nos. 477, 478, ¶ 3. Cooley goes on to declare that he hired a computer forensic firm, and the research that firm conducted made it "reasonable to conclude" that the SCA Media Page was "removed sometime between 5/25/2017 and 5/26/2017." Dkt. No.

V. Additional Dissemination of the PI Materials

Despite the blocking on YouTube, and the belated actions of SCA in removing the Preview video, Doe names, and eventually the YouTube links, the PI materials were accessed and shared by numerous third parties. In one instance, the 144 hours of the raw footage were loaded to a site for public viewing (that site was subsequently blocked through NAF's efforts). Foran Decl. ¶ 31. The Preview video—containing excerpts of PI material and disclosing the names of the NAF members shown—was posted on Facebook and viewed more than 469,000 times and shared 13,400 times. Foran Decl., ¶¶ 33-34 & Ex. V.

VI. NAF'S Response

After being alerted to the disclosures, NAF placed its security team on "high alert." Declaration of Senior Director of Security Gannon in Support of NAF's Response to Order to Show Cause re Contempt [Dkt. No. 416-4] ¶ 3. NAF immediately contacted all of the members shown or mentioned in the Preview video or disclosed as a Doe on SCA's website to advise them of the situation and encourage them to take precautions to ensure their safety. Gannon Decl. ¶ 3. NAF's outside security firm was asked to monitor social media platforms for threats made against any of its members who appeared in the Preview video, as well as any of the identified Does. *Id.* Within one hour, NAF's outside security firm reported back, detailing a number of

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478-1, ¶ 7. However, neither Cooley nor Ferreira—who presumably have knowledge about their own website, and who admit to posting the Media Page in the first instance—provide any evidence as to when the Media Page came down.

what it considered threats; defendants characterize them as merely rhetoric. *Id.* ¶ 4.

The monitoring by NAF and its outside security firm has confirmed that since May 25th, NAF and its members whose identities were disclosed in the Preview video and on SCA's website have seen a sharp increase in "negative and disturbing" threats. *Id.* ¶ 8; *see also* Gannon Supp. Declaration [Dkt. No. 462-9] ¶¶ 2-4.[7] For example, one NAF member shown in the "Preview" video received direct written communications just hours after it was published calling them "evil," "a baby killer," and a "systematic murderer." Gannon Decl. ¶ 6. Another NAF member's image—utilizing a head-shot from the "Preview" video—has been circulating online and generating comments that caused the NAF member to hire a private security firm to drive them to and from work and caused other disruptions to their and their families lives. *Id.* ¶ 7.

NAF security personnel have met with other NAF members and members of their families to monitor and provide recommendations on their security. *Id.* ¶ 9. It was forced to divert both internal and outside consultant staff from other projects to work on monitor-

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[7] Daleiden and CMP object to Paragraph 4 of the Gannon Supplemental Declaration—discussing the threats a NAF-member physician identified in the Preview video received—as hearsay and lacking personal knowledge. Objections [Dkt. No. 469]. The personal knowledge objection is OVERRULED. The hearsay objection is sustained in part as to the quoted threats, but OVERRULED as Gannon's understanding that specific threats were made to the physician. Daleiden and CMP also object as hearsay to news reports attached as Exhibit A and B to the Supplemental Foran Declaration. *Id.* I have not considered those news reports in reaching my conclusion as to contempt and remedy. Therefore, those objections are OVERRULED as moot.

ing and responding to the disclosure of the PI information. Gannon Decl. ¶¶ 3, 10; Gannon Supp. Decl. [Dkt. No. 462-9] ¶¶ 2.

According to NAF's Senior Director of Communications & Membership, as of June 1, 2017, NAF had incurred $1,568.26 in direct security costs to fly a member of their Security Staff to conduct security reviews of the home and office of a NAF member shown in the Preview video. Fowler Decl. ¶ 3. Through June 30, 2017, NAF diverted approximately $26,000 in staff time from regular tasks as a result of the disclosures, assigning those staff to monitor and respond to threats and conduct research into threats related to the disclosures. Supplemental Fowler Decl. ¶ 4 [Dkt. No. 462-5] ¶ 4. An additional $1,282.50 has been incurred for outside consultant staff. *Id.* & Ex. B. One NAF member facility has been invoiced for direct security costs of $11,411.92 to provide armed security for a physician featured in the Preview video. *Id.* ¶ 5 & Ex. C.

Finally, as of the close of business on Wednesday, May 31, 2017, attorney fees incurred on behalf of NAF as a result of the disclosures amount to $96,610.50. Foran Decl. ¶ 35.

VII. OSC Re Contempt Hearing

Prior to the OSC re Contempt Hearing, I issued an order identifying the timeline of pertinent events relevant to the OSC hearing. The defendants and respondents offered no material disagreement to the timeline or the evidence offered by NAF. I also posed questions that I intended to ask of civil defense counsel, criminal defense counsel, and Daleiden. July

10, 2017 Order Concerning OSC Hearing [Dkt. No. 468]. The questions were:

> [For] Ms. Short, Mr. LiMandri, and the other Civil Case Defense Counsel:
>
> - When did you first become aware of the existence of the "Preview" Video? How?
> - When did you first become aware of the existence of the "Defense Filing" playlist videos on CMP's YouTube channel? How?
> - What steps did you take to comply with my May 25, 2017 Order requiring all efforts be made to take down links to the Preliminary Injunction materials?
>
> [For] Messrs. Cooley & Ferreira:
>
> - When did you receive the Preview Video or a link to the Preview Video? From whom?
> - When did you receive a link to the "Defense Filing" playlist hosted on CMP's YouTube channel? From whom?
> - When did you receive a link to the 144 hours of raw footage hosted on CMP's YouTube channel? From whom?
> - When exactly did the Steve Cooley & Associates "Media Page" about your defense of David Daleiden become accessible to the public through the SCA website? Who took the steps to make that page accessible to the public?
> - When did you become aware of my May 25, 2017 Order requiring all efforts be made to take down links to the Preliminary Injunction materials?

What steps did you undertake to comply with that Order?

[For] Mr. Daleiden:

- Did you have any role in creating the Preview video? When was it created? Did you upload the Preview video to CMP's YouTube channel? When was it uploaded? Have you shared the Preview video in any way (*i.e.*, by sharing a link or sharing the actual video file) with others since its creation?
- Who has "administrator" access to/can post material on CMP's YouTube channel?
- Did you have any role in creating/editing the video excerpts included in the "Defense Filing" playlist on CMP's YouTube channel? Did you upload those videos to CMP's YouTube channel? When?
- What steps did you personally take to comply with my May 25, 2017 Order requiring all efforts be made to take down links to the Preliminary Injunction materials?

Dkt. No. 468 at 3-4.

At the July 11, 2017 hearing on the OSC re Contempt, the civil case defense counsel refused to answer any of the questions on the basis of the attorney-client privilege.[8] Criminal defense counsel Cooley

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[8] While Attorney Matthew Heffron initially stood up and on behalf of "all civil defense counsel" asserted the attorney-client privilege as a basis to refuse to answer any of my identified questions, Attorney Paul Jonna subsequently stood up and read out a "statement" from Attorney Charles LiMandri. That statement provided some answers and arguable defenses to contempt with

and Ferreira also asserted the attorney-client privilege as the basis for refusing to answer the first four sets of my questions. As to the fifth set of questions ("When did you become aware of my May 25, 2017 Order requiring all efforts be made to take down links to the Preliminary Injunction materials? What steps did you undertake to comply with that Order?"), Cooley and Ferreira both asserted the attorney work-product doctrine in addition to attorney-client privilege, refusing to answer those questions as well. Finally, Daleiden asserted the attorney-client privilege and refused to answer any of the four sets of questions I posed to him. As a back up, his counsel also indicated that Daleiden could also take the Fifth Amendment to decline to answer the questions.

In declarations submitted after the OSC re Contempt Hearing on July 14, 2017, Cooley and Ferreira declare that the PI materials were "taken down" from YouTube and remote hosts within their control at approximately 4:45 p.m. on May 25, 2017, as confirmed by their computer forensic firm. Dkt. Nos. 477, 478 & 478-1. Neither Cooley nor Ferreira say who took down that material. Nor do they provide any information about who posted the information to

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respect to the civil defense counsel. *See* Transcript of July 11, 2017 hearing at 16:11-20:5. However, to the extent my questions called for attorney-client information (and most did not), LiMandri's statement arguably waived any properly asserted privilege. *See, e.g.*, *id.* at 18:14-22 ("During the May 25th teleconference with the Court, Your Honor ordered us to instruct specific persons to remove the YouTube links to the videos within 15 minutes. It's our understanding that any links posted by those persons the Court asked to us contact were, in fact, removed within 15 minutes. The civil defense counsel confirmed that all the videos we knew and were informed about on YouTube were down.").

their Media Page, when their Media Page went live, when their Media Page was taken down, or who did any of those acts.

LEGAL STANDARD

Civil contempt "consists of a party's disobedience to a specific and definite court order by failure to take all reasonable steps within the party's power to comply." *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993). "A party may also be held liable for knowingly aiding and abetting another to violate a court order." *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 945 (9th Cir. 2014) (*citing Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945)). "As a result, a party to an injunction who assists others in performing forbidden conduct may be held in contempt, even if the court's order did not explicitly forbid his specific acts of assistance." *Id.* at 948.

As the party alleging civil contempt, NAF must demonstrate that the alleged contemnors violated my Preliminary Injunction by "clear and convincing evidence" and not merely by a preponderance of the evidence. *Id.* Once the moving party makes that showing, the burden then "shifts to the contemnors to demonstrate why they were unable to comply." *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999).

"Whether a contempt sanction is civil or criminal is determined by examining 'the character of the relief itself.'" *Ahearn ex rel. N.L.R.B. v. Int'l Long-shore & Warehouse Union, Locals 21 & 4*, 721 F.3d 1122, 1129 (9th Cir. 2013) (quoting *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828

(1994). As "the Supreme Court explained, [] a sanction generally is civil if it coerces compliance with a court order or is a remedial sanction meant to compensate the complainant for actual losses." *Id.* "A criminal sanction, in contrast, generally seeks to punish a 'completed act of disobedience.'" *Id.* (quoting *Bagwell*, 512 U.S. at 828).

As I noted in the Order Concerning OSC Hearing and explain in more detail below, the sanctions imposed here are civil. They are intended to coerce CMP and Daleiden to abide by the Preliminary Injunction on a going forward basis and remove any incentive for further violations, and they will compensate NAF for the costs and expenses it has reasonably incurred in responding to the disclosures made in violation of the Preliminary Injunction.[9]

DISCUSSION

I. Failure to Controvert or Offer Any Evidence

NAF presented clear and convincing direct and circumstantial evidence showing that CMP and

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[9] Defendants' and respondents' cases that apply criminal contempt standards to proceedings involving "complex" injunctions are inapposite. *See, e.g., Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 837 (1994) (distinguishing the injunction at issue from "a complex, complex injunction" where court "effectively policed petitioners' compliance with an entire code of conduct"); *U.S. Equal Employment Opportunity Comm'n v. Univ. of Louisiana at Monroe*, No. CV 05-1158, 2016 WL 917331, at *3 (W.D. La. Mar. 8, 2016 (court addressed "complex factual interpretations of the Decree"). This Court's injunction is in no way "akin to 'an entire code of conduct that the court itself had imposed.'" *N.Y. State Nat. Org. for Women v. Terry*, 41 F.3d 794, 797 (2d Cir. 1994) (quoting *Bagwell*, 512 U.S. at 837).

Daleiden violated the PI by uploading and disclosing PI materials to CMP's YouTube channel. NAF presented additional clear and convincing evidence that Cooley and Ferreira acting on behalf of Daleiden, violated the PI by posting PI material on the SCA Media Page, and including publicly accessible links to PI materials hosted on CMP's YouTube channel in their court filings.

In response, CMP, Daleiden, Cooley, and Ferreira offer no evidence. They dispute whether NAF met its initial burden, but based on the evidence adduced in the OSC proceedings and in the record of this case, NAF has. The burden to prove that they did not violate the PI then shifted to them. *Fed. Trade Comm'n v. Enforma Nat. Prod.*, Inc., 362 F.3d at 1211. Instead of addressing my specific and narrow questions about their respective roles in the creation, uploading, and posting of the PI materials, each of them refused to answer any of my questions, resting on their assertion of the attorney-client privilege.

I explicitly stated in the July 10th Order Concerning OSC Hearing and at the start of the hearing that the only potential form of contempt being considered was civil contempt. Criminal contempt was not contemplated. Dkt. No. 468 at 1. In the context of civil contempt, adverse inferences are appropriately drawn in light of refusals to testify or rebut evidence, *even* where the refusal is made on Fifth Amendment grounds. *See, e.g.*, *Aradia Women's Health Ctr. v. Operation Rescue*, 929 F.2d 530, 532 (9th Cir. 1991) (adverse inferences permissible to draw from invocation of Fifth Amendment privilege).

Moreover, the vast majority of questions I posed did not call for disclosure of attorney-client privileged

information or attorney work-product, such as when someone learned about a certain action, who had access to CMP's YouTube channel, when the SCA Media Page went live, or what steps they took to comply with my May 25th Order. Nonetheless, Daleiden, Cooley, and Ferreira each refused to answer any part of my questions based on the attorney-client privilege.[10] Even if there was a good-faith basis to assert the attorney-client privilege to refuse to answer the questions (and I do not find that there was), defendants and respondents could have chosen to make a limited waiver of the privilege. They could have asked to give their answers to me *ex parte* with an order limiting the waiver to the questions posed for purposes of determining whether they should be held in civil contempt. They did not seek to do this either. Instead, they chose to stonewall my effort to discover their version of the truth.

NAF's clear and convincing showing remains unrebutted. Given that showing it is not necessary to draw "adverse" inferences against defendants and respondents. To be sure, the reasonable inferences supported by NAF's evidence only strengthen my conclusions. As discussed below, the direct and circumstantial evidence lead to the conclusion that CMP, Daleiden, Cooley and Ferreira each knowingly violated the PI.

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[10] As noted above, after the OSC re Contempt Hearing, Cooley and Ferreira submitted declarations that, as confirmed by their forensic expert, the PI materials had been taken down by 4:45 p.m. Dkt. Nos. 477, 478. Those declarations, however, do not answer my questions concerning the steps Cooley and Ferreira took in response to my May 25 Order.

II. Daleiden and CMP

NAF's evidence shows that CMP produced the "new" Preview video and asked supporters to share it and get more information from CMP's website. According to NAF, the Preview video "has all the hallmarks" of the prior videos that Daleiden admittedly produced and took credit for on behalf of CMP, videos whose release led to the filing of this action. It is undisputed that the Preview video was uploaded to CMP's YouTube channel, as were the 14 videos containing excerpts of PI recordings labelled by each Doe's name as the "Accusers" playlist, as were the 337 videos (334 of which contained recordings covered by the PI) under the "Defense Filing" playlist. It is significant that both the Preview video and the Accusers playlist videos were not just raw footage but were edited and cut down from over 500 hours of recordings from the NAF Annual Meetings. The Accusers playlist is comprised of excerpts of recordings showing and identifying the Does in the Criminal Complaint. The Preview video shows seven of those Does and contains other excerpts of PI recordings; excerpts I viewed and addressed in the Preliminary Injunction Order that were characterized by NAF as misleadingly edited and taken out of context and characterized by defendants as showing criminal acts or extreme callousness by NAF members. The conclusion I draw from the direct and circumstantial evidence, from Daleiden's admitted role with CMP, and from his failure to rebut NAF's allegations, is that Daleiden was the one who created the Preview video and Accusers playlist, uploaded them onto CMP's YouTube channel, and forwarded those links to his criminal counsel for their use on his behalf.

Daleiden's civil case defense counsel has described Daleiden as being the person with intimate knowledge of the 500 hours of recordings. That characterization was made in support of defendants' objection to NAF's prior request for me to order Daleiden and his civil counsel to relinquish control over the PI materials. According to civil defense counsel at that time, counsel needed Daleiden to retain control over the recordings so that he could parse through the materials to help them defend this case.

All of the relevant videos—both edited/excerpted and the raw footage—were uploaded to CMP's YouTube channel.[11] At the time of the materials were uploaded to CMP's YouTube channel between May 3, 2017 and May 24, 2017, Daleiden had possession of the PI materials. There is no evidence, except for the limited production of just over 20 video excerpts provided by the DAG to SCA on May 16, 2017, that the SCA attorneys had access to those materials prior to May 24, 2017, much less the intimate knowledge of where in the over 500 hours of recordings excerpts showing the Does could be found. Similarly, there is no evidence that the 337 videos comprising the Defense Filings playlist (including 144 hours of raw footage from the NAF Annual Meetings) was in the criminal defense

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[11] Daleiden has declared under penalty of perjury that he is the founder and "Director" of CMP. *See* Dkt. Nos. 268-2 ¶ 2. Daleiden's counsel has also sought relief on the theory that CMP is not a separate entity from Daleiden, in other words that Daleiden and CMP are one and the same. *See, e.g.*, Dkt. No. 103 at 1-3; Dkt. No. 118 at 1-3.

counsel's possession before they were uploaded to CMP's YouTube channel.[12]

Daleiden and CMP admit the "inescapable inference" from the facts is:

> that someone with access to CMP's YouTube channel posted enjoined videos to a private—*i.e.*, accessible by direct link only—playlist on YouTube and then provided that link to Daleiden's criminal counsel with the apparent expectation that the videos would be used as evidence in Daleiden's criminal case. Plaintiffs have provided no evidence suggesting that Daleiden or CMP had any expectation that the videos would be used in any other way than that single one.

Daleiden/CMP OSC Resp. [Dkt. No. 433-2] at 12 (emphasis added). According to Daleiden and CMP, criminal defense counsel played no role in the creation or uploading of the videos and recordings to CMP's YouTube channel.[13] In light of Daleiden and CMP's deafening silence as to their role, there is clear and

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[12] In their brief, Cooley and Ferreira assert that at the time Presiding Judge Jackson ordered the DAG to make all seized evidence available to SCA for purposes of privilege review, "Defense counsel already possessed the videos for purposes of investigating the case against Mr. Daleiden." SCA OSC Resp. at 3. There is, however, no declaration or other evidence supporting that assertion.

[13] CMP and Daleiden also admit they knew SCA planned to "use," and therefore disclose and publish, the videos.

convincing evidence sufficient to hold them in contempt.[14]

In addition to their self-created "no evidence" argument, Daleiden and CMP raise a number of other arguments that they cannot or should not be held in civil contempt. First, they argue that there is insufficient evidence that the disclosures of the PI materials caused NAF harm resulting from Daleiden's and CMP's alleged role in the disclosures because of the alleged lack of evidence of any harm flowing from the Demurrer and RJN link to the Defense Filing playlist. Dalieden/CMP Resp. OSC at 6-7. Defendants are wrong. *See* Foran Decl. ¶ 31 (noting efforts NAF and its counsel took to take down all 150 hours of materials from all three YouTube links uploaded to Google by one particular user).[15]

Second, Daleiden and CMP argue that they bear no responsibility for the ultimate disclosures on SCA's Media Page. As an initial matter, this argument

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[14] There is some additional evidence that CMP likely acting through Daleiden directly disclosed the Preview video, separate and apart from SCA's disclosure. For example, the 12:01 am EST May 25, 2017 publication of the Preview video on the National Review's website, where the National Review attributed the shocking new video to CMP. There is no mention of SCA in connection with the Preview video. Foran Decl., Ex. J; Foran Second Supp. Decl., Ex. B.

[15] Defendants argue that if there was a violation of the PI, NAF can only be compensated for harms flowing from the first disclosure, *i.e.*, defense counsel's choice to make public the Defense Filing link in the Demurrer and RJN, and that subsequent or cumulative disclosures cannot have separately harmed NAF. Defendants' OSC Resp. at 6-7. That argument, if accepted, would give contemnors a free pass to continue their contempt and provide no disincentive to continued or future violation of court orders.

wholly ignores that the first "disclosure" (if not publication) was the uploading of PI materials to YouTube during the May 2017 time period. The PI prevented CMP and Daleiden from "publishing or otherwise disclosing to any third-party" any of the materials covered by the PI. Dkt. No. 354 at 42. Daleiden and CMP do not defend why the uploading of materials to a server operated and controlled by a third-party is not a disclosure to a third-party. Even if the links were "unlisted" and "private" so that they could not be seen (yet) by members of the public, those videos were still disclosed to a third-party, namely YouTube and its employees. The whole purpose of YouTube is to facilitate video-sharing. Marking a video as "private" does not mean it cannot be shared, but only that it will not be searchable or viewable absent having received a link to it. *See, e.g., Viacom Int'l Inc. v. Youtube Inc.*, 253 F.R.D. 256, 264 (S.D.N.Y. 2008) (discussing YouTube.com's default public setting and how videos marked as "private" are nonetheless sharable). The only reasonable conclusion to draw from uploading materials to YouTube is that they were uploaded for the purpose of facilitating the publishing and distribution of those videos, which is what in fact occurred.[16]

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[16] At oral argument, counsel for Daleiden and CMP posited that the videos could have been uploaded to YouTube for the limited purpose of "sharing" them with criminal defense counsel, an action that in their view would not have violated the PI. That potential explanation is not supported by a declaration or by any reasonable inference from the evidence that is in the record. Neither the attorney-client privilege nor work product doctrine would have been necessary to shield such an explanation.

Beyond this unaddressed point, Cooley and Ferreira admit that they posted the PI materials and links to CMP's YouTube playlists on their client's behalf. SCA OSC Resp. at 13. While Daleiden attempts to walk away from the conduct of his criminal defense attorneys, he cannot. As the Supreme Court has explained, "[p]etitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962). Had Daleiden come forward with sworn testimony that he did not know, intend, or approve his attorneys to publicly disclose these materials, additional analysis might be required.[17] But given Daleiden's silence, no additional analysis is required.[18]

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[17] Daleiden's own conduct with uploading the materials to CMP's YouTube channel would still be at issue. This is not "a situation where the lawyer alone commits misconduct and the court visits the lawyer's sins on the innocent client when awarding sanctions." Douglas R. Richmond, *Sanctioning Clients for Lawyers' Misconduct-Problems of Agency and Equity*, 2012 Mich. St. L. Rev. 835, 837 (2012).

[18] During oral argument, defendants' counsel also relied on *Lal v. California*, 610 F.3d 518 (9th Cir. 2010), to argue that Daleiden and CMP should not be held liable for SCA's "gross negligence" if I determine that Cooley and Ferreira violated the PI. As discussed, I find Daleiden and CMP in contempt for their own conduct, separate and apart from the conduct of Cooley and Ferreira. In addition, *Lal* is inapposite. It addresses whether

Daleiden attempts to escape liability for anything SCA did with the YouTube links because he acted in good faith and believed that this Court's PI could not possibly prohibit the use of the videos in his criminal proceeding. CMP/Daleiden Resp. OSC at 6-7. As an initial matter, generalized "good faith" isn't a defense to civil contempt based on violation of a court order, absent a showing that the court's order was ambiguous or vague. *See Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 953 (9th Cir. 2014). There is no argument that the short, simple commands of the Preliminary Injunction are vague or ambiguous. Even if Daleiden may have held a genuine a belief that the PI did not reach use of the videos in support of his criminal defense (and there is no evidence what Daleiden's alleged good faith belief was because Daleiden refused to answer any questions at the OSC re Contempt Hearing and failed to provide a declaration to support the existence of his supposed good faith belief), that does not provide him cover. *Id.* at 943 (rejecting "Defendants' self-serving interpretation of their obligations under our injunction" as an unwarranted invitation to "experimentation with disobedience").

Moreover, as will be described in more detail below, the vast majority of the videos uploaded to YouTube and published on websites, Twitter, and eventually on the SCA Media Page had little or nothing to do with the criminal court filings and arguments made in Superior Court. The Criminal Complaint is limited to recordings made in California, but many hours of recordings disclosed by Daleiden, CMP,

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attorney gross negligence constitutes an "extraordinary circumstance" for relief under Fed. R. Civ. Proc. 60(b). *Id.* at 524-527.

Cooley and Ferreira were taken at NAF's Baltimore meeting and are irrelevant to the criminal proceedings. Moreover, while the Defense Filing list was submitted to the Superior Court in support of the Demurrer,[19] the Preview video and the Accusers playlist were not.

Finally, Daleiden and CMP argue that NAF has not established its entitlement to damages for the contempt. I disagree. The declarations of Fowler and Gannon from NAF and the Foran Declarations show exactly how NAF was damaged; by having to expend money, staff time, and attorney time (a) to identify and get websites to take down the PI materials, (b) to address their members' security needs caused by the identification of those members in the disclosed PI materials and the threats those members received following the May 25 disclosures, (c) to monitor websites for PI materials and threats against the members identified in the disclosed PI materials, and (d) by their attorneys' legal efforts to secure take downs and sanctions. The harms have been identified and sufficiently established. The reasonable amount of monetary sanctions necessary to compensate NAF for those harms will be "proved up" as described below.

III. Cooley and Ferreira

The facts showing express and repeated violations of the PI are even stronger with respect to Cooley and Ferreira. The SCA Media Page expressly acknowledged the existence of the PI and that the PI prevented

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[19] The Defense Filing list should have been filed under seal, absent an order of the Superior Court. As noted above, the Superior Court denied Daleiden's request that it take judicial notice of the videos and removed them from the docket. *See supra*.

Daleiden from "publishing or otherwise disclosing to any third-party" any recordings covered by the PI.[20]

Cooley and Ferreira argue, instead, that they reasonably believed the PI did not bind them, even though they admit that at all times they were acting on their client's behalf. SCA OSC Resp. at 4. Cooley and Ferreira admit that all of their acts were in furtherance of representing their client. But if Daleiden could not violate the PI, they could not do so on his behalf. Rule 65(d) specifically binds a party's "officers, agents, servants, employees, and attorneys" to an injunction binding the party. Fed. R. Civ. Proc. 65(d)(2(B).

Cooley and Ferreira's arguments that they had a good faith belief the injunction did not cover them fails for the same reasons that argument fails for Daleiden.[21] There is nothing ambiguous about the scope of or language in the PI. That the PI does not "enjoin in the future criminal defense counsel" from using the PI materials "should criminal charges be brought

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[20] As noted above, Cooley and Ferreira provide no evidence explaining how they received the information at issue—the Preview video link to embed on their site, the YouTube link to the Accuser playlist containing excerpts from PI recordings showing the Does named in the Criminal Complaint, or the YouTube Defense Filings playlist linking to the 144 hours of raw footage. As discussed above and arguably admitted by CMP and Daleiden, the only reasonable conclusion is that all of the YouTube materials were edited, uploaded to YouTube, and delivered via link to Cooley and Ferreira by Daleiden.

[21] As with Daleiden, neither Cooley nor Ferreira submit a declaration attesting under penalty of perjury as to what their belief actually was with respect to the PI. There is simply no evidence at all on this topic.

in a separate sovereign" is irrelevant. SCA OSC Resp. at 10. The PI expressly covered Daleiden, and Cooley and Ferreira were at all times working as his agents. If there was any doubt, prudent counsel could have sought guidance from me or from the Superior Court. Cooley and Ferreira did not.[22] They decided to publicly disclose the materials with full knowledge of the existence of the PI binding their client and them.

Cooley and Ferreira also argue that the PI could not prevent them from publicly disclosing the PI materials because they did so in order to mount a full and vigorous criminal defense for Daleiden. In their OSC Response, Cooley and Ferreira do not even attempt to show how the embedding of the Preview video on their website and providing the link to the Accusers YouTube playlist was done in connection with contemplated or actual legal proceedings in Superior Court. Instead, they focus on their use of the Defense Filing YouTube playlist in their Demurer and RJN, arguing that it was important to submit that to the Superior Court to "defend their client's right to due process as well as demonstrate to the superior court their position that the videos themselves disproved there was a violation of any alleged victim's right to privacy." SCA OSC Resp. at 4. They fail to acknowledge that submission of the Defense Filing YouTube link

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[22] In contrast, the civil case defense counsel 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. Dkt. No. 323-3. Counsel notified me in advance of the appearance and sought guidance to the extent I had concerns about that intended testimony. No response from me was necessary, but the civil case defense counsel adopted the appropriate approach, seeking guidance in advance.

was unnecessary when they also filed a thumb drive containing the same videos. Nor do they address why, if using the link in the Demurrer itself and the RJN was necessary, they did not file those portions of the documents under seal. They fail to address that if their purpose was to defend their client's right to due process—presumably access to the Does' names and specific identification of the recordings charged by the AG (the arguments that were made in the Demurrer)—and to show that there was no privacy violation, why did they include in that link recordings made at NAF's Baltimore conference (which were not charged in the Criminal Complaint)? Why did they include all 144 hours when the vast majority of those hours were irrelevant to the issues raised?

Absent explanation from Cooley and Ferreira, the only conclusion I can draw from the uncontroverted facts is that Cooley and Ferreira's use of the Defense Filing link was a wholly gratuitous effort to give Cooley and Ferreira a fig leaf to cover their plan to violate the PI by making the raw footage and the other videos available to the public. Despite the lip service argument that disclosure of the raw footage was necessary to show the Court and the public why the Demurrer should be granted, Cooley and Ferreira admit that their real goal was to score a win in the court of public opinion by releasing the PI materials. They admit that the decision to post the videos on their website "was in the first instance a way criminal defense counsel through which they could get their side of the story out." SCA OSC Resp. at 5. Relying on the fact that they had first failed to file under seal the YouTube link in the Demurrer and RJN, and that the AG had not objected to the YouTube link in the

Demurrer and RJN, Cooley and Ferreira argue that they believed they were then free to include that link on their website as well as the edited and excerpted Preview video and Accuser playlist "in response to the Attorney General's press release" on the criminal case. *Id.* There is no rational or legal basis for such a belief.

Cooley and Ferreira also complain of a double standard, arguing that because the California Attorney General is not bound by the Preliminary Injunction and is free to use the PI materials, they should be free to do so as well. SCA OSC Resp. at 11. However, what law enforcement agencies do with evidence secured through legally obtained search warrants or pursuant to criminal subpoenas is not something I have interfered with or intend to interfere with. *See* Dkt. No. 323-3.[23] Cooley and Ferreira are not on equal footing with state or local law enforcement agencies.

I also reject Cooley and Ferreira's argument that complying with the Preliminary Injunction would hamper their ability to defend Daleiden. They have already made a successful (in part) Demurrer. Foran Reply Decl., Ex. C (Transcript of Superior Court proceedings).[24] As the criminal case progresses, I will not interfere with Judge Hite's determinations con-

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[23] Relatedly, a number of subpoenas were issued by state attorneys generals for the PI materials. NAF and defendants negotiated agreements to defer responses or legal challenges to those subpoenas pending the appeal of the Preliminary Injunction Order. I have taken steps to ensure that those attorney generals supported those deferments. *See* Dkt. Nos. 379, 380.

[24] In so ruling, Judge Hite declined to take judicial notice of the videos and ordered the flash drive removed from the court's docket. *Id.* at 5:27-6:5.

cerning what information about the Does or what portion of the relevant recordings should become publicly accessible or disclosed in connection with the criminal pre-trial and trial proceedings. Those determinations are Judge Hite's, not Cooley's, Ferreira's or Daleiden's.[25]

Defendants and respondents' apparent request for *Younger* abstention with respect to the PI has no merit. In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court explained how "interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 237-38 (1984). Abstention is not warranted here because significant federal proceedings have already occurred, and they occurred well before the state court action was initiated. *Id.*[26] Instead, because "federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them," this case will proceed (pending

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[25] There is no support for defendants' or respondents' assumption that, given Daleiden's public trial rights under the Sixth Amendment, all of the PI materials they disclosed in contravention of the PI would become public through the trial. For example, they ignore that a substantial amount of the disclosed PI materials were from the Baltimore NAF meeting and there are no criminal charges related to those recordings. Judge Hite will determine what is relevant, admissible, and accessible to the public in the criminal proceedings.

[26] The posture of this case is the opposite of the posture in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), relied on by respondents. In that case, Texaco filed a federal action after a state court jury verdict, to prevent that verdict from becoming an enforceable judgment. *Id.* at 5-6.

exhaustion of the Supreme Court *certiorari* process by defendants if they choose to seek it) and the PI remains in place and in effect. *Id.* Finally, even if *Younger* abstention was theoretically feasible, it is not necessary given the lack of any true conflict between NAF's interests in this case and Daleiden's ability defend himself in state court.

CONCLUSION AND REMEDIES

Based on the foregoing, defendants Center for Medical Progress and David Daleiden, and Daleiden's criminal defense attorneys Steve Cooley and Brantford J. Ferreira, as the agents of Daleiden, ARE FOUND IN CIVIL CONTEMPT for violating the clear mandate of the Preliminary Injunction Order, due to the following conduct each of them facilitated, conducted, or directed:

(i) the uploading and hosting of the Preview video containing recordings covered by the PI Order on CMP's YouTube channel; the posting of CMP's Preview video on the SCA website; and the posting/sharing of CMP's Preview video through links to its location on CMP's YouTube channel;

(ii) the uploading and hosting excerpts of video materials covered by the PI Order on CMP's YouTube channel, subsequently collected as the "Superior Court Defense Filing-Accusers" playlist; posting on SCA's website the link to the Accusers playlist hosted on CMP's YouTube channel; and

(iii) the uploading and hosting of the over 144 hours of PI Materials to CMP's YouTube

channel collected as the Defense Filing playlist; the posting on SCA's website of the Demurrer and related Request for Judicial Notice, making the link to the Defense Filing playlist hosted on CMP's YouTube channel accessible to the public; and the failure to file Footnote 1 and Ex. 1 to RJN under seal in the first instance.

In order to secure these parties' and respondents' current and future compliance with the Preliminary Injunction Order and to compensate NAF for expenses it has incurred that are directly the result of the violation of the Court's Preliminary Injunction Order, CMP, Daleiden, Cooley, and Ferreira are held jointly and severally liable for:

(i) NAF's security costs, incurred from May 25, 2017 as a result of the violations of the Preliminary Injunction Order. NAF's Security Costs are calculated, based on the Fowler declarations as:

(a) $1,568.26, for the security assessment of the home and office of one of the individuals named and featured in the Preview video. Fowler Decl. ¶3.

(b) $11,411.92, for security costs incurred by a NAF-member facility to protect a physician identified in the Preview video. Fowler Supp. Decl. ¶ 5 & Ex. C.

(ii) NAF's personnel time, incurred as a result of the violations of the Preliminary Injunction Order, because NAF was required to divert in-house staff from other work and provide additional assignments to outside

consultants. NAF's personnel costs are calculated, based on the Fowler Declarations, as:

(a) $26,000 for in-house staff time through June 30, 2017. Fowler Supp. Decl. ¶ 4.

(b) $1,282.50 for outside consultant time. *Id.*

(iii) NAF's attorneys' fees incurred as a result of the violations of the Preliminary Injunction, including counsel's efforts to get websites to "take down" the PI materials and the time reasonably incurred in communicating with civil and criminal defense counsel and moving for contempt sanctions. The amount of attorneys' fees incurred by NAF's counsel, as of June 1, 2017, is $96,610.50. Foran Decl. [Dkt. No. 462-5] ¶ 37.

By July 28, 2017, NAF's counsel shall lodge in camera with chambers their detailed and contemporaneous billing records substantiating their attorneys' fees request. At the same time, NAF shall e-file a redacted copy of the same, redacting only information protected by the attorney-client or attorney work product doctrines. By August 4, 2017, if they wish, counsel for CMP, Daleiden, Cooley, and Ferreira may file a joint objection, not exceeding 10 pages, challenging specific entries or the reasonableness of the time spent by NAF's counsel.

Similarly, by July 28, 2017, NAF shall lodge in camera with chambers a detailed breakdown of the $26,000 in time NAF has incurred by diverting in-house staff to respond to the disclosures. That breakdown shall list the title of each staff member whose time is sought, the hourly rate sought for staff

member's time, the hours spent by each staff member, and a general description of the tasks completed by each staff member. At the same time, NAF shall e-file a redacted version (if redaction is necessary) of the same. By August 4, 2017, if they wish, counsel for CMP, Daleiden, Cooley, and Ferreira may file a joint objection, not exceeding 10 pages, challenging specific entries or the reasonableness of the time spent by NAF's in-house staff.

I will take the billing records and any objections under submission, and issue a final order quantifying the total amount of sanctions imposed for the civil contempt.

In addition to these monetary sanctions, as announced at the hearing on July 11, 2017, I ORDER the following:

(i) On or before Friday July 14, 2017, CMP, Daleiden, Cooley, and Ferreira must confirm under oath that they have "taken down" or otherwise removed any materials covered by the PI Order from any third-party hosting service (*e.g.*, YouTube) and removed any materials covered by the PI Order from websites under their control[27]; and

(ii) On or before Friday July 14, 2017, CMP and Daleiden must turn over to counsel all materials covered by the PI Order and must not retain control over any of that material,

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[27] Pursuant to the Minute Order following the July 11, 2017 hearing, on July 13, 2017 and on July 14, 2017, Daleiden, Cooley and Ferreira filed these confirmations under oath. Dkt. Nos. 476, 477, 478.

> absent further Order of this Court or the Superior Court handling the criminal matter. Absent an order from this Court or the Superior Court providing Daleiden with greater access to that material, Daleiden may only access the PI material onsite at the offices of SCA or his civil defense counsel.

In imposing these sanctions for civil contempt, I have considered the character and magnitude of "the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 304 (1947). If there are any further violations of the PI, I will move swiftly to ensure compliance with the PI. If that occurs, I will consider further and more significant civil sanctions, as well as criminal contempt sanctions.

IT IS SO ORDERED.

/s/ William H. Orrick
United States District Judge

Dated: July 17, 2017

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION (FEBRUARY 5, 2016)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NATIONAL ABORTION FEDERATION, ET AL.,

Plaintiffs,

v.

CENTER FOR MEDICAL PROGRESS, ET AL.,

Defendants.

Case No. 15-cv-03522-WHO

Re: Dkt. Nos. 3, 109, 222, 225, 287, 298, 310, 320, 322, 346, 352

Before: William H. ORRICK, United States District Judge

On July 31, 2015, plaintiff National Abortion Federation (NAF) filed this lawsuit and sought a Temporary Restraining Order to prohibit defendants David Daleiden, Troy Newman, and the Center for Medical Progress from publishing recordings taken at NAF Annual Meetings. NAF alleged, and it has turned out to be true, that defendants secured false identification and set up a phony corporation to obtain surreptitious recordings in violation of agreements they had signed that acknowledge that the NAF infor-

mation is confidential and agreed that they could be enjoined in the event of a breach. In light of those facts, because the subjects of videos that defendants had released in the previous two weeks had become victims of death threats and severe harassment, and in light of the well-documented history of violence against abortion providers, I issued the TRO.

The defendants' principal arguments against injunctive relief rest on their rights under the First Amendment, a keystone of our Constitution and our democracy. It ensures that the government may not—without compelling reasons in rare circumstances—restrict the free flow of information to the public. It provides that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). But Constitutional rights are not absolute. In rare circumstances, freedom of speech must be balanced against and give way to the protection of other compelling Constitutional rights, such as the First Amendment's right to freedom of association, the Fifth and Fourteenth Amendments' protection of liberty interests, and the right to privacy. After fully considering the record before me, I conclude that NAF has made such a showing here.

Discovery has proven that defendants and their agents created a fake company and lied to gain access to NAF's Annual Meetings in order to secretly record NAF members for their Human Capital Project. In furtherance of that Project, defendants released confidential information gathered at NAF's meetings and intend to release more in contravention of the confidentiality agreements required by NAF. Critical to my decision are that the defendants agreed to

injunctive relief if they breached the agreements and that, after the release of defendants' first set of Human Capital Project videos and related information in July 2015, there has been a documented, dramatic increase in the volume and extent of threats to and harassment of NAF and its members.

Balanced against these facts are defendants' allegations that their video and audio recordings show criminal activity by NAF members in profiteering from the sale of fetal tissue. I have reviewed the recordings relied on by defendants and find no evidence of criminal activity. And I am skeptical that exposing criminal activity was really defendants' purpose, since they did not provide recordings to law enforcement following the NAF 2014 Annual Meeting and only provided a bit of information to law enforcement beginning in May, 2015. But I have not interfered with the Congressional committee's subpoena to obtain the recordings to make its own evaluation, nor with the subpoenas from the states of Arizona and Louisiana (although I have approved a process to insure that only subpoenaed material is turned over).

Defendants also claim that the injunction is an unconstitutional prior restraint. They ignore that they agreed to keep the information secret and agreed to the remedy of an injunction if they breached the agreement. Confidentiality agreements are common to protect trade secrets and other sensitive information, and individuals who sign such agreements are not free to ignore them because they think the public would be interested in the protected information.

There is no doubt that members of the public have a serious and passionate interest in the debate over abortion rights and the right to life, and thus in the

contents of defendants' recordings. It should be said that the majority of the recordings lack much public interest, and despite the misleading contentions of defendants, there is little that is new in the remainder of the recordings. Weighed against that public interest are NAF's and its members' legitimate interests in their rights to privacy, security, and association by maintaining the confidentiality of their presentations and conversations at NAF Annual Meetings. The balance is strongly in NAF's favor.

Having fully reviewed the record before me, I GRANT NAF's motion for a preliminary injunction to protect the confidentiality of the information at issue pending a final judgment in this case.

Background

I. The Center for Medical Progress and the Human Capital Project

In 2013, defendant David Daleiden founded the Center for Medical Progress ("CMP") for the purpose of monitoring and reporting on medical ethics, with a focus on bioethical issues related to induced abortions and fetal tissue harvesting. Declaration of David Daleiden (Dkt. No. 265-3, "Daleiden PI Decl.") ¶ 2. CMP is incorporated in California as a nonprofit public benefit corporation, with a stated purpose "to monitor and report on medical ethics and advances." NAF Appendix of Exhibits in Support of Motion for Preliminary Injunction ("Pl. Ex.") 9 (at NAF0000533).[1] In

[1] Defendants raise a number of objections to NAF's evidence. *See* Dkt. No. 265-7. These evidentiary objections were submitted as a separate document in violation of this Court's Local Rules. Civ. L. R. 7-3(a). Recognizing that error, defendants filed a motion

order to obtain CMP's tax-exempt status, in its registration with the California Attorney General and in its application with the Internal Revenue Service Daleiden certified, among other things, that "[n]o substantial part of the activities of this corporation shall consist of carrying on propaganda, or otherwise attempting to influence legislation, and this corporation shall not participate or intervene in any political campaign." Pl. Ex. 9 (at NAF0000535); Pl. Ex. 10 (at NAF0001789).

As part of CMP's work, Daleiden created the "Human Capital Project" ("Project") to "investigate, document, and report on the procurement, transfer, and sale of fetal tissue." Daleiden PI Decl. ¶ 3. The Project's goal is to uncover evidence regarding violations of state and/or federal law due to the sale of fetal tissue, the alteration of abortion procedures to obtain fetal tissue for research, and the commission of partial birth abortions. *Id.* Putting the Project into action, Daleiden created a fake front company that purportedly supplies researchers with human biological specimens and specifically secured funding from supporters in order to infiltrate NAF's 2014 Annual Meeting. Pl.

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asking for leave to file an amended Opposition or for relief therefrom. Dkt. No. 298. That motion is GRANTED and I will consider defendants' evidentiary objections. *See also* Dkt. No. 301. To the extent I rely on evidence to which defendants object, I will address the specific objection, bearing in mind that on a motion for preliminary injunction evidence is not subject to the same formal procedures as on a motion for summary judgment or at trial and that a court may consider hearsay evidence. *See, e.g.*, *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). To the extent I do not rely on specific pieces of evidence, defendants' objections to that evidence are overruled as moot. These evidentiary rulings apply only to the admissibility of evidence for purposes of determining the motion for a preliminary injunction.

Ex. 26. The express aim of that infiltration was to: "1) network with the upper echelons of the abortion industry to identify the best targets for further investigation and ultimate prosecution, and 2) gather video and documentary evidence of the fetal body parts trade and other shocking activities in the abortion industry." *Id.*

Defendant Troy Newman was, until January 2016, a board member and the secretary of CMP. He counseled Daleiden on the efforts to set up the fake company, to infiltrate meetings, and to secure recordings in support of the Project. Pl. Ex. 14 (at NAF0004475-76); Pl. Ex. 16 (at NAF0004493-94); *see also* Dkt. No. 344.[2] The result of the Project, Newman hoped, would be prosecution of abortion providers, state and Congressional investigations, the defunding of Planned Parenthood by the government, and the closure of abortion clinics. Pl. Ex. 16 (at NAF0004494, 4496); Pl. Ex. 136 at 16.[3] Defendant Newman is President of Operation Rescue, an anti-abortion group that posts the names and work addresses of abortion providers on its website and manages another website that lists every abortion facility and all known abortion providers. Pl. Exs. 18, 20, 21, 22.[4]

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[2] Defendants object to Exhibits 14 and 16 for lack of foundation and authentication. Defendants do not contend these transcripts do not accurately represent the contents of the recordings attached as Exhibits 15 and 17. Defendants' objections are overruled.

[3] Defendants object to Exhibit 136 on the grounds of relevance, lack of foundation, and lack of authentication. Defendants to not contend the transcript does not accurately represent the contents of the recording identified. Defendants' objections are overruled.

[4] After the public launch of the Project on July 15, 2015, counsel for CMP and Daleiden, Life Legal Defense Foundation,

II. The Creation of BioMax and Infiltration of NAF's 2014 and 2015 Annual Meetings

In September 2013, Daleiden directed "investigators" on the Project (known by the aliases Susan Tennebaum and Brianna Allen) to attend a conference of the Association of Reproductive Health Professionals (ARHP) as a representative of a fake business, BioMax Procurement Services. That business did not exist, other than to be a "front" for the Project. Daleiden PI Decl. ¶ 8; Pl. Ex. 26. Daleiden's associates spoke with representatives from NAF, and BioMax was invited to apply to attend the NAF Annual Meeting in San Francisco, California the following April. Daleiden PI Decl. ¶ 10.

In February 2014, defendant CMP received a grant to fund the "infiltration of the . . . NAF Annual Meeting." Pl. Exs. 26, 36; Deposition Transcript of David Daleiden (Dkt. No. 187-3) 213:14-214:6. To that end, Daleiden followed up with the NAF representatives—posing as Brianna Allen on behalf Tennenbaum and BioMax—and received a copy of the 2014 NAF Annual Meeting Exhibitor Prospectus and Exhibitor Application for the upcoming meeting. Daleiden PI Decl. ¶ 11; Pl. Ex. 43. Daleiden filled out the Exhibitor Application packet—comprised of the "Exhibit Rules and Regulations" ("Exhibit Agreement" or "EA"), the "Application and Agreement for Exhibit Space," and the "Annual Meeting Registration Form." Daleiden signed Susan Tennenbaum's name to the EA, and

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explained that it had also been involved in the Project as a legal advisor "since its inception" and were committed to defunding "contract killer" Planned Parenthood. Pl. Ex. 24. Defendants object to Exhibits 18, 20, 21 and 22 as irrelevant and inadmissible hearsay. Those objections are overruled.

returned the Application packet. Daleiden PI Decl. ¶ 11; PL. Ex. 3; Daleiden Depo. at 160:8-18.

In February 2015, Daleiden contacted NAF seeking information about BioMax exhibiting at NAF's 2015 Annual Meeting in Baltimore, Maryland. Pl. Ex. 47. Daleiden again filled out the "Application Agreement for Exhibit Space," "Exhibit Rules and Regulations," and "Registration Form," signing Susan Tennenbaum's name to the EA. Pl. Exs. 4, 47; Daleiden Depo. at 287:5-22.[5]

Both the 2014 and 2015 EAs contain confidentiality clauses:

> 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.

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[5] On the 2014 EA, Daleiden listed the "exhibitor representatives" as Brianna Allen a Procurement Assistant, Susan Tennenbaum the C.E.O., and Robert Sarkis a V.P. Operations. Pl. Ex. 3. On the 2015 EA, Daleiden listed the exhibitor representatives as Susan Tennenbaum the C.E.O., Robert Sarkis the Procurement Manager, and Adrian Lopez the Procurement Technician. Pl. Ex. 4.

Pl. Exs. 3 & 4 at ¶ 17. Above the signature line, the EAs provide: "I also agree to hold in trust and confidence any confidential information received in the course of exhibiting at the NAF Annual Meeting and agree not to reproduce or disclose confidential information without express permission from NAF." Pl. Exs. 3, 4 (emphasis in originals).

The EAs required Exhibitor representatives to "be registered" for the NAF Annual Meeting and wear badges in order to gain entry into exhibit halls and meeting rooms. *Id.* ¶ 8. The EAs also provide that "[p]hotography of exhibits by anyone other than NAF or the assigned Exhibitor of the space being photographed is strictly prohibited." *Id.* ¶ 13. The EAs required an affirmation: "[b]y signing this Agreement, the Exhibitor affirms that all information contained herein, contained in any past and future correspondence with either NAF and/or in any publication, advertisements, and/or exhibits displayed at, or in connection with, NAF's Annual Meeting, is truthful, accurate, complete, and not misleading." *Id.* ¶ 19. Finally, the EAs provide that breach of the EA can be enforced by "specific performance and injunctive relief" in addition to all other remedies available at law or equity. *Id.* ¶ 18.

In order to gain access to the NAF Annual Meetings, Exhibitor representatives also had to show identification and sign a "Confidentiality Agreement" ("CA"). Declaration of Mark Mellor (Dkt. No. 3-33) ¶ 11.[6] For the 2014, Annual Meeting Daleiden (as

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[6] NAF has identified copies of two drivers licenses it claims were used by Daleiden and Tennenbaum to access the NAF meetings. Pl. Exs. 49-50. During his deposition, Daleiden asserted his Fifth Amendment rights and refused to testify about the licenses.

Sarkis) and the individuals pretending to be Tennenbaum and Allen, each signed a CA. Pl. Exs. 5, 6; Daleiden PI Decl. ¶ 13. For the 2015 Annual Meeting, the individual pretending to be Adrian Lopez, signed the CA. Pl. Ex. 8.[7] Daleiden (as Sarkis), Tennenbaum, and Allen did not sign the 2015 CAs. When Daleiden, Tennenbaum, and Allen were at the registration table, they were met by a NAF representative. A NAF representative asked Daleiden to confirm that the sign-in staff had checked their identifications and that they had signed the confidentiality forms. Daleiden

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Foran PI Decl. ¶¶ 31-32. Defendants object to Exhibits 49 and 50 for lack of personal knowledge. Those objections are overruled.

Relatedly, NAF filed a motion to supplement the Preliminary Injunction record, to include a press release from the Harris County District Attorney's office in Houston Texas. Dkt. No. 346. That motion is GRANTED. In the press release, the District Attorney explained that a grand jury had cleared a local Planned Parenthood affiliate of wrongdoing, but indicted Daleiden and the person posing as Susan Tennenbaum for tampering with governmental records, presumably related to their use of false identification to gain access to meetings in Texas. *Id.*

In his deposition, Daleiden testified that he created false business cards to use at the ARHP meeting and the NAF Meetings for Susan Tennenbaum, Robert Daoud Sarkis, and Brianna Allen. Pl. Ex. 51; Daleiden Depo. at 200:2–201:6 (business cards used at the 2014 Meeting); *see also* Pl. Exs. 51, 52 & Daleiden Depo. at 315:23–316:19 (business cards for Adrian Lopez and Susan Wagner used at the 2015 Annual Meeting); Declaration of Megan Barr (Dkt. No. 226-27) ¶¶ 4-5 (use of business card at 2015 Meeting).

[7] Daleiden testified that all of the "investigators" involved in the Project were CMP "contractors" acting under Daleiden's specific direction. Daleiden Depo. Trans. at 131:7-24, 135:21-136:11, 194:1, 194:10-195:6; *see also* Daleiden Supp. Resp. to NAF Interrogatories (Dkt. No. 227-18) Nos. 2, 6.

responded "Yeah yeah yeah. Excellent. Thank you so much. . . . " Declaration of Derek Foran in Support of Preliminary Injunction (Dkt. No. 228-6) ¶ 79C[8]; Daleiden Decl. ¶ 17; Daleiden Depo. 290:2-291:14. Daleiden testified that it was his "preference" to avoid signing the 2015 CA. Daleiden Depo. at 291:15-25. The CAs provide:

> It is NAF policy that all people attending its conferences (Attendees) sign this confidentiality agreement. The terms of attendance are as follows:
>
> 1. Videotaping or Other Recording Prohibited: Attendees are prohibited from making video, audio, photographic, or other recordings of the meetings or discussions at this conference.
> 2. Use of NAF Conference Information: NAF Conference Information includes 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. . . .
> 3. Disclosure of NAF Materials to Third Parties: Attendees may not disclose any NAF Conference Information to third parties without first obtaining NAF's express written consent. . . .

Pl. Exs. 5-8.

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[8] ¶ 79(C) refers to a specific excerpt of a recording taken by Daleiden. Sub-Bates 15-062; Time stamp: 14:56:02-14:56:50. The Court has reviewed all recording excerpts or transcripts of recording excerpts cited in this Order.

At the 2014 and 2015 Annual Meetings, Daleiden and his associates wore and carried a variety of recording devices that they did not disclose to NAF or any of the meeting attendees. Daleiden Depo. at 118-121; 255; 292-93. Daleiden and his associates did not limit their recording to presentations or conversations regarding fetal tissue, but instead turned on their recording devices before entering the meetings each day and only turned them off at the end of the day. Daleiden Depo. at 121:24-122:22, 124:1-15. In the end, they recorded approximately 257 hours and 49 minutes at NAF's 2014 Annual Meeting and 246 hours and 3 minutes at NAF's 2015 Annual Meeting. They recorded conversations with attendees at the BioMax Exhibitor booths, the formal sessions at the Meetings, and interactions with attendees during breaks. Foran PI Decl. ¶ 2 & Pl. Ex. 1[9]; Daleiden PI Decl. ¶ 18; Daleiden Depo. at 122:18-123:25; 293:4-25. The interactions with individuals were recorded in exhibit halls, hallways, and reception areas where Daleiden contends hotel staff were "regularly" present. Daleiden PI Decl. ¶ 18. Hotel staff were also present in the rooms during presentations and talks, but hotel staff did not sign confidentiality agreements. *Id.* ¶ 19; Deposition of Vicki Saporta (Defendants' Ex. 7) at 33:10-23. Broadly speaking, the majority of the recordings lack any sort of public interest and consist of communications that are tangential to the ones discussed in this Order.

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[9] Plaintiff's Exhibit 1 is a copy of the hard drive produced by defendants containing the audio and video recordings made by Daleiden and his associates at the 2014 and 2015 NAF Annual Meetings.

During the Annual Meetings, Daleiden and his associates would meet to "discuss our . . . strategy for . . . the project and for the meeting," including "specific strategies for specific individuals." Daleiden Depo. at 134:15-135:6. The associates were given a "mark list" to identify their targets. Foran PI Decl. ¶ 79D (Sub-Bates: 15-145; Time stamp: 14:56:02-14:56:50). The group also picked targets based on circumstance: in one instance, Daleiden tells "Tennenbaum" that it "would be really good to talk tonight" with a particular doctor "now that she's been drinking." *Id.* ¶ 79E (Sub-Bates: 15-225; Time stamp 15:33:00-15:34:00).

In approaching these individuals, the group used "pitches" in their efforts to capture NAF members agreeing to suggestions and proposals made by the group about the "sale" of fetal tissue or other conduct that might suggest a violation of state or federal law. Daleiden told his associates that their "goal" was to trap people into "saying something really like messed up, like yeah, like, I'll give them, like, live everything for you. You know. If they say something like that it would be cool." *Id.* ¶ 79G (Sub-Bates: 15-021; Time Stamp: 5:13-5:49). Daleiden also instructed his group to attempt to get attendees to say the words "fully intact baby" on tape. *Id.* ¶ 79H (Sub-Bates: 15-152; Time Stamp: 16:06:50-16:07:00). As part of their efforts, "Tennenbaum" would explain to providers that she "can make [fetal tissue donation] extremely financially profitable for you" and that BioMax has "money that is available" and is "sitting on a goldmine" as long as you're "willing to be a little creative with [your] technique." Foran PI Decl. ¶ 79J (Sub-bates: 15-152 Time Stamp: 15:48:00-15:52:00). She asked NAF attendees:

"what would make it profitable for you? Give me a ballpark figure. . . . " *Id.* Or "[i]f it was financially very profitable for you to perhaps be a little creative in your method, would you be open to" providing patients with reimbursements for tissue donations. *Id.* ¶ 79K (Sub-bates: 15-203; Time Stamp: 12:09:00-12:10:21).

The parties dispute whether these goals were met and if defendants' traps worked.[10] Defendants argue that they captured NAF attendees agreeing to explore, or at least expressing interest in exploring, being compensated for the sale of fetal tissue at a profit, which defendants contend is illegal under state and federal laws. Defendants' Opposition to Motion for Preliminary Injunction (Dkt. No. 262-4) at 10-14. However, they tend to misstate the conversations that

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[10] NAF argues that defendants cannot rely on any portion of the recordings to oppose NAF's motion for a preliminary injunction. NAF Reply Br. at 29-30. NAF is correct that under California and Maryland law, recordings taken in violation of state laws prohibiting recordings of confidential communications are not admissible in judicial proceedings, except as proof of an act or violation of the state statutes. *See* Cal. Penal Code § 632(d); *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 667 (9th Cir. 2003) (concluding that § 632(d) is a substantive law, applicable in federal court on state law claims); *see also* Md. Code Ann., Cts. & Jud. Proc. § 10-405; *Standiford v. Standiford*, 89 Md. App. 326, 346 (1991). Because the accuracy of defendants' allegations of criminal conduct are central to this decision, however, I discuss the portions of the recordings relied upon by plaintiff and defendants in some detail in this section. To place this discussion under seal would undermine my responsibility to the public as a court of public record to explain my decision. Consistent with the TRO and the reasoning of this Order, in describing the protected conversations I balance the interests of the providers' privacy, safety and association by omitting names, places, and other identifying information.

occurred or omit the context of those statements. For example, defendants rely on a conversation with a clinic owner where Daleiden suggests BioMax could pay $60 per sample instead of $50 per sample. Defs. Ex. 8. The clinic owner doesn't respond to that suggestion, or give any indication about the actual costs to the clinic of facilitating outside companies to come in and collect fetal tissue. *Id.* Instead, the clinic owner responds that providing tissue to outside companies "is a nice way to get extra income in a very difficult time, and you know patients like it." *Id.*[11] Defendants point to another conversation where a provider asks what the "reimbursement rate" is for the clinic, and was told "it varies" by Tennenbaum. Defs. Ex. 9 (Dkt. No. 266-4) at p. 18. Then, in response to Tennenbaum's suggestion about whether she'd "be open to maybe being a little creative in the procedure," the provider responds that she was not sure and would have to discuss it and run it by the doctors. Defs. Ex. 9 (Dkt. No. 266-4) at p. 18. Tennenbaum explains that specimens "go for" anywhere from "500 up to 2,000" and so "you can *see* how profitable" it would be for clinics, to which the provider says "Yeah, absolutely" and a different provider says "that would be great" in response to comments about having further discussions. *Id.* at p. 19.

Another provider responded to defendants' suggestion of financial incentives by indicating that the clinic would be "very happy about it," but admitted others would have to approve it and it wasn't up to her. *Id.*, Dkt. No. 266-4 at p.8. Defendants point to a

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[11] Defendants do not suggest the "patients like it" is a suggestion that patients are being paid for the fetal tissue. Instead, in the context of that conversation, it refers to patients that like providing fetal tissue for research purposes.

conversation with a provider who discusses the "fine line" between an illegal partial birth abortion and the types of abortion that they perform, and the techniques that they employ to ensure that they do not cross that line. Defs. Ex. 10, Dkt. No. 266-5 at p. 4. That conversation, however, does not indicate that any illegal activity was occurring. Similarly, defendants contend that a provider stated that he ordinarily minimizes dilation, since that is what is safest for the women, but that if he had a reason to dilate more (such as tissue procurement), he might perform abortions differently. Oppo. Br. at 11. But that is not what the provider said. After acknowledging tissue donation was not allowed in his state, he stated that "I could mop up my technique if you wanted something more intact. But right now my only concern is the safety of the woman" and there was no reason to further dilate a woman. Defs. Ex. 11, Dkt. No. 266-6 at p. 5.

Defendants rely on another conversation where an abortion provider explains that how intact aborted fetuses are depends on the procedure used and that she does not ordinarily use digoxin to terminate the fetus before performing 15-week abortions. Defs. Ex. 12, Dkt. No. 266-7, pgs. 1-8. She goes on to say that if there was a possibility of donating the tissue to research, women may choose that, and with the consent of the woman she would be open to attempting to obtain intact organs for procurement. *Id.* Again, this is not evidence of any wrongdoing.

In another conversation, a provider states that his/her clinic has postponed the stage at which digoxin is used and that as a result they can secure more and bigger organs for research so the tissue "does not go to waste," to which the vast majority of women using

their facility consent. Defs. Ex. 13, Dkt. No. 266-8 pgs. 1-8.[12] Defendants contend that a provider commented that he/she may be willing to be "creative" on a case-by-case basis, but the provider was responding to a question about doctors using digoxin in general. Defs. Ex. 9, Dkt. No. 266-4 pg. 13. And while defendants characterize that provider as assenting to being "creative," so that BioMax could "keep them happy financially" (Oppo. Br. at 11-12), the actual discussion was about off-setting the disruption that third-party technicians can have on clinic operations and keeping those disruptions to a minimum. *Id.* at p. 14.

In a different conversation, defendants characterize a provider as agreeing to discuss ways in which a financial transaction would be structured to make it look like a clinic was not selling tissue. Oppo. Br. at 12. The unidentified female (there is no indication of where she works or what role she plays) simply responds to Tennenbaum's suggestions that in response to payment for tissue from BioMax the clinic could offer its services for less money or provide transportation for the patients, with an interested but non-committal response and clarified "that's something we'd have to figure out how to do that." Defs. Ex. 14, Dkt. No. 266-9 pgs. 1-4. Another provider admits that doing intact D&Es for research purposes would "be challenging" and explained that there are layers of people and approvals at the clinic before any agreements to work with a bioprocurement lab could be reached. Defs. Ex. 9, Dkt. No. 266-4 pgs. 8-9.

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[12] There is no evidence that a desire to secure more fetal tissue samples caused the clinic to alter its procedures.

Defendants state that a provider responded to Tennenbaum's comment that with the right vision an arrangement can be "extremely financially profitable," with "we certainly do" have that vision. Oppo. Br. at 12. But defendants omit that the context of the conversation was the "waste" of fetal tissue that could otherwise be going to research. Defs. Ex. 9, Dkt. No. 266-4 pgs. 2-3. In the excerpt relied on by defendants, after Tennenbaum mentioned the profit she went onto describe tissue donation working for those that have the "vision and the passion for research." The provider responded, "Which we certainly do." *Id.* p. 2. Similarly, while defendants are correct that a provider did say, "if guys it looks like you'd pay me for [fetal tissue], that would be awesome," but omit that the provider preceded that comment with "I would love to have it [the fetal tissue] go somewhere" and that the provider was excited about the possibility of the tissue going to be used in research to be "doing something." Defs. Ex. 15, Dkt. No. 266-10. pgs. 1-2.

Defendants cite a handful of similar discussions—where "profit" "sale" or "top dollar" are terms used by Daleiden or Tennenbaum and then providers at some point following that lead in the conversation express general interest in exploring receiving payment for tissue—but those conversations do not show that any clinic is making a profit off of tissue donations or that the providers are agreeing to a profit-making arrangement.[13] Defendants are correct that

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[13] Some of defendants' citations are to comments about providers performing abortions differently, not in terms of gestational timing, but in terms of attempting to keep tissue samples more intact during the procedure if those samples might be of use for research. Oppo. Br. at 12-13. There is no argument that taking

one provider indicates it received $6,000 a quarter from a bioprocurement lab, but there is no discussion showing that amount is profit (in excess of the costs of having third-party technicians on site and providing access and storage for their work). Defs. Ex. 21, Dkt. No. 267-2 p.2. An employee of a bioprocurement lab also agrees in response to statements from Tennenbaum that the clinics know it is "financially profitable" for them to work with bioprocurement labs and that arrangement helps the clinics "significantly." Defs. Ex. 23, Dkt. No. 267-4 p. 2.

Having reviewed the records or transcripts in full and in context, I find that no NAF attendee admitted to engaging in, agreed to engage in, or expressed interest in engaging in potentially illegal sale of fetal tissue for profit. The recordings tend to show an express rejection of Daleiden's and his associates' proposals or, at most, discussions of interest in being paid to recoup the costs incurred by clinics to facilitate collection of fetal tissue for scientific research, which NAF argues is legal. *See, e.g.*, Foran PI Decl. ¶ 79(I) (Sub-bates: 14-147; Time Stamp 05:56:00-05:57:00 (Dr. Nucatola identifying an "ethical problem" with Daleiden's payment proposal: "We just really want the affiliates to be compensated in a way that is proportionate to the amount of work that's

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those steps violates any law. Defendants also cite provider comments—for example, an abortion provider engaging in conduct "under the table" to get around restrictions—which do not show up in the transcript excerpts they refer to. Oppo. Br. at 13. Finally, defendants rely on comments—from panel presentations and individual conversations—where providers express the personal and societal difficulties they face in performing abortions. There is no indication in those comments of any illegal conduct. Oppo. Br. at 12, 14-15.

required on their end to do it. In other words, we don't see it as a money making opportunity. That's not what it should be about."); Foran PI Decl. ¶ 79(K) (Sub-bates: 15-203; Time Stamp: 12:09:00-12:10:21) (NAF attendee responding to Tennenbaum's proposal" "Do the patients get any reimbursement? No, you can't pay for tissue, right. You can't pay for tissue."); Foran PI Decl. ¶ 79(M) (Sub-bates: 15-010; Time Stamp: 24:29-25:43) (NAF attendee responds that "we cannot have that conversation with you about being creative," because it "crosses the line."); Foran PI Decl. ¶ 79(N) (Sub-Bates: 15-010; Time Stamp: 59:18-1:04:32) (NAF attendee responding to Tennenbaum with, "No profiteering or appearance of profiteering . . . we need it to be a donation program rather than a business opportunity.").

Defendants also gathered confidential NAF and NAF-member materials at the Annual Meetings, including lists and biographies of NAF faculty and contact information for NAF members. Foran PI Decl. ¶ 3; Pl. Ex. 56 at 3; Pl. Ex. 58.

Following the 2014 Annual Meeting, Daleiden followed up with the "targets" he met at the Meeting, in part to set up meetings with abortion providers, including Dr. Deborah Nucatola.[14] Pl. Exs. 26 (list of "targets"), 36, 59-61, 64-65, 67-69; Daleiden Depo. 257-259, 265-269. As he explained to his supporters and funders in a report prepared following the 2014 Meeting—in which he shared some of the confidential NAF information that had been collected at that

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[14] Dr. Nucatola was identified by defendants as a key target and the Senior Director of Medical Services for Planned Parenthood. Pl. Ex. 26.

meeting—he was able to secure the follow up meetings because, following its attendance at the 2014 Annual Meeting, "BioMax is now a known and trusted entity to many key individuals in the upper echelons of the abortion industry." Pl. Ex. 26; *see also* Pl. Exs. 59-63 (emails to targets referencing their meeting at NAF); Pl. Ex. 64 (email to Dr. Nucatola); Daleiden Depo. at 253-259 (Daleiden's follow up with Dr. Nucatola); Pl. Ex. 67 ¶¶ 3-4 (StemExpress representative explaining her initial meeting with Daleiden at the NAF 2014 Annual Meeting, as the reason a subsequent meeting was arranged); Daleiden Tr. at 271-274 (discussing his follow up communications with StemExpress representatives). In a recording following Daleiden and Tennenbaum's meeting with StemExpress representatives, Daleiden credited the ability to secure that meeting to "because like we've been at NAF. Like, we're so vetted and so like." Foran PI Decl. ¶ 12; Pl. Ex. 70 at FNPB029820150522190849.avi at 19:13:00-19:15:00).

III. Defendants Release Human Capital Project Videos

On July 14, 2015, CMP released two videos of a lunch meeting that Daleiden had with Dr. Nucatola, a "key" target from the 2014 NAF Annual Meeting. Daleiden PI Decl. ¶ 25; Pl. Ex. 26. Daleiden testified that one of the videos "contained the entire conversation with Nucatola" and the other was "a shorter summary version of the highlights from the conversation." *Id.* CMP issued a press release in conjunction with the release of these videos entitled "Planned Parenthood's Top Doctor, Praised by CEO, Uses Partial-Birth Abortion to Sell Baby Parts." Pl. Ex. 66. NAF counters that the "highlights" video was misleadingly edited and omits Dr. Nucatola's comments that "nobody should

be selling tissue. That's just not the goal here," and her repeated comments that Planned Parenthood would not sell tissue or profit in any way from tissue donations. Foran TRO Decl. Ex. 18 at 7, 21-22, 25-26, 34, 48, 52-54.

On July 21, 2015, CMP released two more videos: a 73-minute video and a shorter "highlights summary" from Daleiden's lunch meeting with Planned Parenthood "staff member" Dr. Mary Gatter. Daleiden PI Decl. ¶ 26. CMP issued a press release in conjunction with the release of these videos entitled "Second Planned Parenthood Senior Executive Haggles Over Baby Parts Prices, Changes Abortion Methods." Pl. Ex. 71. NAF again contends the "highlight" video was misleadingly edited, including the omission of Dr. Gatter's comments that tissue donation was not about profit, but "about people wanting to see something good come out" of their situations, "they want to see a silver lining. . . . " Pl. Ex. 82 at NAF0001395.

CMP has continued to release other videos as part of the Project, including one featuring a site visit to Planned Parenthood Rocky Mountains, where Savita Ginde is Medical Director. Daleiden PI Decl. ¶ 27. On July 30, 2015, CMP issued a press release in conjunction with the release of this video entitled "Planned Parenthood VP Says Fetuses May Come Out Intact, Agrees Payments Specific to the Specimen." Pl. Ex. 74.[15]

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15 *See also* Pl. Ex. 74 (CMP press release on fifth Project video; "'Intact Fetal Cadavers' at 20 Weeks 'Just a Matter of Line Items' at Planned Parenthood TX Mega-Center; Abortion Docs Can 'Make it Happen.'"); Pl. Ex. 69 (CMP press release on eighth Project video; "Planned Parenthood Baby Parts Buyer StemExpress Wants 'Another 50 Livers/Week,' Financial Benefits

Daleiden asserts that when CMP released the "highlight" or summary videos, CMP also released "full" copies of the underlying recordings. Daleiden PI Decl. ¶¶ 25-27. NAF has submitted a report by Fusion GPS, completed at the request of counsel for Planned Parenthood, analyzing the videos released by CMP and concluding that there is evidence that CMP edited content out of the "full" videos and heavily edited the short videos "so as to misrepresent statements made by Planned Parenthood representatives." Pl. Ex. 77; *see also* Pl. Exs. 78-79.[16]

The day before the first set of videos was released, CMP put together a press kit with "messaging guidelines" that was circulated to supporters. Pl. Ex. 135; Deposition Transcript of Charles C. Johnson (Dkt. No. 255-11) 70:22-71:19. In those guidelines, defendants assert that their aim for the Project is to create "political pressure" on Planned Parenthood, focusing on "Congressional hearings/investigation and political consequences for" Planned Parenthood such as defunding and abortion limits. Pl. Ex. 135.

To be clear, the videos released by CMP as part of the Project to date do not contain information

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for Abortion Clinics."); Pl. Ex. 75 (CMP press release on ninth Project video; "Planned Parenthood Baby Parts Vendor ABR Pays Off Clinics, Intact Fetuses 'Just Fell Out.'"); Pl. Ex. 76 (CMP press release on tenth Project video; "Top Planned Parenthood Exec Agrees Baby Parts Sales 'A Valid Exchange,' Some Clinics 'Generate a Fair Amount of Income Doing This.'").

16 Defendants object to Exhibits 78-79 as inadmissible hearsay, for lack of personal knowledge and authentication, and improper expert testimony. Those objections are overruled.

recorded during the NAF Annual Meetings.[17] With respect to the NAF material covered by the TRO and at issue on the motion for a preliminary injunction, Daleiden affirms that other than: (i) providing a StemExpress advertisement from the NAF 2014 Annual Meeting program to law enforcement in El Dorado County, California in May 2015; (ii) short clips of video to law enforcement in Texas in June or July 2015; (iii) providing the 504 hours of recordings in response to the Congressional subpoena; and (iv) providing a short written report to CMP donors in April 2014, "Daleiden and CMP have made no other disclosures of recordings or documents from NAF meetings." Daleiden PI Decl. ¶ 24. However, a portion of the NAF materials were leaked and posted on the internet on October 20 and 21, 2015.[18]

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[17] NAF contends that the meetings Daleiden had with Doctors Nucatola, Gatter, and Ginde that resulted in the CMP videos would not have been possible without BioMax having fraudulently gained access to NAF's Annual Meetings and, thereby, appearing to be a legitimate operation.

[18] This leak occurred after defendants produced NAF materials covered by the TRO to Congress. NAF argues—and moves for an Order to Show Cause asking me to sanction defendants—that defendants violated my order and the TRO by producing to Congress NAF audio and video recordings that were not directly responsive to the Congressional subpoena. *See* Dkt. Nos. 155, 222. NAF complains that as a result of this "over production," the subsequent leak included NAF Materials that had nothing to do with alleged criminal activity. I heard argument on this motion on December 18, 2015. Dkt. No. 310. Having considered the representations of defense counsel, I DENY the motion for an order to show cause. Defendants did produce materials that were not covered by the subpoena, but were covered by the TRO, contrary to my Order allowing a response to the subpoena. Dkt. No. 155. Defense counsel did so because in light of their conver-

IV. Impact of Disclosures on NAF and Its Members

NAF is a not-for-profit professional association of abortion providers, including private and non-profit clinics, Planned Parenthood affiliates, women's health centers, physicians' offices, and hospitals. Declaration of Vicki Saporta (Dkt. No. 3-34) ¶ 2. It sets standards for abortion care through Clinical Policy Guidelines (CPGs) and Ethical Principles for Abortion Care, and develops continuing medical education and training programs and educational resources for abortion providers and other health care professionals. *Id.* ¶ 3. NAF also implemented a multi-faceted security program to help ensure the safety of abortion providers by putting in place reference, security, and confidentiality requirements for its membership and for attendance at its Meetings. *Id.* ¶¶ 10-14; Declaration of Mark Mellor (Dkt. No. 3-33) ¶ 5-12. NAF tracks security threats to abortion providers and clinics, and offers technical assistance, on-site security training, and assessments at facilities and homes of clinic staff, as well as 24/7 support to its members when they are "facing an emergency or are targeted. *Id.* ¶ 10, 15; *see also* Declaration of Derek Foran in Support of TRO (Dkt No. 3-2) ¶ 6 & Ex 2 (NAF statistics documenting more than 60,000 incidents of harassment, intimidation, and violence against abortion providers, including murder, shootings, arson, bombings, chemical

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sations with Congressional staffers, they believed Congress wanted "unedited" recordings, which defense counsel interpreted to mean the whole batch of recordings, even those where fetal tissue was not being discussed. At the hearing I 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 me first.

and acid attacks, bioterrorism threats, kidnapping, death threats, and other forms of violence between 1997 and 2014).

Following the release of the videos in July 2015, the subjects of those videos (including Doctors Nucatola, Gatter, and Ginde), have received a large amount harassing communications (including death threats). Pl. Exs. 80-81 (internet articles and threats by commentators), 83-91; *see also* Saporta Decl. ¶ 19. Incidents of harassment and violence directed at abortion providers increased nine fold in July 2015, over similar incidents in June 2014. Pl. Ex. 92. The incidents continued to sharply rise in August 2015. Pl. Ex. 93. The FBI has also reported seeing an increase in attacks on reproductive health care facilities. Pl. Ex. 94.[19] Since July 2015, there have also been four incidents of arson at Planned Parenthood and NAF-member facilities. Saporta Depo. at 42:1-10; Pl. Exs. 96-99.[20] Most significantly, the clinic where Dr. Ginde is medical director—a fact that was listed on the AbortinDocs.org website operated by defendant Newman's Operation Rescue group—was attacked by a

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[19] Defendants object to Exhibits 92-94 on the grounds that Foran lacks personal knowledge and cannot authenticate the exhibits, as hearsay, and on relevance. Those objections are overruled.

[20] Defendants object to Exhibits 96-99 as inadmissible hearsay, lack of personal knowledge, lack of authentication, irrelevant and prejudicial. Those objections are overruled. Defendants also filed a motion to supplement the Preliminary Injunction record with a news article indicating the individual arrested in connection with the fire at the Thousand Oaks Planned Parenthood office was not motivated by politics, but by a "domestic feud." Dkt. No. 322. That motion is GRANTED.

gunman, resulting in three deaths. Pl. Exs. 18, 20, 21, 22, 148.[21]

NAF's President and CEO testified that there "has been a dramatic increase" in harassment since July 14, 2015, and the "volume of hate speech and threats are nothing I have ever seen in 20 years." Pl. Ex. 95 (Deposition Transcript of Vicki Saporta) at 16:17-23, 39:13-20; *see also id.* at 43:15-18 ("We have uncovered many, many direct threats naming individual providers. Those providers have had to undergo extensive security precautions and believe they are in danger."). In response, NAF hired and committed additional staff to monitoring the internet for harassment and threats. Saporta Depo. at 38:2-20. NAF's security team has also seen an increase in off-hour communications from members about security. Mellor Decl. ¶ 15. As a result, NAF has been forced to take increased security measures at increased cost, has cut back on its communications with members, and alerted hotel staff and security for its upcoming events that those meetings have been "compromised." *Id.* ¶ 15.

Two NAF members also submit declarations in support of NAF. Jennifer Dunn, a law professor, submits a declaration explaining her expectation that she was filmed during the 2014 Annual Meeting during a panel presentation and that following the release of the CMP videos, she took steps to protect the safety and privacy of her family. Declaration of Jennifer T. Dunn (Dkt. No. 3-31) ¶ 10.[22] She explains that she is

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[21] Defendants object to Exhibit 148 as irrelevant and inadmissible hearsay. Those objections are overruled.

[22] Defendants object to paragraph 10 of Dunn's declaration as lacking in personal knowledge, improper expert testimony, inad-

fearful that CMP may release a misleading and highly edited video featuring some or all of her panel presentation that would open her up to the sort of public disparagement and intimidation she saw directed towards Doctors Nucatola and Gatter after the CMP videos were released. *Id.* ¶¶ 9-10.

Dr. Matthew Reeves, the medical director of NAF, submits a declaration explaining his understanding that Daleiden filmed conversations with him during the 2014 Annual Meeting. Declaration of Dr. Matthew Reeves (Dkt. No.) ¶¶ 12-16.[23] 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." *Id.* ¶ 17. Because of his expectation that defendants could "target" him, since the release of the videos, he had his home inspected by NAF's security team and is installing a security system, but given the current atmosphere he remains fearful for his safety and that of his family. *Id.* ¶¶ 19, 21.

V. Temporary Restraining Order and Preliminary Injunction

On July 31, 2015, based on an application from NAF and after reviewing the preliminary evidentiary record, I granted NAF's request and entered a Tem-

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missible hearsay, and improper opinion. Those objections are overruled.

[23] Defendants object to paragraph 12 of Dr. Reeves declaration as speculative, improper expert testimony, improper opinion testimony, and for lack of personal knowledge. Those objections are overruled.

porary Restraining Order that restrained and enjoined defendants and their officers, agents, servants, employees, and attorneys, and any other persons who are in active concert or participation with them from:

(1) publishing or otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF annual meetings;

(2) publishing or otherwise disclosing to any third party the dates or locations of any future NAF meetings; and

(3) publishing or otherwise disclosing to any third party the names or addresses of any NAF members learned at any NAF annual meetings.

Dkt. No. 15. On August 3, 2015, after reviewing the arguments and additional evidence submitted by defendants, I issued an order keeping the TRO in place pending the hearing and ruling on NAF's motion for a preliminary injunction. Dkt. No. 27. On August 26, 2015, I entered a stipulated Protective Order, which provided that before responding to any subpoenas from law enforcement entities for information designated as confidential under the Protective Order, the party receiving the subpoena must notify the party whose materials are at issue and inform the entity that issued the subpoena that the materials requested are covered by the TRO. Dkt. No. 92 ¶ 9. The purpose of the notice provision is to allow the party whose confidential materials are sought the opportunity to meet and confer and, if necessary, seek relief from

the subpoena in the court or tribunal from which the subpoena issued. *Id.*

In NAF's motion for preliminary injunction, NAF asks me to continue in effect the injunction provided in the TRO, but also to expand the scope to include the following:

> (4) enjoin the publication or disclosure of any video, audio, photographic, or other recordings taken of members or attendees Defendants first made contact with at NAF meetings; and publishing or otherwise disclosing to any third party the dates or locations of any future NAF meetings; and
>
> (5) enjoin the defendants from attempting to gain access to any future NAF meetings.

Motion (Dkt. No. 228-4) at i.

Legal Standard

"'A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008)). Where an injunction restrains speech, a showing of "exceptional" circumstances may be required, as the Reporters Committee for Freedom of the Press pointed out.[24] *See, e.g.*, *Bank Julius Baer*

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[24] The Reporters Committee for Freedom of the Press resubmitted their motion asking the Court to consider their *amici curiae*

& Co. Ltd v. Wikileaks, 535 F. Supp. 2d 980, 985 (N.D. Cal. 2008). On this record, I conclude that exceptional circumstances exist, meriting the continuation of injunctive relief pending final resolution of this case.

Discussion

I. Likelihood of Success

NAF's Amended Complaint asserts eleven different causes of action against the three defendants. Dkt. No. 131. In moving for a preliminary injunction, NAF rests on only two—breach of contract and violation of California Penal Code section 632—to argue its likelihood of success on the merits.

A. Breach of Contract

Under California law, to succeed on a breach of contract claim, a plaintiff must prove: (1) the existence of a contract, (2) plaintiff performed or is excused for nonperformance, (3) defendant's breach, and (4) resulting damages to plaintiff. *See, e.g.*, *Reichert v. Gen. Ins. Co. of Am.*, 68 Cal. 2d 822, 830 (1968). NAF argues that defendants' conduct: (i) breached the EAs, by misrepresenting BioMax and their own identities; (ii) breached the EAs and CAs by secretly recording during the Annual Meetings; and (iii) breached the EAs and CAs by disclosing and publishing NAF's confidential materials.

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letter brief. Dkt. No. 287. I GRANT that motion and consider the Reporters Committee letter, as well as NAF's response, and the Reporters Committee's reply. Dkt. Nos. 109, 111, 114, 287.

1. Existence of a Contract; Consideration for the Confidentiality Agreements

Defendants argue that NAF cannot enforce the CA because that particular agreement was not supported by consideration for the 2014 or 2015 Meetings. *See Chicago Title Ins. Co. v. AMZ Ins. Servs., Inc.*, 188 Cal. App. 4th 401, 423 (2010) ("Every executory contract requires consideration, which may be an act, forbearance, change in legal relations, or a promise.").[25] They contend that the only document that needed to be signed to gain access to the NAF Meetings was the EA. Therefore, according to defendants, there was no separate consideration given with respect to the CAs that were signed by or sought from the attendees at the NAF registration tables because NAF already had a legal obligation to permit them access to the meetings. Oppo. Br. at 19-20.

Defendants' argument is not supported by the facts. The EAs on their face provided access to the exhibition area ("Exhibit Rules and Regulations") and also required that any exhibitor's representatives be registered for the NAF Annual Meetings. Pl. Exs. 3,4. The CAs were required as part of the registration for the NAF Annual Meeting, and NAF's evidence demonstrates that no one was supposed to be allowed into the Meetings unless their identification was checked and they signed a CA. Declaration of Mark Mellor (Dkt. No. 3-33) ¶ 11; Dunn Decl. ¶ 6; *see also* Foran PI Decl. ¶ 79(C) (Sub-Bates 15-062; Time stamp:

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[25] Defendants make no argument that the EA was not supported by consideration. It plainly was; access to the exhibition hall in exchange for submission of the Application and payment of the exhibitor fee.

14:56:02-14:56:50) (NAF representative confirming that Daleiden and associates had their identification checked and signed confidentiality agreements). Nothing in the language of the EAs or CAs, or the other facts in the record, support defendants' argument that upon signing the EAs, NAF had the legal obligation to permit Daleiden's group access to the meetings without further requirement.

Other than lack of consideration, the only other argument defendants appear to make with respect to the CA is that the CA cannot be enforced against Daleiden and two of his associates (Tennenbaum and Allen) because they did not execute CAs for the 2015 NAF Annual Meeting. Oppo. Br. at 19-20 & fn. 7. As an initial matter, there is no dispute that everyone in Daleiden's group signed the CAs for the 2014 Meeting. There is also no dispute that the reason Daleiden and two of his associates did not sign the CAs for the 2015 Meeting is that Daleiden lied about it to a NAF representative. Foran PI Decl. ¶ 79(C) (Sub-Bates 15-062; Time stamp: 14:56:02-14:56:50). There is likewise no dispute that at least one of the CMP associates working at Daleiden's direction, "Lopez," signed the 2015 CA. Given these facts, on this record, the 2015 CA can be enforced against defendants for purposes of determining likelihood of success on NAF's breach of contract claim.

I find that NAF has shown a likelihood of success on their breach of contract claim based on the 2014 and 2015 CAs.

2. Whether Defendants' Conduct Breached the EA

Defendants argue that NAF cannot prevail on its claim that defendants misrepresented themselves in violation of the EA because Paragraph 15 of the EA only requires Exhibitors to "identify, display, and/or represent their business, products, and/or services truthfully, accurately, and consistently with the information provided in the Application." Defendants contend that this requirement applies only to BioMax, not Daleiden and his associates "individually," and that NAF is attempting to base its breach claim on representations defendants made about BioMax and/or CMP outside of the NAF Annual Meetings. Oppo. Br. at 20-21.

By signing the EA on behalf of a fake company, defendants CMP and Daleiden necessarily violated paragraph 19 of the EA, which required the signatory's affirmation that the information in the Agreement, as well as any information displayed at the Meetings, was "truthful, accurate, complete, and not misleading." Pl. Exs. 3,4. Similarly, by signing the EA and then displaying and representing false and inaccurate information about BioMax at the Meetings, defendants CMP and Daleiden violated paragraph 15 as well.[26]

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[26] Defendants assert in their brief, without any citation to evidence, that BioMax's "business" was to "assess the market for clinics and abortion providers willing to partner with it in buying and selling fetal tissue." Oppo. Br. at 21. This post-hoc rationalization is contrary to the defendants' own contemporaneous statements and their statements on the EAs themselves which required the applicant to "5. List the products or services to be exhibited" and which Daleiden filled out as "biological specimen procurement, stem cell research" and "fetal tissue procurement,

Defendants' conduct with respect to the information they conveyed in the EA and their conduct at the NAF meeting is sufficient—on this record—to show a violation of that agreement, regardless of how defendants may have portrayed BioMax outside of the NAF Meetings.

Defendants' argument that paragraph 15 of the EA restricts the remedies NAF can seek for breach to cancellation of the EA and removal of exhibits at the Meetings, and excludes the injunctive relief sought in this motion is likewise without support. Defendants continue to ignore paragraphs 18 and 19, which provide that if there is a breach of the EA, NAF is entitled to seek specific performance, injunctive relief and "all other remedies available at law or equity." Pl. Exs. 3,4.

On the record before me, NAF has a strong likelihood of success on its argument that defendants breached the EA for the 2014 and 2015 NAF Annual Meetings.[27]

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human biospecimen procurement." Pl. Exs. 3,4; *see also* Pl. Ex. 26 (describing BioMax as a "front organization.").

[27] Defendants also argue that their recordings could not have violated the EA because the EA did not prohibit audio and video recording, it only prohibited photography. Oppo. Br. at 19-20; EA at ¶ 13. Disputes over whether a ban on "photography" would prohibit video and audio recording aside, the CAs clearly prohibited all forms of recording and are enforceable against defendants, even for the 2015 meeting as discussed above. In a footnote, defendants assert that the CAs should be read as limiting the prohibition on recording to only formal sessions at the Meetings and not informal discussions. Oppo. Br. at 20, fn. 8. That argument is not supported. There is nothing in the text of the CA that indicates that "discussions" is limited to formal

3. Scope and Reasonableness of the EA

Defendants argue that the EA is unenforceable because it is overbroad, imprecise, and unreasonable. Specifically, they rely on NAF's characterization of the EA (and presumably the CA as well) as "broad" and encompassing all NAF communications and things learned at the NAF Meetings to argue that the EA's breadth is problematic.

That a confidentiality provision is broad does not mean it is unenforceable. The cases cited by defendants on this point are not to the contrary.[28] For example, in *Wildmon v. Berwick Universal Pictures*, 803 F. Supp. 1167, 1178 (N.D. Miss.) *aff'd*, 979 F.2d 209 (5th Cir. 1992), after applying Mississippi's contract interpretation doctrine and determining that the contract language was ambiguous, the Court concluded that "an ambiguous contract should be read in a way that allows viewership and encourages debate." The problem in *Wildmon* was not breadth, but ambiguity.

In *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127 (N.D. Cal. 2002), a securities class action, the state of Connecticut moved the court to limit the scope of a confidentiality agreement the employer imposed on its employees so that the employees could respond to a state investigation. The court concluded,

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panel or workshop presentations and does not encompass information that is conveyed outside of those "formal" events.

[28] *Cf. Coast Plaza Doctors Hosp. v. Blue Cross of California*, 83 Cal. App. 4th 677, 684 (2000), *as modified* (Sept. 7, 2000) (giving full effect to "contractual language [that] is both clear and plain. It is also very broad. In interpreting an unambiguous contractual provision we are bound to give effect to the plain and ordinary meaning of the language used by the parties.").

to "the extent that those agreements preclude former employees from assisting in investigations of wrongdoing that have nothing to do with trade secrets or other confidential business information, they conflict with the public policy in favor of allowing even current employees to assist in securities fraud investigations." *Id.* at 1137. The considerations the court addressed in *In re JDS Uniphase Corp. Sec. Litig* that led it to limit the scope of the employee confidentiality agreement may have some persuasive value with respect to the interests of the Attorney General *amici* discussed below, but do not weigh against enforcement of NAF's confidentiality agreements against defendants generally. This is especially true considering that there are significant, countervailing public policy arguments weighing in favor of enforcing NAF's confidentiality agreements. *See, e.g.*, Cal. Govt. Code § 6215(a) (recognizing that persons working in the reproductive health care field, specifically the provision of terminating a pregnancy, are often subject to harassment, threats, and acts of violence by persons or groups).

The final case relied on by defendants in support of their argument that the EA should be interpreted narrowly, consistent with the public's interest in hearing speech on matters of public concern, did not address a confidentiality agreement at all. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 145 (1967). The *Curtis* case found that absent clear and compelling circumstances, the Court would not find that a defendant had waived a First Amendment defense to libel (where that specific defense had not been established by the Supreme Court at the time of defendants' libel trial).

Defendants also rely on established case law directing courts to interpret ambiguous contracts in a manner that is reasonable and does not lead to absurd results. Oppo. Br. at 22-23. Defendants argue that the broad coverage NAF contends the EA imposes on defendants is unreasonable and absurd because NAF's interpretation of the broad scope of the EA would cover all information discussed at NAF's Meetings, even publicly known information. Oppo. at 22-23. Defendants' argument might have some merit if it was made concerning a challenge to the application of the EAs' confidentiality provisions with respect to specific pieces or types of information that are otherwise publicly known or intended by NAF to be shared with individuals not covered by the EA. Defendants do not make that type of "as applied," narrow argument. Instead, they argue that the whole EA is unenforceable. There is no legal support for that result or for defendants' speculation that the EA might be enforced in an unreasonable manner against other NAF attendees.[29]

4. What Information is Covered by EA

Defendants argue that even if enforceable, the EA should be read to create confidentiality only for the information provided by NAF in formal sessions

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[29] I agree with defendants that NAF's intent with respect to the EA and CA is irrelevant for purposes of this motion. Under California contract law, intent comes into play only when contract language is ambiguous. There is no ambiguity concerning meaning of the EA or CA with respect to defendants' conduct here and, therefore, no need to construe otherwise ambiguous terms against the drafter. *But see Rebolledo v. Tilly's, Inc.*, 228 Cal. App. 4th 900, 913 (2014) ("ambiguities in standard form contracts are to be construed against the drafter.").

and should not be construed to cover information provided by conference attendees in informal conversations. Oppo. Br. at 26-27. Defendants rely on the two portions of paragraph 17 of EA for their restrictive interpretation of its coverage; they argue that paragraph 17 only restricts disclosure of information "NAF may furnish" and "written information provided by NAF." Those provisions, defendants say, should be read to modify "any information which is disclosed orally or visually." Taken together, defendants argue, this language "connotes formality" and therefore should cover only oral and visual information provided in formal sessions at the Meetings. Oppo. Br. at 26.

As an initial matter, defendants wholly ignore the provision in the EAs that signatories agree—on behalf of entities and their employees and agents—to "hold in trust and confidence any confidential information received in the course of exhibiting at the NAF Annual Meeting and agree not to reproduce or disclose confidential information without express permission from NAF." Pl. Exs. 3,4. The only reason defendants gained access to the NAF Annual Meetings was under their guise as exhibitors and all information they received was in the course of that role, even if gathered in places other than the exhibition hall. Moreover, defendants' constrained reading of paragraph 17 is illogical. The text of paragraph 17, when read as a whole, covers all written, oral, and visual information, and the "formality" of the language does not restrict its requirements to only the "formal" workshops and presentations as argued by defendants.[30]

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[30] The same is true of defendants "implications of formality" argument made with respect to the CAs in a footnote. *See* Oppo. Br. at 27, n.12.

In sum, on the record before me, NAF has demonstrated a strong likelihood of success on its breach of contract claims both with respect to the EAs that were signed by all CMP operatives in 2014 and 2015, and with respect to the CAs that were signed by Daleiden and his associates in 2014 and signed by Lopez in 2015.

B. California Penal Code Section 632

NAF also contends that it has demonstrated a likelihood of success on its claim that defendants violated California Penal Code section 632. That provision makes it a crime to, "without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device." Cal. Penal Code § 632(a). "The term 'confidential communication' includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication . . . in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." *Id.* § 632(c). And "[e]xcept as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding." *Id.* § 632(d).

Defendants argue that because section 632 does not prohibit publication of recordings made in violation of the statute, NAF cannot justify an injunction against defendants based upon an alleged violation of that statute. Indeed, California courts have 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); *cf. Kight v. CashCall, Inc.*, 200 Cal. App. 4th 1377, 1393 (2011) ("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.").

In reply, NAF argues that its section 632 claim is not being asserted as a basis for enjoining release of the recordings already made, but in support of its request that defendants be enjoined from "attempting to gain access to any future NAF meetings in order to tape its members, a form of relief specifically provided under § 637.2(b) ("Any person may . . . bring an action to enjoin and restrain any violation of this chapter, and may in the same action seek damages as provided by subdivision (a).").

Penal Code section 632, therefore, is not relevant to NAF's chances of success on the merits, but only with respect to the appropriate scope of injunctive relief, discussed below.[31]

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[31] Both sides spend much time arguing whether section 632 prohibits recording panel presentations as opposed to conversations between individuals, because section 632's protections only extend to information as to which the speaker has a "reasonable expectation" of privacy. I need not reach these arguments as NAF no longer asserts section 632 as a ground for its likelihood of success on this motion.

C. The First Amendment and Public Policy Implications of the Requested Injunction

Defendants argue that, assuming NAF demonstrates a likelihood of success on the breach of contract claim, the EAs and CAs should not be enforced through an injunction prohibiting defendants from publishing the recordings because that is an unjustified prior restraint and against public policy. NAF counters that even if First Amendment issues are raised by the injunction it seeks, any right to speech implicated by publishing the NAF recordings has been waived by defendants knowing agreement to the EAs and CAs.

NAF relies primarily on a line of cases holding that where parties to a contract agree to restrictions on speech, those restrictions are generally upheld. For example, in *Leonard v. Clark*, the Ninth Circuit addressed a union and union members' challenge to a Collective Bargaining Agreement that arguably restricted their First Amendment rights to petition the government. 12 F.3d 885, 886 (9th Cir. 1993), *as amended* (Mar. 8, 1994). The court, following Supreme Court precedent, recognized that "First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent," and concluded that in negotiating the CBA the union knowingly waived any First Amendment rights that may have been implicated. *Id.* at 890.

Other cases have likewise found that speech rights can be knowingly waived. *ITT Telecom Prod. Corp. v. Dooley*, 214 Cal. App. 3d 307, 317, 319 (1989) (recognizing, in a case determining the scope of California's litigation privilege, that "it is possible to waive even First Amendment free speech rights by contract."); *Perricone v. Perricone*, 292 Conn. 187,

202 (2009) (Supreme Court of Connecticut enforced non-disclosure agreement as knowing and voluntary waiver of First Amendment rights and enjoined ex-wife from "appearing on radio or television" for purposes of discussing her former marriage or spouse); *Brooks v. Vallejo City Unified Sch. Dist.*, No. 2:09-CV-1815 MCE JFM, 2009 WL 10441783, at *5 (E.D. Cal. Oct. 30, 2009) (recognizing, in denying a third-party's attempt to secure a copy of a public entities' settlement agreement with two individual plaintiffs, that individuals "were entitled to bargain away their free speech rights by agreeing to confidentiality provisions or other contractual provisions that restrict free speech").

Defendants respond that NAF has not shown that Daleiden knowingly and intelligently waived his First Amendment rights by signing the NAF confidentiality agreements, resting their argument on Daleiden's position that he believed the agreements were unenforceable and void. Daleiden PI Decl. ¶ 12 ("I understood that no nondisclosure agreement is valid in the face of criminal activity. In the course of my investigative journalism work, I have seen other confidentiality agreements, all of which were far more specific and detailed in terms of what the protected information was. I believed the working of the nondisclosure portions of the Exhibit Agreement was too broad, vague, and contradictory to be enforced."). However, even if Daleiden honestly believed he had defenses to the enforcement of the confidentiality agreements, there is no argument—and no case law cited—that his signature on them and his agreement to them was not "knowing and voluntary." Daleiden and his associates chose to attend the NAF Annual Meetings and voluntarily and knowingly signed the EAs and CAs.

Daleiden's argument would vitiate the enforceability of confidentiality agreements based on an individual's correct or mistaken belief as to the enforceability of those agreements. It is contrary to well-established law. *See, e.g.*, *Leonard v. Clark*, 12 F.3d at 890 ("The fact that the Union informed the City of its view that Article V was 'unconstitutional, illegal, and unenforceable' does not make the Union's execution of the agreement any less voluntary."); *see also Griffin v. Payne*, 133 Cal. App. 363, 373 (Cal. Ct. App. 1933) ("A secret intent to violate the law, concealed in the mind of one party to an otherwise legal contract, cannot enable such party to avoid the contract and escape his liability under its terms.").

Defendants contend that the public policy at issue—allowing free speech on issues of significant public importance—weighs against finding a waiver and/or enforcing the confidentiality agreements. The Ninth Circuit has recognized that courts should balance the competing public interests in determining whether to enforce confidentiality agreements that restrict First Amendment rights. *Leonard*, 12 F.3d at 890 ("even if a party is found to have validly waived a constitutional right, we 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.'") (quoting *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir.1991)); *see also Perricone v. Perricone*, 292 Conn. 187, 221-22 (in weighing the public interests as to whether to enforce the agreement, the court observed: "The agreement does not prohibit the disclosure of information concerning the enforcement of laws protecting important rights, criminal behavior, the public health

and safety or matters of great public importance, and the plaintiff is not a public official.").

On the record before me, balancing the significant interests as stake on both sides supports enforcement of the confidentiality agreements at this juncture. As the Supreme Court recognized in *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991), "the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law." *Id.* at 672. "'[T]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.'" *Id.* at 7670 (quoting *Associated Press v. NLRB*, 301 U.S. 103 (1937)); *see also Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) ("The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime."). That defendants intended to infiltrate the NAF Annual Meetings in order to uncover evidence of alleged criminal wrongdoing that would "trigger criminal prosecution and civil litigation against Planned Parenthood and to precipitate pro-life political and cultural ramifications when the revelations become public," does not give defendants an automatic license to disregard the confidentiality provisions. Pl. Ex. 26.

Defendants passionately contend that public policy is on their side (and the side of public disclosure) because the recordings show criminal wrongdoing by abortion providers—a matter that is indisputably of significant public interest. *Cf. Bernardo v. Planned*

Parenthood Fed'n of Am., 115 Cal. App. 4th 322, 358 (2004) (approving judicial notice "of the fact that abortion is one of the most controversial political issues in our nation.").[32] I have reviewed the recordings relied on by defendants and find no evidence of criminal wrongdoing. At the very most, some of the individuals expressed an interest in exploring a relationship with defendants' fake company in response to defendants entreaties of how "profitable" it can be and how tissue donation can assist in furthering research. There are no express agreements to profit from the sale of fetal tissue or to change the timing of abortions to allow for tissue procurement.[33]

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[32] Defendants ask for leave to supplement the record to include the January 20, 2016 Order in the *StemExpress LLC, Inc. v. Center for Medical Progress* case pending in Los Angeles Superior Court. Dkt. No. 352. Defendants ask me to take notice that the Superior Court found defendants' Project video regarding StemExpress was "constitutionally protected activity in connection with a matter of public interest" under California's anti-SLAPP statute. That motion is GRANTED.

[33] The first piece of evidence that defendants repeatedly point to show "illegality" is an advertisement by StemExpress that was in both of the NAF 2014 and 2015 Meeting brochures. That ad states that clinics can "advance biomedical research," that partnering with StemExpress can be "Financially Profitable*Easy to Implement Plug-In Solution*Safeguards You and Your Donors" and that the "partner program" "fiscally rewards clinics." *See* Dkt. No. 270-1 at p. 3 of 10. However, the ad explains that StemExpress is a company that provides human tissue products "ranging from fetal to adult tissues and healthy to diseased samples" to many of the leading research institutions in the world. *Id.* The ad, therefore, is a general one and not one aimed solely at providers of fetal tissue. The ad does not demonstrate that StemExpress was engaged in illegal conduct of paying clinics at a profit for fetal tissue.

I also find it significant that while defendants' repeatedly assert that their primary interest in infiltrating NAF was to uncover evidence of criminal wrongdoing, and that the NAF recordings show such wrongdoing, defendants did not provide any of the NAF recordings to law enforcement following the 2014 Annual Meeting. Nor did defendants provide any of the NAF recordings to law enforcement immediately following the 2015 Annual Meetings. Instead, defendants decided it was more important to "curate" and release the Project videos starting in July 2015. Sworn testimony from Daleiden establishes that the only disclosure of NAF materials he made to law enforcement officers was: (i) providing a StemExpress advertisement from the NAF 2014 Annual Meeting program to law enforcement in El Dorado County, California in May 2015; and, providing (ii) "short clips" of video to law enforcement in Texas in June or July 2015. Daleiden PI Decl. ¶ 24. If 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. They did not.

Perhaps realizing that the recordings do not show criminal wrongdoing, defendants shift and assert that there is a public interest in the recordings showing "a remarkable de-sensitization in the attitudes of industry participants." Oppo. Br. at 14. As part of that shift, defendants' opposition brief highlights portions of the recordings where abortion providers comment candidly about how emotionally and professionally difficult their work can be. Oppo. Br. at 14-15. I have reviewed defendants' transcripts of these portions of the recordings. Some comments can be characterized as

callous and some may show a "de-sensitization," as defendants describe it. They can also be described as frank and uttered in the context of providers mutually recognizing the difficulties they face in performing their work. However they are characterized, there issome public interest in these comments. But unlike defendants' purported uncovering of criminal activity, this sort of information is already fully part of the public debate over abortion. Oppo. Br. at 49-50 (citing *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 962 (2000)); *see also* VALUE OF HUMAN LIFE, 162 Cong Rec S 162, 163 (January 21, 2016); PROVIDING FOR CONSIDERATION OF H.R. 1947, FEDERAL AGRICULTURE REFORM AND RISK MANAGEMENT ACT OF 2013, 159 Cong Rec H 3708, 3709 (June 8, 2013 testimony on the PAIN-CAPABLE UNBORN CHILD PROTECTION ACT). The public interest in additional information on this issue cannot, standing alone, outweigh the competing interests of NAF and its members' expectations of privacy, their ability to perform their professions, and their personal security.

It is also this very information that could—if released and taken out of the context that it was shared in by NAF members—result in the sort of disparagement, intimidation, and harassment of which NAF members who were recorded during the Annual Meetings are afraid. Dunn Decl. ¶ 10; Reeves Decl. ¶ 17. In sum, the public interest in these comments is certainly relevant, but does not weigh heavily against the enforcement of the NAF confidentiality agreements.

On the other side, public policy also supports NAF's position. NAF has submitted extensive evidence

that in order to fulfill its mission and allow candid discussions of the challenges its members face—both professional and personal—confidentiality agreements for NAF Meeting attendees are absolutely necessary. Dunn Decl. ¶¶ 5-6; Reeves Decl. ¶ 7; Saporta Decl. ¶¶ 11, 13-16; Mellor Decl. ¶¶ 7, 10-14. Release of the recordings procured by fraud and taken in violation of NAF's stringent confidentiality agreements, which disclose the identities of NAF members and compromise steps NAF members take to protect their privacy and professional interests, is also contrary to California's recognition of the dangers faced by providers of abortion, as well as California's efforts to keep information regarding the same shielded from public disclosure and protect them from threats and harassment. *See* Cal. Govt. Code § 6215(a) ("(a) Persons working in the reproductive health care field, specifically the provision of terminating a pregnancy, are often subject to harassment, threats, and acts of violence by persons or groups."); Cal. Civ. Code § 3427 *et seq.* (creating cause of action to deter interference with access to clinics and health care); Cal. Govt. Code § 6218 ("Prohibition on soliciting, selling, trading, or posting on Internet private information of those involved with reproductive health services"); Cal. Govt. Code § 6254.28; Cal. Penal Code § 423 ("California Freedom of Access to Clinic and Church Entrances Act."). As noted above, since defendants' release of the Project videos (as well as the leak of a portion of the NAF recordings), harassment, threats, and 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. Weighing the public

policy interests on the record before me, enforcement of the confidentiality agreements against defendants is not contrary to public policy.

That said, public policy may well support the release of a small subset of records—those that defendants believe show criminal wrongdoing—to law enforcement agencies.[34] Defendants rely on a line of cases where courts have refused to enforce, or excused compliance with, otherwise applicable confidentiality agreements for the limited purpose of allowing cooperation with a specified law enforcement investigation. *See, e.g., Alderson v. United States*, 718 F. Supp. 2d 1186, 1200 (C.D. Cal. 2010); *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127 (N.D. Cal. 2002); *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 854 (10th Cir. 1972); *see also United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 965 (9th Cir. 1995) (refusing to enforce a prefiling release of a False Claims Act claim); *Siebert v. Gene Sec. Network, Inc*, No. 11-CV-01987-JST, 2013 WL 5645309, at *8 (N.D. Cal. Oct. 16, 2013) (declining to enforce a nondisclosure agreement with respect to documents relevant to a FCA claim because application of the NDA to those documents would "would frustrate Congress' purpose in enacting the False Claims Act—namely, the public policy in favor of providing incentives for whistleblowers to come forward, file FCA suits, and aid the government in its investigation efforts."); *but see Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1062 n.15 (9th Cir. 2011)

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[34] As I have said, my review of the recordings relied on by defendants does not show criminal conduct, but I recognize that law enforcement agencies may want to review the information at issue themselves in order to make their own assessment.

(upholding breach of confidentiality claim, despite plaintiff's attempt to "excuse her conduct on the grounds that she was in contact with, and providing information to, government investigators," in part because that justification "neither explains nor excuses the overbreadth of her seizure of documents.").[35]

I do not disagree with the analysis and results in those cases, but note that the posture of this case is different. Defendants' purported desire to disclose the NAF recordings to law enforcement does not obviate the confidentiality agreements for all purposes. At most, defendants might have a defense to a breach of contract claim based on production of NAF materials to law enforcement. However, the question of whether defendants should be excused from complying with NAF's confidentiality agreements in order to provide NAF materials to law enforcement has not been placed directly at issue. In this case, Attorney General *amici* have appeared (with leave of court) to present their arguments on the scope of the TRO and the requested preliminary injunction.[36] They have not directly sought relief from the confidentiality agreements, the TRO,

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[35] Defendants also rely on a related line of cases holding that contracts which expressly prohibit a signatory from reporting criminal behavior to law enforcement agencies are void as against public policy. *See, e.g.*, Oppo. Br. at 52-55 (citing *Fomby-Denson v. Dep't of the Army*, 247 F.3d 1366, 1376 (Fed. Cir. 2001); *Bowyer v. Burgess*, 54 Cal. 2d 97, 98 (1960)). Those cases are inapposite.

[36] I have granted the Attorneys General of the states of Alabama, Arizona, Arkansas, Michigan, Montana, Nebraska, and Oklahoma leave to participate as *amici curiae* in this matter. Dkt. Nos. 99, 100, 285. As represented by the office of the Attorney General of Arizona, the *amici* filed a brief and argued in court during the hearing on the Motion for a Preliminary Injunction.

or the requested preliminary injunction by intervening and moving for declaratory relief in this Court or by seeking enforcement of their subpoenas in the courts of their own states. And contrary to their assertion, the TRO in place and the Preliminary Injunction requested do not prevent law enforcement officials from investigating defendants' claims of criminal wrongdoing. For example, law enforcement agencies from the states of Arizona and Louisiana have instituted formal efforts to secure the NAF recordings. Under procedures outlined in the Protective Order in this case, NAF and defendants have been and continue to meet and confer with those state authorities about the scope of the subpoenas and defendants' responses.[37]

The record before me demonstrates that defendants infiltrated the NAF meetings with the intent to disregard the confidentiality provisions and secretly record participants and presentations at those meetings. Defendants also admit that only a small subset of the total material gathered implicate any potential criminal wrongdoing. Oppo. Br. at 10-14. I have reviewed those transcripts and recordings and find no evidence of actual criminal wrongdoing. That defendants did not promptly turn over those recordings to law enforcement likewise belies their claim that they uncovered criminal wrongdoing, and instead supports NAF's contention

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[37] There have only been three subpoenas served on CMP for NAF materials; the Congressional subpoena that has been complied with, as well as subpoenas from Louisiana and Arizona. Negotiations between NAF, CMP, and the states of Louisiana and Arizona are ongoing. While NAF and the defendants have repeatedly stipulated to extend the timeframe for NAF to file a challenge to the state subpoenas in state court (*see* Dkt. Nos. 246, 300), those were decisions reached by the parties and not imposed by the Court.

that defendants' goal instead is to falsely portray the operations of NAF's members through continued release of its "curated" videos as part of its strategy to alter the political landscape with respect to abortion and the public perception of NAF's members.[38] I conclude that NAF has shown a strong likelihood of success on its breach of contract claims against CMP and Daleiden. Enforcement of NAF's confidentiality provisions for purposes of continuing the injunction prohibiting defendants from releasing the NAF materials is not against public policy.

D. Claims Against Newman

Defendant Newman argues that NAF has failed to show a likelihood of success against him because there is no evidence of his role in the NAF infiltration and no argument that Newman breached any of NAF's agreements. Newman's argument would be more relevant if this were a motion for summary judgment. However, it is not. The only question is whether NAF has made a strong showing of the likelihood of success on its contract claim against CMP and Daleiden, which it has. NAF submitted evidence of Newman's own admissions that he advised Daleiden on how to infiltrate the NAF meetings as part of the Project, which is relevant to the appropriate scope of an injunction. Pl. Ex. 14 (at NAF0004475-76); Pl. Ex. 16 (at NAF0004493-

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[38] In opposing NAF's request that the Court order Daleiden to turn over the NAF materials to his outside counsel, Daleiden's counsel explained that Daleiden needed access to the NAF materials because "Mr. Daleiden continues to work on the Human Capital Project, including the work of curating available raw investigative materials for disclosure to law enforcement and for release of videos to the public." Dkt. No. 195.

94). That evidence makes clear that Newman should remain covered by the Preliminary Injunction, even if he is no longer serving as a board member of CMP. Dkt. No. 344.

II. Irreparable Injury

To sustain the request for a preliminary injunction, NAF must demonstrate that "irreparable injury is likely in the absence of" the requested injunction" and establish a "sufficient causal connection" between the irreparable harm NAF seeks to avoid and defendants' intended conduct—release of the NAF materials. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 982 (9th Cir. 2011).

Defendants argue that NAF has not shown that it will suffer irreparable injury to justify a preliminary injunction. However, as detailed above, the release of videos as part of defendants' Human Capital Project has 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. This significant increase in harassment and violent acts—including the most recent attack in Colorado Springs at the clinic where "target" Dr. Ginde is the medical director—has been adequately linked to the timing of the release of the Project videos by CMP. Saporta Decl. ¶ 19; Saporta Depo. 42:1-10; Pl. Exs. 92, 93, 96-99.[39] If the NAF materials were publicly released, it is likely that the

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[39] Defendants object to Exhibits 98 and 99 as inadmissible hearsay, for lack of personal knowledge, lack of authentication, and as irrelevant. Those objections are overruled.

NAF attendees shown in those recordings would not only face an increase in harassment, threats, or incidents of violence, but also would have to expend more effort and money to implement additional security measures. *See, e.g.*, Dunn Decl. ¶ 10; Reeves Decl. ¶ 19.[40] The same is true for NAF itself, which provides security assessments and assistance for its members. Mellor Decl., ¶ 15; Saporta Decl. ¶ 10.

Defendants contend that they cannot be held responsible for the threats, harassment, and violence caused by "third-parties" in response to the release of the Project videos, and that defendants' ability to publish the NAF materials cannot be prevented when defendants have not themselves been linked to the threats, harassment, and violence. Oppo. Br. at 43-44. But they fail to contradict NAF's evidentiary showing that a significant increase in these acts followed CMP's release of its Project videos. Moreover, a report submitted by NAF of an analysis of many of the "highlight" and "full" videos released by CMP concluded that the "curated" or highlight Project videos were "misleading" and suggests that the "full" videos defendants released along with their "highlights" were also edited. Pl. Ex. 77. Defendants do not counter this evidence, other than pointing to Daleiden's assertion that the highlight videos were accompanied by the release of the "full" recordings. Given the evidence of defendants' past practices, allowing defendants to use the NAF materials in future Project videos would likely lead to the same result—release of misleading "highlight" videos disclosing the identity

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[40] Defendants object to paragraph 19 of Dr. Reeves' declaration as speculative, improper expert testimony, and for lack of foundation. Those objections are OVERRULED.

and comments of NAF members and meeting attendees, resulting in further harassment and incidents of violence against the individuals shown in those recordings. The NAF members and attendees in the recordings have a justifiable expectation that release of the materials—in direct contravention of the NAF confidentiality agreements—will result not only in harassment and violence but reputational harms as well. *See, e.g.*, Dunn Decl. ¶¶ 9-10;[41] Reeves Decl. ¶ 17.

Defendants miss the point in their attempt to shift the responsibility to overly zealous third-parties for the actual and likely injury to NAF and its members that would stem from disclosure of the NAF materials. If defendants are allowed to release the NAF materials, NAF and its members would suffer immediate harms, including the need to take additional security measures. The "causal connection" between NAF's and its members' irreparable injury and the conduct enjoined (release of NAF materials) has been shown on this record.[42]

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[41] Defendants object to paragraph 9 of the Dunn Declaration as lacking in personal knowledge, improper expert testimony, inadmissible hearsay, improper opinion testimony, and under the best evidence rule. Those objections are overruled.

[42] The sum of defendants' argument and evidence on this point is that they cannot be blamed for the "hyperbolic comments of anonymous Internet commenters" and that "hyperbolic 'death threats' on the Internet and through social media has become an ubiquitous feature of online discourse." Oppo. Br. at 44-45. But the misleading nature of the Project videos that they 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, including the attack in Colorado where the

On the other side of the equation is defendants' claim of irreparable injury. They focus on their First Amendment right to disseminate the information fraudulently obtained at the NAF Meetings, and the injury to the public of being deprived of the NAF recordings. But freedom of speech is not absolute, especially where there has been a voluntary agreement to keep information confidential. While the disclosure of evidence of criminal activity or evidence of imminent harm to public health and safety could outweigh enforcement of NAF's confidentiality agreements (as discussed above), there is no such evidence in defendants' recordings. Viewed in a light most favorable to defendants, what does appear is information that is already in the public domain that defendants characterize as showing a "de-sensitization" as to the work performed by abortion providers. The balance of NAF's strong showing of irreparable injury to its members' freedom of association (to gather at NAF meetings and share their confidences), to its and its members' security, and to its members' ability to perform their chosen professions 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.

III. Balance of Equities

Similar to the discussion of competing claims of irreparable injury, the balance of equities favors NAF. Defendants will suffer the hardship of being restricted in what evidence they can release to the public in support of their ongoing Human Capital

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gunman was apparently motivated by the CMP's characterization of the sale of "baby parts."

Project, at least through a final determination at trial. However, the hardships suffered by NAF and its members are far more immediate, significant, and irreparable.

IV. Public Interest

I fully recognize that there is strong public interest on the issue of abortion on both sides of that debate, and that members of the public therefore have an interest in accessing the NAF materials. I also recognize that this case impinges on defendants' rights to speech and the public's equally important interest in hearing that speech. But this is not a typical freedom of speech case.[43] Nor is this a typical

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[43] None of the "prior restraint" cases defendants rely on address the types of exceptional facts established here: (i) enforceable confidentiality agreements, knowingly and voluntarily entered into, in which defendants agreed to the remedy of injunctive relief in the event of a breach; (ii) extensive and repeated fraudulent conduct; (iii) misleading characterizations about the information procured by misrepresentation; and (iv) a strong showing of irreparable harm if the confidentiality agreements are not enforced pending trial. *See* Oppo. Br. at 32-35. Several of defendants' prior restraint cases expressly left open the possibility of limits on speech where "private wrongs" and "clear evidence of criminal activity" occurred. *See, e.g.*, *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971) (overturned broad injunction prohibiting "peaceful" pamphleteering across a city where injunction was not necessary to redress a "private wrong"); *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (emergency stay overturning prior restraint where damage to meat packing company was readily remedied by post-publication damages action and "the record as developed thus far contains no clear evidence of criminal activity on the part of CBS, and the court below found none."); *see also Bartnicki v. Vopper*, 532 U.S. 514, 529-30 (2001) (striking down wiretap statutes to extent they penalized the publishing of secretly recorded phone conversations by reporters who played no role in the illegal interception; rejecting

"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. *See, e.g.*, *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994); *see also Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

Instead, this is an exceptional case where the extraordinary circumstances and evidence to date shows that the public interest weighs in favor of granting the preliminary injunction. Weighing against the public's general interest in disclosure of the recordings showing the "de-sensitization" of abortion providers, is the fact that there is a constitutional right to abortions and that NAF members also have the right to associate in privacy and safety to discuss their profession at the NAF Meetings, and need that privacy and safety in order to safely practice their profession. On the record before me, NAF has demonstrated the release of the NAF materials will irreparably impinge on those rights.

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 the manufacture of fake documents, the creation and registration with the state of California of a fake company, and repeated false statements to a numerous NAF representatives and NAF members in order to infiltrate NAF and implement their Human Capital Project.

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proposition that "speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.").

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. Defendants provide no evidence to support that assertion and no cases on point.[44]

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[44] Defendants rely on cases where reporters misrepresented themselves in the course of undercover investigations, but those cases do not show the level of fraud and misrepresentation defendants engaged in here. For example, in *Med. Lab. Mgmt. Consultants v. ABC*, 306 F.3d 806, 812 (9th Cir. 2002), reporters posed as employees of fictitious labs, in order to investigate whether an existing lab was violating federal regulations and misreading pap smear tests. There is no evidence that the reporters in the *Med. Lab.* case did anything other than verbally misrepresent themselves to the lab owner; the reporters did not create fictitious documents, register a fictitious company, or intentionally agree to confidentiality agreements before making their undercover recordings. *Id.* at 814 n.4 (noting the plaintiffs failed to obtain confidentiality agreements from defendants). It is also important to note that while the Ninth Circuit affirmed the district court's order granting summary judgment to defendants on plaintiffs' intrusion on seclusion, trespass, and tortious interference claims under Arizona law, the district court denied in part defendants' motion as to plaintiffs' fraud claim. *Id.* at 812. In *J.H. Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1348 (7th Cir. 1995), the reporters posed as patients of an eye center and secretly recorded their eye exams. The misrepresentations in that case simply do not rise to the level of the misrepresentations here or the fraudulent lengths defendants went through to secure their recordings. Also, in that case, the Court of Appeals remanded the defamation claim for further proceedings, and affirmed the dismissal of the trespass, privacy, wiretapping, and fraud claims based on an analysis of the facts under the state and federal laws at issue. The district court did not dismiss

V. Scope of Injunction

A. Coverage of Third Party Law Enforcement Entities and Governmental Officials

Defendants and the Attorney Generals of the states of Alabama, Arizona, Arkansas, Michigan, Montana, Nebraska, and Oklahoma (AG *Amici*) argue that any continuing injunction on the release of the NAF materials should not run to third-party law enforcement entities or government officials because NAF has not shown that disclosure of the NAF materials to law enforcement entities or government officials will result in irreparable harm and the public interest strongly favors governments being free to exercise their investigatory powers. *See* AG *Amici* Brief (Dkt. No. 285).

The Protective Order and the injunction in this case do not hinder the ability of states or other governmental entities from conducting investiga-

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the breach of contract claim. *Id.* at 1354. Finally, defendants' citation to *Animal Legal Def. Fund v. Otter*, No. 1:14-CV-00104-BLW, 2015 WL 4623943 (D. Idaho Aug. 3, 2015), for the proposition that using deceptive tactics to conduct an undercover investigation "is not 'fraud' and is fully protected by the First Amendment," is not supported. In that case, the district court struck down a state law that criminalized the use of "misrepresentation" to gain access to and record operations in an agricultural facility. In striking down the law as a content-based regulation of protected speech which failed strict scrutiny, the court noted that the law did not "limit its misrepresentation prohibition to false speech amounting to actionable fraud," and any harm from the speech at issue would not be compensable as "harm for fraud or defamation" because the harm did not stem from the misrepresentation made to access the facility. *Id.* at * 5-6. That case did not hold that undercover operations could not result in actionable fraud, breach of contract, or libel.

tions. Nor do they bar defendants from disclosing materials in response to subpoenas from law enforcement or other government entities. Instead, those orders simply impose a notice requirement on defendants; requiring them to notify NAF prior to defendants' production of the NAF materials so that NAF may (if necessary) challenge the subpoenas in the state court at issue. Contrary to the AG *Amici* position, these limited procedures do not purport to bind the states or prevent them from conducting investigations or seeking relief in their own courts. The Protective Order and injunction simply create an orderly procedure to allow production of relevant information to state law enforcement or other governmental entities. As far as I am aware, that procedure has worked well and negotiations are ongoing between NAF, defendants, and the two states that have issued subpoenas to CMP, Arizona and Louisiana.[45]

B. Expansion of Injunctive Relief

NAF also seeks to expand the injunctive relief to prevent defendants and those acting in concert with them from publishing or disclosing "any video, audio, photographic, or other recordings taken of members or attendees Defendants first made contact with at NAF meetings" and "enjoin the defendants from

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[45] Similarly defendants 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.

attempting to gain access to any future NAF meetings." Motion at i, 2.

On this record, NAF has not demonstrated that an expansion of the injunction is warranted. NAF does not identify (under seal or otherwise) the NAF members or attendees whom it believes have been recorded and whom defendants "first made contact with" at a NAF Annual Meeting. A request for injunctive relief must be specific and reasonably detailed, but NAF's request would import ambiguity into the scope of the injunction. Absent a more specific showing supported by evidence, I will not expand the preliminary injunction to ban CMP from releasing unspecified recordings of unspecified NAF members or attendees defendants "first made contact with" at the NAF Meetings.

Similarly, NAF has not shown that an "open-ended" expansion of the injunction to prohibit the "defendants from attempting to gain access to any future NAF meetings," is necessary. Defendants and their agents are now well known to NAF and its members and absent evidence that defendants intend to continue to attempt to infiltrate NAF meetings, there is no need to extend the preliminary injunction at this juncture.

CONCLUSION

Considering the evidence before me, and finding that NAF has made a strong showing on all relevant points, I GRANT the motion for a preliminary injunction. Pending a final judgment, defendants and those individuals who gained access to NAF's 2014 and 2015 Annual Meetings using aliases and acting with defendant CMP (including but not limited to the

following individuals/aliases: Susan Tennenbaum, Brianna Allen, Rebecca Wagner, Adrian Lopez, and Philip Cronin) are restrained and enjoined from:

(1) publishing or otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF annual meetings;

(2) publishing or otherwise disclosing to any third party the dates or locations of any future NAF meetings; and

(3) publishing or otherwise disclosing to any third party the names or addresses of any NAF members learned at any NAF annual meetings.

IT IS SO ORDERED.

/s/ William H. Orrick
United States District Judge

Dated: February 5, 2016

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITIONS FOR REHEARING EN BANC (JULY 19, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL ABORTION FEDERATION,

Plaintiff-Appellee,

v.

CENTER FOR MEDICAL PROGRESS; ET AL.,

Defendants,

and

STEVE COOLEY; BRENTFORD J. FERREIRA,

Respondents-Appellants.

No. 17-16622

D.C. No. 3:15-cv-03522-WHO
Northern District of California, San Francisco

NATIONAL ABORTION FEDERATION,

Plaintiff-Appellee,

v.

CENTER FOR MEDICAL PROGRESS; ET AL.,

Defendants-Appellants.

No. 17-16862

D.C. No. 3:15-cv-03522-WHO

Before: RAWLINSON, WATFORD, and FRIEDLAND, Circuit Judges.

The panel unanimously votes to deny the petitions for rehearing *en banc* (Dkt. Nos. 81, 82).

The full court has been advised of the petitions for rehearing *en banc*, and no judge requested a vote on whether to rehear either matter en banc. Fed. R. App. P. 35.

The petitions for rehearing *en banc*, filed June 19, 2019, are DENIED.