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**MEMORANDUM\* OPINION OF THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
(AUGUST 9, 2022)**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**NATIONAL ABORTION FEDERATION,**

*Plaintiff-Appellee,*

v.

**CENTER FOR MEDICAL PROGRESS; BIOMAX  
PROCUREMENT SERVICES, LLC; DAVID  
DALEIDEN AKA ROBERT DAOUD SARKIS,**

*Defendants-Appellants,*

and

**TROY NEWMAN,**

*Defendant.*

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**No. 21-15953**

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

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

NATIONAL ABORTION FEDERATION,

*Plaintiff-Appellee,*

v.

STEVEN COOLEY; BRENTFORD J. FERREIRA,

*Appellants,*

CENTER FOR MEDICAL PROGRESS;  
BIOMAX PROCUREMENT SERVICES, LLC;  
DAVID DALEIDEN, AKA ROBERT DAOUD  
SARKIS; TROY NEWMAN,

*Defendants.*

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No. 21-15955

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

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

Before: S.R. THOMAS, McKEOWN, and CLIFTON,  
Circuit Judges.

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The Center for Medical Progress (“CMP”), Biomax Procurement Services, LLC (“Biomax”), and David Daleiden (aka “Robert Sarkis”) (collectively “Defendants”) appeal from the district court’s final judgment granting summary judgment to the National Abortion Federation (“NAF”) and entering a permanent injunction in favor of NAF. CMP and Daleiden, along with appellants Steven Cooley and Brentford J. Ferreira, who represent Daleiden in a related state criminal

case, also appeal from the district court’s orders holding them in civil contempt for violation of the preliminary injunction and setting the civil contempt sanctions amount. We have jurisdiction pursuant to 28 U.S.C. § 1291. Because the parties are familiar with the factual and procedural history of the case, we need not recount it here. We affirm.<sup>1</sup>

1. There is subject matter jurisdiction over NAF’s state law claims under 28 U.S.C. § 1332. A prior panel has already considered and rejected Appellants’ argument that NAF lacks complete diversity. *Nat’l Abortion Fed’n v. Ctr. for Med. Progress*, 793 F. App’x 482, 484 n.1 (9th Cir. 2019) (noting that it had “considered the issue and conclude[d] that diversity jurisdiction properly existed”). This determination is the law of the case. *See Hanna Boys Ctr. v. Miller*, 853 F.2d 682, 686 (9th Cir. 1988).

2. NAF’s breach of contract claim is not barred by claim preclusion because NAF is not in privity with the plaintiffs in *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 214 F. Supp. 3d 808 (N.D. Cal. 2016), *aff’d*, 890 F.3d 828 (9th Cir. 2018), *amended*, 897 F.3d 1224 (9th Cir. 2018), and *aff’d*, 735 F. App’x 241 (9th Cir. 2018), for purposes of res judicata.<sup>2</sup> *See United States v. Schimmels (In re Schimmels)*, 127 F.3d 875, 881 (9th Cir. 1997).

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<sup>1</sup> Defendants’ motion to supplement the record and motion for judicial notice are granted (Case No. 21-15953, Docket No. 21).

<sup>2</sup> By failing to specifically and distinctly argue that the district court incorrectly applied issue preclusion, Defendants forfeited this argument. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994).

3. The district court did not err in entering a permanent injunction in favor of NAF.<sup>3</sup>

a. The Supreme Court has held that First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary, and intelligent. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps. Council 31*, 138 S. Ct. 2448, 2486 (2018); *see also Leonard v. Clark*, 12 F.3d 885, 889-90 (9th Cir. 1993), as amended (Mar. 8, 1994). Defendants knowingly, voluntarily, and intelligently waived any First Amendment rights in disclosing the information they obtained at the NAF conferences by signing the agreements with NAF. Daleiden voluntarily signed the agreements, and testified that he was familiar with the contents. The agreements unambiguously prohibited him from making records, disclosing recordings, and from disclosing any information he received from NAF. His waiver of First Amendment rights was demonstrated by clear and convincing evidence.

b. The permanent injunction does not interfere with Daleiden's Sixth Amendment rights. The district court repeatedly stated that the federal court would not interfere with the state court's determinations regarding what information will become publicly available or disclosed in connection with the criminal proceedings.

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<sup>3</sup> Defendants forfeited any argument that the district court abused its discretion in entering an unjustified permanent injunction in favor of NAF. "We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review." *Greenwood*, 28 F.3d at 977.

C. Daleiden's breach of contract claim and the resulting permanent injunction are not preempted by the Copyright Act. *See Grosso v. Miramax Film Corp.*, 383 F.3d 965, 968 (9th Cir. 2004), *amended on denial of reh'g*, 400 F.3d 658 (9th Cir. 2005). The injunction does not conflict with any part of the statute.

4. The district court did not abuse its discretion by denying Defendants' motion to disqualify the district judge. Defendants failed to demonstrate that a reasonable person would believe that the district judge's impartiality could be questioned. *See United States v. Hernandez*, 109 F.3d 1450, 1453-54 (9th Cir. 1997) (per curiam) (setting forth standard of review and discussing standard for recusal under 28 U.S.C. §§ 144 and 455).

5. The district court did not abuse its discretion by holding Daleiden and CMP in contempt of the preliminary injunction. To do so, a court must find "by clear and convincing evidence that the contemnors violated a specific and definite order of the court." *FTC v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999) (citation omitted). The district court did not err in finding that Daleiden created a video containing the enjoined footage and uploaded that video to CMP's YouTube channel.

6. The district court did not err in holding Cooley and Ferreira in contempt.

a. Cooley and Ferreira were bound by the preliminary injunction, as Daleiden's attorneys, agents, and as parties in active concert or participation with Daleiden. Fed. R. Civ. P. 65(d)(2)(A)-(C).

b. Cooley and Ferreira received adequate notice. *See Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1110 (9th

Cir. 2005). They were apprised of the possibility of civil sanctions in late May, and the contempt hearing was held in mid-July. They had approximately six weeks to prepare. Shortly before the hearing, they were informed that the district judge was only considering civil sanctions.

c. Cooley and Ferreira were subject to civil sanctions—not criminal ones. A prior panel determined that the contempt sanctions entered against Cooley and Ferreira were civil contempt sanctions, and that determination is the law of the case. *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 926 F.3d 534, 538 (9th Cir. 2019). Thus, they were not entitled to procedural safeguards beyond notice and an opportunity to be heard. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994).

d. *Younger* abstention is not applicable to this case. The district court's contempt order has neither the actual nor the practical effect of enjoining the state court prosecution of Daleiden. *See ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 758 (9th Cir. 2014); *Gilbertson v. Albright*, 381 F.3d 965, 977-78 (9th Cir. 2004) (en banc).

e. Cooley and Ferreira do not fall within the “narrow circumstances” that would permit them to contest the legality of the underlying injunction by disobeying it. *Irwin v. Mascott*, 370 F.3d 924, 931 (9th Cir. 2004).

f. The district court did not err in concluding that Cooley and Ferreira did not have an objectively reasonable basis for believing that the injunction did not apply to them. *See Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801-02 (2019).

**AFFIRMED.**

**AMENDED JUDGMENT OF THE  
UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA  
(FEBRUARY 1, 2022)**

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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NATIONAL ABORTION FEDERATION (NAF),

*Plaintiff,*

v.

THE CENTER FOR MEDICAL PROGRESS,  
BIOMAX PROCUREMENT SERVICES LLC, DAVID  
DALEIDEN (aka “ROBERT SARKIS”),  
and TROY NEWMAN,

*Defendants.*

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Case No. 3:15-cv-3522-WHO

Before: William H. ORRICK, III, Judge.

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Pursuant to Federal Rules of Civil Procedure 54 and 58(a), the Court enters judgment as follows.

**I. Definitions**

The following terms are defined as follows:

- A. NAF: Plaintiff National Abortion Federation.
- B. CMP: Defendant Center for Medical Progress.

- C. BioMax: Defendant BioMax Procurement Services, LLC.
- F. Daleiden: Defendant David Daleiden.
- E. All Defendants: CMP, BioMax, and Daleiden.

## **II. Claim**

The Court enters judgment on NAF's Sixth Cause of Action (Breach of Contract) in favor of NAF and against All Defendants. The Court enters the Permanent Injunction specified in Section IV as a remedy for this claim.

## **III. Costs and Attorneys' Fees**

NAF is the prevailing party for purposes of taxable costs. The amount of taxable costs to be awarded, and the entitlement of any party to non-taxable costs and attorneys' fees, has been determined in accordance with Federal Rule of Civil Procedure 54 and Local Rule 54.

Therefore, consistent with my December 23, 2021 Order on Motion for Attorney Fees (ECF No. 765), Defendants are ordered to pay Plaintiffs' attorneys fees in the amount of \$6,339,196.60 and non-taxable costs in the amount of \$29,358.30.

## **IV. Permanent Injunction**

For the reasons stated in the Court's Order on NAF's Motion for Summary Judgment and Entry of a Permanent Injunction (ECF No. 720), the Court enters the following Permanent Injunction:

All Defendants and their officers, agents, servants, employees, owners, and representatives, and all other

persons, firms, or corporations acting in concert or participation with them, are hereby permanently 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 the 2014 and 2015 NAF Annual Meetings;
- 2) Retaining possession of any materials covered by this permanent injunction. Any and all such materials covered by this permanent injunction must be turned over to counsel of record in this matter or counsel of record in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.), the identity of whom shall be disclosed to this Court. Access to any and all such materials by individuals covered by this permanent injunction shall occur only onsite at the offices of said counsel and subject to the supervision of said counsel, absent further order of this Court or the court in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.).

Nothing in this permanent injunction shall prevent the court in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.) from making orders about how materials covered by this injunction can be used in those proceedings.

IT IS SO ORDERED.

/s/ Hon. William H. Orrick  
United States District Judge

Dated: February 1, 2022

**ORDER ON MOTION FOR ATTORNEY FEES  
(DECEMBER 23, 2021)**

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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NATIONAL ABORTION FEDERATION,

*Plaintiff,*

v.

CENTER FOR MEDICAL PROGRESS, ET AL.,

*Defendants.*

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Case No. 15-cv-03522-WHO

Re: Dkt. No. 727

Before: William H. ORRICK, III, Judge.

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The National Abortion Federation (“NAF”), plaintiff, seeks an award of attorney fees of \$6,933,374.25 as the prevailing party in this litigation. Dkt. No. 727. Defendants – the Center for Medical Progress (CMP), Biomax Procurement Services, LLC (Biomax), and David Daleiden – oppose, contending that NAF did not prevail or sufficiently prevail and that the amount of fees sought is grossly excessive. Dkt. No. 759. Considering the arguments made and evidence submitted – as well as my intimate familiarity with defendants’ aggressive defense of this case (an acceptable although costly strategy) and the amount of work required to

reasonably litigate the claims and defenses – I GRANT the motion but in a substantially reduced amount.

## **BACKGROUND**

### **I. Contractual Attorney Fee Provision**

I granted NAF’s motion for summary judgment on its breach of contract claim, finding that defendants were precluded from relitigating the decision in the related case<sup>1</sup> that defendants had breached two sets of NAF contracts – Confidentiality Agreements and Exhibitor Agreements – in order to gain access to NAF’s 2014 and 2015 Annual Meetings in violation of those agreements’ provisions. *See* April 7, 2021 NAF Summary Judgment Order (Dkt. No. 753) at 5-9 (identifying preclusive effect of the Order on Summary Judgment in related *PPFA* case, the *PPFA* Rule 50 Order, and jury verdict finding defendants breached the 2014 and 2015 NAF Agreements). Both of the Exhibitor Agreements state, “Exhibitors agree to reimburse NAF for all costs incurred by NAF, including reasonable attorneys’ fees, in handling or responding to any violations of any provision of this entire Agreement.” *See* Dkt. Nos. 225-6, 225-7. Daleiden signed both on behalf of BioMax and while working for CMP in 2014 and 2015. That is the basis for NAF’s motion for an award of attorney fees.

NAF submits that its attorneys throughout the duration of this case billed \$11,233,917 in fees to respond to what it characterizes as defendants’ “scorched-earth litigation tactics.” Mot. at 2; Declaration of Derek F.

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<sup>1</sup> *Planned Parenthood Federation of America et al. v. Center for Medical Progress et al.*, Case No. 16-cv-00236 (“PPFA” case).

Foran [Dkt. No. 727-1] ¶¶ 8-9. NAF voluntarily reduced the fees it seeks by: (1) cutting the time out for pursuing sanctions at the District Court and defending that award at the Ninth Circuit, Foran Decl. ¶ 10; (2) omitting the time for any Morrison & Forester biller who billed less than 100 hours on the matter and excluded time for secretaries, discovery assistants and other support staff; *id.* ¶ 9; and (3) further reducing the time for the remaining 23 billers by 25% to account for potential inefficiencies or duplications. *Id.* ¶ 10. Initially, NAF sought an award of \$7,409,103.73 and \$29,358.20 in non-taxable costs.<sup>2</sup> *Id.* Upon discovering errors, and when submitting counsel's redacted time entries according to my Order, NAF clarified that it sought \$6,933,374.25 in attorney fees for only 22 billers and \$29,358.20 in non-taxable costs. Dkt. No. 756; Corrected Declaration of Derek K. Foran [Dkt. No. 756-2]; Reply at 15.

## II. Litigation History

Although this case was ultimately resolved on a narrow basis – summary judgment based on issue preclusion as a result of the trial, verdict, and judgment in the related *PPFA* case – the initial rounds of litigation and concomitant discovery battles were atypically extensive. A brief recap is necessary to

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<sup>2</sup> NAF also sought \$26,564.07 in taxable costs through its Bill of Costs. Mot. at 24; Dkt. No. 728. Defendants objected to that amount. Dkt. No. 760. The Clerk's office ultimately taxed costs of \$24,468.62 against Defendants. Dkt. No. 761. Defendants did not move within seven days to challenge those costs or otherwise object to the determination of the Clerk's office. *See* Fed. R. Civ. Proc. 54(d)(1). That award, therefore, will not be addressed by me. *See* Civ. L.R. 54-4, 77-2.

explain (in part) the size of the fee request sought by NAF.

NAF filed this suit on July 31, 2015, seeking damages and injunctive relief to prevent defendants from publishing or disclosing any video, audio, photographic, or other recordings taken during NAF's 2014 and 2015 Annual Meetings. Dkt. Nos 1, 3. It also brought a motion for a Temporary Restraining Order to stop defendants from disclosing the recordings and any information learned at the Annual Meetings.<sup>3</sup>

I issued an Order to Show Cause and granted the TRO on that same date. Dkt. No. 15. After securing a written response from defendants, I held a hearing on August 3, 2015, and issued an order extending the TRO until a motion for a preliminary injunction could be heard. Dkt. No. 27.<sup>4</sup> The parties commenced expedited discovery necessary to support or oppose a preliminary injunction. Within a matter of days, defendants filed two motions seeking clarification on the scope of the TRO, a motion to dismiss and motion to strike, disputes over defenses to the written and

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<sup>3</sup> Troy Newman was also a defendant in this case until he was voluntarily dismissed. Dkt. No. 653.

<sup>4</sup> NAF was granted leave to file a First Amended Complaint on September 15, 2015. Dkt. No. 131. In that operative complaint, NAF alleged the following claims against defendants: violation of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1962(c) & (d) or RICO), federal wiretapping law (18 U.S.C. § 2511), Civil Conspiracy, Promissory Fraud, Fraudulent Misrepresentation, Breach of Contract, Tortious Interference With Contracts, Trespass, violation of California Business & Professions Code § 17200, et seq., violation of California Penal Code § 632, and violation of § 10-402 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code. *Id.*

deposition discovery sought by plaintiff in support of a preliminary injunction, disputes over the scope of the Protective Order, and disputes over defendants' responses to Congressional subpoenas. Those issues were resolved or further addressed at in person or telephonic hearings throughout September and October 2015. *See* Dkt. Nos. 34, 64, 78, 84, 95, 107, 116, 132, 137, 145, 153, 155, 161, 162, 185. Throughout November and early December 2015, the parties raised and I resolved disputes regarding who had access to materials covered by the TRO, the scope of the Protective Order, contested sealing motions, and issues of privilege, as well as NAF's allegations that TRO materials had been inappropriately shared with third-parties and its request for an Order to Show Cause. Dkt. Nos. 191, 201, 220, 244, 252.<sup>5</sup>

I held a hearing on the motion for preliminary injunction on December 18, 2021 and on a third-party's motion to quash discovery related to NAF's request for an OSC and sanctions on December 23, 2015. Dkt. Nos. 310, 314. In January 2016, I entered an order on defendants' motion to modify the TRO, and in February granted the motion for a preliminary injunction (Preliminary Injunction) and resolved a second motion to quash. Dkt. Nos. 350, 354, 356.<sup>6</sup>

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<sup>5</sup> NAF's attorneys describe the work done in filing the complaint, seeking the TRO, and defending the TRO during July through December 2015 at Phase One, accounting for approximately 17% of the hours they seek compensation for. NAF describes the work done on expedited discovery in support of their motion for a preliminary injunction, including the disputes over privilege and whether discovery should be stayed, as Phase 2, accounting for 27% of the time they seek. Dkt. No. 756-3.

<sup>6</sup> NAF's attorneys describe the briefing (not discovery) done for the preliminary injunction and time spent on the hearing for the

Defendants sought an immediate and expedited appeal of the Preliminary Injunction, and the injunction was upheld by the Ninth Circuit in March 2017. Dkt. No. 401.

In May 2017, NAF sought relief for a breach of the Preliminary Injunction and an Order to Show Cause re Contempt. The issue – regarding some defendants disclosing preliminary injunction materials through their criminal defense counsel – was briefed and determined on an expedited basis. Dkt. Nos. 409, 410, 418. During the OSC and contempt briefing, defendants moved to disqualify me. That disqualification issue was referred to another judge in the Northern District to resolve. Dkt. Nos. 430, 431. After the motion for disqualification was denied and the matter was back before me, the contempt proceedings were finalized and an Order of Contempt entered in July 2017. Dkt. Nos. 460, 468, 482, 517.<sup>7</sup>

In August 2018 (after most of the pending appeals and writs taken by the defendants were resolved), I set a case schedule in this and the related *PPFA* case. Dkt. No. 540. NAF dismissed a number of its claims in this case in August 2018, Dkt. No. 542, and the defendants proceeded to file motions to dismiss and strike, as well as a motion to dissolve the Preliminary Injunction.

Those motions were resolved, along with defendants' requested stay on discovery, in September and

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preliminary injunction as Phase 3, accounting for 23% of the time they seek compensation for. Dkt. No. 756-3.

<sup>7</sup> NAF's attorneys describe the briefing and hearings on these issues as Phase 4, accounting for 3% of the time they seek compensation for. Dkt. No. 756-3.

November 2018. Dkt. Nos. 560, 572.<sup>8</sup> During this period, NAF's attorneys participated in discovery that was being taken in the related *PPFA* case, in order to provide efficiencies to defendants as well as plaintiffs in both cases as much of that discovery was relevant to both cases. That discovery process was uniquely intensive, in scope and amount, requiring the Magistrate Judge assigned to handle discovery to resolve frequent disputes and hold numerous hearings. NAF attorneys also participated in preparing NAF witnesses to testify in the related *PPFA* trial.<sup>9</sup>

Following the jury verdict and post-trial rulings in the *PPFA* trial, the parties in this case met and conferred on NAF's proposal to resolve this case by moving for summary judgment based on issue preclusion on its breach of contract claim given the evidence, verdict, and rulings in the *PPFA* trial. I agreed with that approach and resolved disputes regarding the scope of discovery required to present that claim for adjudication. Dkt. Nos. 596, 611, 621, 638.

During the remainder of 2020 the parties briefed and I resolved the disputed voluntary dismissal of defendant Newman and issues regarding the scope of discovery necessary to resolve the motion for summary judgment on preclusion and determine what (if any) permanent injunctive relief NAF might be entitled to. Dkt. Nos. 645, 648, 651, 653, 679. NAF's motion for

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<sup>8</sup> NAF's attorneys describe work done on the motions to dismiss, strike, and modify as Phase 5, accounting for 7% of the time they seek compensation for. Dkt. No. 756-3.

<sup>9</sup> NAF's attorneys describe work done on the discovery and PPFA trial preparation as Phase 6, accounting for 9% of the time they seek compensation for. Dkt. No. 756-3.

summary judgment and request for permanent injunction was argued in February 2021 and granted in April 2021. Dkt. Nos. 713, 720, 723.<sup>10</sup>

Finally, after resolving more disputes regarding the scope of the injunction and contested sealing motions, NAF submitted its motion for attorney fees. I granted defendants' request to require NAF's attorneys to produce redacted time records, over NAF's objection, so that defendants could make targeted objections to the reasonableness of the hours expended by NAF's counsel. Dkt. No. 739. NAF's motion for attorney fees, and defendants' objections to NAF's statutory costs, are all that remains for me to rule on.<sup>11</sup>

## **DISCUSSION**

### **I. Entitlement to Fees**

#### **A. Incurred Fees**

Defendants argue at the outset that no attorney fees should be awarded to NAF because defendants cannot be required to "reimburse" reasonable attorney fees "incurred" by NAF – as provided in the Exhibitor Agreements – because there is nothing for defendants to "reimburse" as NAF did not "incur" any fees since Morrison & Forester was representing NAF pro bono. In support, defendants cite only non-California and

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<sup>10</sup> NAF's attorneys describe work for these later two areas at Phase 7, accounting for 12% of the time they seek compensation for. Dkt. No. 756-3.

<sup>11</sup> NAF's attorneys describe work related to the fee motion as Phase 8, accounting – prior to the redaction of their time records requested by defendants and granted by me – for just under 2% of the time they seek compensation for. Dkt. No. 756-3.

non-Ninth Circuit authority finding that no “reimbursement” was required under contractual fee provisions (as opposed to statutory fee recovery) because public policy concerns underlying statutory fee provisions are absent in routine contact cases. Def. Oppo. at 5-6.

Not only are these out-of-state and out-of-circuit authorities not persuasive, defendants’ argument ignores the import of California Civil Code section 1717. Section 1717 provides that “in an action for an award of attorney fees under a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs.” Cal. Civ. Code Ann. § 1717. As California courts have explained, the purposes behind Section 1717, including “mutuality of remedy and to prevent oppressive use of fee provisions,” compel the conclusion that “section 1717 to provide[s] a reciprocal remedy for a prevailing party who has not actually incurred legal fees.” *Beverly Hills Properties v. Marcolino*, 221 Cal.App.3d Supp. 7 (1990).

Ample authority – applying Section 1717 and similarly worded statutes – rejects defendants’ argument here, that simply where a party is fortunate enough to secure pro bono counsel or otherwise does not pay out of pocket for its attorney fees, the losing party on a contract with an attorney fees provision should receive a windfall and avoid paying fees to the prevailing party. *See Intl. Billing Services, Inc. v. Emigh*,

84 Cal. App. 4th 1175, 1193 (Cal. App. 3d Dist. 2000) (where named parties to a contract providing for attorney fees did not pay for their counsel [instead their company did], court rejected argument that losing plaintiff did not have to pay those fees, explaining that “[i]t is [losing-plaintiff] which seeks a windfall” where plaintiff wants to “avoid paying the prevailing party fees based on the ‘fortuitous circumstance’ the [defendants] had arranged a means of defending themselves from this non-meritorious lawsuit.”); *Beverly Hills Properties v. Marcolino*, 221 Cal.App.3d Supp. 7, 11 (1990) (tenant represented pro bono entitled to fee award as “Section 1717 does not expressly require the prevailing party to incur legal expenses. The statute simply provides that a prevailing party is entitled to attorney fees and costs, ‘which are incurred to enforce that contract.’ (§ 1717, subd. (a), italics added.) [¶] Thus, the statute is ambiguous. It does not state who, the prevailing party or the attorney representing him, must incur the legal fees and costs” and enforcing the “reciprocal remedy for a prevailing party who has not actually incurred legal fees, but whose attorneys have incurred costs and expenses in defending the prevailing party on the underlying agreement.”); *see also Lolley v. Campbell*, 28 Cal. 4th 367, 373 (2002) (“[i]n practice, it has been generally agreed that a party may ‘incur’ attorney fees even if the party is not personally obligated to pay such fees” and a party’s entitlement “to ‘fees is not affected by the fact that the attorneys for whom fees are being claimed were funded by governmental or charitable sources or agreed to represent the party without charge” and recognizing numerous courts that have “awarded attorney fees under fee-shifting statutes that apply when fees are ‘incurred’ when the party seeking fees was represented by a legal

services organization or counsel appearing pro bono publico.” (internal citations omitted)); *Dept. of Fair Empl. and Hous. v. L. Sch. Admis. Council Inc.*, 12-CV-01830-JCS, 2018 WL 5791869, at \*3 (N.D. Cal. Nov. 5, 2018) (recognizing the *Lolley* Court considered statutory fee-shifting under the Labor Code rather than contractual fee-shifting under section 1717, but applying same rationale to section 1717 case, and recognizing *Lolley*’s reliance on a lower court’s decision awarding fees under section 1717 where the prevailing party was represented at no personal cost by a public interest organization); *Rosenaur v. Scherer*, 88 Cal. App. 4th 260, 283 (Cal. App. 3d Dist. 2001) (stating that the phrase, “entitled to recover his or her attorney fees,” under California Code of Civil Procedure 426.16 “can certainly include recovery of the fees that the defendant’s agent—the attorney—has accrued on defendant’s behalf, even if the agent has waived payment from defendant, but not their recovery otherwise.”); *Moran v. Oso Valley Greenbelt Assn.*, 117 Cal. App. 4th 1029, 1036 (Cal. App. 4th Dist. 2004) (“Modern jurisprudence does not require a litigant seeking an attorney fee award to have actually incurred the fees.”); *Voice v. Stormans Inc.*, 757 F.3d 1015, 1017 (9th Cir. 2014) (“That some of the legal services were provided pro bono does not alter our analysis or conclusion. Attorneys’ fees are recoverable by pro bono attorneys to the same extent that they are recoverable by attorneys who charge for their services.”).

Under California law, NAF is entitled to attorney fees under the EAs even though NAF secured pro bono representation.

## **B. Prevailed on the Contract**

Defendants also argue that NAF is not entitled to attorney fees because it “obtained no relief” based on the Exhibitor Agreements. While defendants acknowledge their breach of the Exhibitor Agreements – through their false representations, they gained access to the 2014 and 2015 NAF Annual Meetings – they contend that the injunctive relief secured was only to prevent defendants from releasing or retaining access to the materials secured at those meetings in violation of the Confidentiality Agreements. They assert that because I rejected NAF’s overbroad request for injunctive relief preventing defendants from making future false statements to attempt to enter NAF meetings or facilities (rejected because the specifics of NAF’s future contracts were not known or arguably knowable), the relief achieved is not adequately tethered to the misrepresentation provisions of the Exhibitor Agreements that were breached. Oppo. at 7-8.

This argument is easily disposed of. Defendants breached material provisions of the EAs. The EAs provided for both recovery of reasonable attorney fees to enforce the contract and for specific performance or injunctive relief. *See* Dkt. Nos. 225-6, 225-7. That is sufficient.

## **II. Reasonable Amount of Fees**

Turning to the reasonableness of the amount of fees requested, defendants do not challenge the hourly rates requested for any of the 22 billers NAF seeks compensation for. I have reviewed the submission regarding the hours charges for each biller based on experience and prior billing rates and find them reasonable. *See* Corrected Foran Decl. ¶¶ 12-43 & Exs. 1-3.

Instead, defendants argue that the fee request is “grossly excessive.” They point to NAF’s litigation tactics and argue that the hours were also excessive because: (1) the case resolved pretrial, on summary judgment (meaning that the overall hours spent were not reasonable); (2) NAF secured limited relief; (3) 22 billers were too many to work on the case and resulted in unnecessary time billed for conferencing and strategizing (resulting in at least \$500,000 in unnecessary charges); and (4), NAF seeks compensation for uncompensable time. Oppo. at 9-23. Although defendants complain about excessive time, they only identify a few examples even though I granted their request requiring NAF to produce redacted time records so that defendants could specifically identify excessive time spent on specific tasks. Those redacted time records – although some entries may be “vague” and demonstrate block-billing (issues arguably already accounted for by NAF’s reduction of fees from the 22 billers by 25%) – provided adequate information for defendants to make more-targeted objections. I address the targeted objections defendants did make below.<sup>12</sup>

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<sup>12</sup> Both sides accuse the other of scorched-earth litigation tactics. Both sides are well aware of the context of this case and what was at stake for both sides. An atypical amount of disputes and aggressive defense – over the scope of the injunctive relief, over the scope of discovery into sensitive information on both sides (identity of staff, identity of funders) – was to be expected. Neither side should claim surprise by the number of hours billed by the other. It is notable that defendants presented no information about the number of hours their attorneys billed in defending this case (or in taking or defending the relevant to this case discovery in the related *PPFA* case) for comparison purposes.

## A. Disproportionate Considering Success

Defendants argue that the fee request should be denied as disproportionate considering that NAF dropped 10 of its 11 substantive claims (ultimately moving for summary judgment only on its breach of contract claim) and secured limited success (only injunctive relief). However, NAF's primary goal from the outset was to prevent defendants from disclosing or maintaining any of the information they secured as a result of their breaches of NAF's contracts. This is shown by the bulk of the attorney fees sought in this motion, which were spent in securing early injunctive relief. NAF could have continued to summary judgment and trial on more claims, but that would have entailed more work and more risk for both sides when NAF had already secured its central goal. That NAF made a strategic and sensible choice to move for summary judgment only on its breach of contract claim (under issue preclusion as a result of the findings, verdict, and judgment in the *PPFA* case) does not mean that it had only marginal success such that its award for attorney fees should be denied or reduced.<sup>13</sup>

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<sup>13</sup> Defendants cite two cases that do not apply. In *McGinnis v. Kentucky Fried Chicken of California*, 51 F.3d 805, 810 (9th Cir. 1994), where the court applied Washington law deferring to federal law and where the success achieved was merely monetary, the court held that it was an abuse of discretion for the district court to fail to account for limited success under the "private attorney general" theory that is tied to consideration of "what a reasonable individual would pay lawyers for the benefit conferred on him." *Id.* at 810. In this case, and applying California law, the primary benefit is significant injunctive relief tied to the core theory of NAF's case and resulting directly from its success on the central contract claim. And this case, unlike *Banas v. Volcano Corp.*, 47 F. Supp. 3d 957, 965 (N.D. Cal. 2014), was resolved only

Finally, defendants make no effort to show how any of the hours spent by NAF's counsel were unrelated to the breach of contract claim or the preliminary or final injunctive relief awarded under that claim. While defendants fault plaintiff for not making that showing, Oppo. at 9-10, I find that while claims were dropped along the way, the core of this litigation – the injunctive relief, the discovery, the motions practice – were necessarily related to and tied to the successful breach of contract claim that resulted in the significant injunctive relief awarded. *See, e.g., Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932, 939 (9th Cir. 1999) (awarding fees where plaintiff's unsuccessful fraudulent inducement and accounting claims were based upon the same common core of facts as its successful claims of breach of contract and breach of the implied covenant of good faith and fair dealing).<sup>14</sup> This result is especially appropriate here where, although NAF's other claims were not pursued to summary judgment, the other claims all arose out of the conduct caused by defendants' breach of the NAF agreements. *See id.* (contractual fee agreement covered tort claims arising out of the contractual relationship).

Defendants' argument regarding limited success has no merit. Having presided over this case since its

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after an atypically aggressive defense, a remarkably high number of motions, and resolution of many disputes over discovery, sealing, and compliance with the injunctive relief ordered by the Court.

<sup>14</sup> Contrary to defendants' repeated characterizations, while I denied some of the injunctive relief terms requested by NAF because those terms were not adequately tied to the breach of contract claim, that does not mean NAF secured only "limited" success in this case.

inception, I find that NAF secured full success on its central claim. There is no reason to reduce the award on that basis.

That said, some of defendants' objections do have merit, as discussed below. In sustaining them, I will require NAF to submit a revised proposed judgment, discussed in the Conclusion section, that accounts for the reductions.

## **B. Entries that Should be Excluded**

Excessive and Unreasonable Staffing. Defendants' argument that NAF staffed this case with too many attorneys – seeking compensation for the time of 22 billers (19 attorneys and 3 paralegals) who each expended over 100 hours on the matter – is somewhat more persuasive when considered in conjunction with specific challenges.

As a general matter, this was a complex case that extended over a long period of time. As such, that NAF seeks compensation for the time of the 22 billers that spent over 100 hours on this case is not in and of itself problematic. But defendants raise a fair point as to the significant amount of time billed to “team meetings” and “intrafirm communications” that support their position that too many billers who were not decision-makers or necessary to the matters being discussed were billing for those meetings and strategy sessions. For example, defendants contend that plaintiff's counsel routinely billed for more than necessary timekeepers at the same team meetings (e.g., entries 3361, 3363, 3364, 3365, 3366; five timekeepers each recording at least 0.8 hours each) resulting in at least

\$500,000 in billed time. Oppo. at 11-12.<sup>15</sup> Defendants also point to the 1,600 plus intrafirm communications that have been billed (where multiple timekeepers billed when sending/ reading/ responding to the same communications), to support their argument that significant portions of those entries were unnecessary and unreasonable. Oppo. at 12-14.<sup>16</sup>

Plaintiff does not address these issues specifically, except to argue that it was appropriate to bill for each of the 22 individuals whose time on the case exceeded 100 hours and to note that it already accounted for potential duplication and inefficiencies by its 25% across the board deduction. However, the impact of the absolute number of these team meetings and intrafirm communications on their face is unreasonable in an amount that exceeds the 25% across the board reduction voluntarily taken by defendants. Considering the unrebutted estimate of \$500,000 billed to team meetings and the well-over-1000 intrafirm communications billed (according to defendants), a further significant reduction is warranted. NAF shall calculate the amount charged for meetings

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15 Defendants also argue that 50% of all fees for all entries should be reduced due to “gross overstaffing,” but fail to identify any particular instances of overstaffing or other justifications (*i.e.*, in light of the task at hand or the number of defense counsel who billed fewer hours for the same/tasks). There is no basis to reduce all entries by 50% for unidentified overstaffing.

16 Defendants also complain about the redactions of those intrafirm communications, contending it makes it impossible for them to challenge their reasonableness and all entries that have been redacted should be disallowed. However, given the context of this case and my express order allowing redactions, that particular argument is unpersuasive.

where more five or more team members billed for their attendance and reduce the amount claimed for those meetings by 50%. Similarly, NAF shall calculate the amount charged to interfirm communications and reduce the amount sought for those communications by a further 10%.<sup>17</sup>

Defendants also specifically challenge 721 block-billing entries, amounting to 3,211 total hours and \$1,452,268.50 in fees (after the 25% reduction). Defendants argue that because they are precluded from challenging unreasonableness given the block descriptions, a reduction of 50% (or \$726,134.25) should be made. Plaintiff does not dispute that these 721 entries (15% of the time entries they seek compensation for) were block billed, precluding defendants from lodging particularized objections to the reasonableness of those entries. Reply at 13. Instead, NAF argues that any duplication has been accounted for by its 25% across-the-board deduction and, in any event, a deduction of no more than \$193,635 is warranted. I find that a further reduction in the fee award of \$193,635 is appropriate for block-billing.

Unrelated Issues. Defendants also challenge NAF's seeking fees to: (1) unsuccessfully quash or limit defendants' response to a Congressional subpoena (\$100,000 in fees); (2) unsuccessfully seeking a contempt order based on defendants allegedly providing too much information to Congress (\$250,000 in fees); (3)

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<sup>17</sup> The difference in the percentage reduction is because many of the examples of intrafirm communications are just between two or three counsel – as opposed to the team meetings of five or more attorneys that amounted to a significant percentage of the total time billed.

providing “assistance” to the prosecution in the related criminal proceeding (\$20,000); and (4) seeking dismissal or Newman (\$100,000). Oppo. 19-20. Defendants identify the specific time entries they associate with each of these efforts. *Id.*

Plaintiff responds by addressing only its response to the Congressional subpoena, noting that its actions were necessary to protect the integrity of injunctive relief I had entered and to ensure that only appropriate materials were provided by defendants to Congress. I agree that NAF was entitled to take steps to protect the integrity of my orders. Defendants fail to make a more targeted challenge to these matters (for example, that the amount of hours billed was unreasonable). On this record, NAF’s fees will not be reduced in connection with NAF’s steps to protect against disclosure of information covered by my orders.

However, NAF fails to address the other two challenges; the propriety of fees for providing “assistance” in the criminal case against Daleiden or why defendants should be charged for plaintiff’s efforts (and defendants’ objections) to dismiss Newman as a defendant. Those matters are, absent any justification from NAF, not sufficiently related to the breach of contract action and the judgment against the remaining defendants. Therefore, NAF shall remove the time spent on these two tasks from the fees it seeks.

Clerical Tasks. Defendants challenge compensation for clerical work at attorney or paralegal rates, identifying numerous alleged instances of time billed for clerical work. Oppo. at 21-22. Defendants estimate this amounted to \$100,000 in fees sought (when compensated at hourly rates between \$335-650/hour) and

argue that NAF is entitled to clerical rates of \$40/hour for those tasks. *Id.* at 22.

Plaintiff responds with cases noting that some compensation for clerical time is warranted, as long as it is “minimal” and only “quasi-clerical.” *See, e.g., Smith v. Citifinancial Retail Services*, C06 2966 BZ, 2007 WL 2221072, at \*2 (N.D. Cal. Aug. 2, 2007). They also cite a case approving compensation for clerical tasks performed by a paralegal at \$115/hour. *Sierra Club v. U.S. E.P.A.*, 625 F. Supp. 2d 863, 869 (N.D. Cal. 2007). Plaintiff, however, does not address any of the specific instances of clerical billing identified by defendants or justify the hourly rates charged for the identified tasks incurred by two billers; Laks (an associate) and Beyer (a senior paralegal). While the majority of the clerical tasks identified by defendants and performed by Beyer appear to be appropriate, the rub for defendants is presumably the senior paralegal rate charged by Beyer. Given plaintiff’s failure to respond to justify the tasks being performed by the associate and senior paralegal, performed at the specific rates charged for those tasks, a reduction of 50% in the entries identified by defendants (and only those entries identified by defendants in their Opposition at 21-22) is warranted.

Whole/Half Numbers and 0.1 Entries. Defendants challenge two billers’ alleged “overuse” of whole or half numbers, suggesting that they rounded up their time. Oppo. at 22-23 (identifying entries by Shostak and Sarano that were apparently rounded). However, those whole/half number entries do not appear to be excessive when compared to the overall entries nor is there evidence that any rounding was up (rather than down). I will not mandate deductions on that basis.

Finally, defendants argue that NAF improperly seeks fees for 208 six-minute (0.1 hour) entries for a total of \$14,342.50 in time, arguing that those entries should be reduced by 50%. Oppo. at 23. However, precision in entries is appropriate; simply because they are 0.1 entries does not mean the time was unreasonably incurred. I will not mandate deductions based on this basis either.

Other than the five areas I have identified mandating a reduction in the hours sought (for unjustified team meeting and excess intrafirm communications, for block billing, for efforts unrelated to the core work in this case, and for clerical work charged at unjustified rates), NAF's motion for an award of attorney fees is GRANTED.

### **III. Costs**

NAF also seeks an award of non-taxable costs of \$29,358.30, that Morrison & Foerster incurred on behalf of NAF in the course of this litigation for: (1) attorney travel costs (\$20,688.92), (2) investigation fees (\$5,876.88), (3) delivery and messaging services (\$2,792.50). Corrected Foran Decl., ¶¶ 104-106. NAF's attorneys declare that it is Morrison & Forester's standard practice to bill these types of costs to clients separate from their hourly billing rates and that passing on these costs to clients is standard practice in San Francisco and more broadly in California. *Id.* ¶¶ 107-109.

Defendants object to recovery of these costs on the grounds that the expenses are "inadequately documented." NAF did not submit the underlying invoices and instead submitted a general description of the 3 categories of costs they seek with a total for each,

Foran Decl., ¶ 106. I agree that a sufficient showing has been made that these are types of expenses typically billed separately from attorney time and charged to clients. *Id.*, ¶¶ 107-109. While “not particularly fulsome,” the general descriptions of the categories of expenses and the amounts sought appear to be reasonable. *See Planned Parenthood Fedn. of Am., Inc. v. Ctr. for Med. Progress*, 16-CV-00236-WHO, 2020 WL 7626410, at \*8 (N.D. Cal. Dec. 22, 2020). Defendants do not contend that NAF’s attorneys are not entitled to any of the particular categories of costs or that the specific amounts sought are excessive (when compared to their own travel costs or otherwise). The motion is GRANTED in full as to the non-taxable costs sought.

## CONCLUSION

NAF’s request for an award of attorney fees is GRANTED, subject to the reductions required by this Order. The request shall be reduced by:

1. \$193,635 for block-billing;
2. The hours spent on providing “assistance” in the criminal case against Daleiden;
3. The hours spent to dismiss Newman as a defendant;
4. 50% of the amount charged for meetings where more than five or more team members billed for their attendance;
5. 10% of the amount charged to interfirm communications; and

6. 50% the amount sought for the clerical tasks identified by defendants in their Opposition at 21-22.

NAF's request for an award of non-taxable costs of \$29,358.30 is GRANTED.

Within thirty days (30) of the date of this Order, NAF shall submit a Proposed Amended Judgment including an award for attorney fees (as mandated by this Order) and costs, after having met and conferred with defendants to demonstrate that the required reductions are accounted for.

IT IS SO ORDERED.

/s/ William H. Orrick

United States District Judge

Dated: December 23, 2021

**ORDER ON MOTION FOR  
SUMMARY JUDGMENT AND PERMANENT  
INJUNCTIVE RELIEF  
(APRIL 7, 2021)**

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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NATIONAL ABORTION FEDERATION,

*Plaintiff,*

v.

CENTER FOR MEDICAL PROGRESS, ET AL.,

*Defendants.*

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Case No. 15-cv-03522-WHO

Re: Dkt. Nos. 665, 669, 707

Before: William H. ORRICK, III, Judge.

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Plaintiff National Arbitration Federation (NAF) moves for entry of summary judgment on its claim of breach of contract against defendants Center for Medical Progress (CMP), BioMax Procurement Services (BioMax) and David Daleiden. NAF argues that given the claims pursued, evidence adduced, and judgments entered in a related case against defendants – *Planned Parenthood Federal of America, et al. v. Center for Medical Progress et al.*, Case No. 16-cv-236 (PPFA case)<sup>1</sup>

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<sup>1</sup> The remaining defendants in this case – Daleiden, CMP, and

– summary judgment in its favor is appropriate as a matter of issue preclusion because the breaches of the same NAF contracts at issue here were determined against defendants in the *PPFA* case. As a remedy for those breaches, NAF seeks to convert the existing preliminary injunction into a permanent injunction that broadly prevents defendants from publishing or disclosing any recordings or other information learned at any NAF meeting, disclosing the dates or locations of any future NAF meeting, publishing or otherwise disclosing the names or addresses of any NAF members learned at any NAF meeting, and entering any NAF office, NAF meeting, or other NAF event by misrepresenting their true identity. Defendants respond that issue preclusion cannot prevent them from relitigating the issue of whether they breached NAF's contracts. They also argue that NAF's proposed permanent injunction is illegal and inappropriate under the Copyright Act and is otherwise not merited.

As discussed below, issue preclusion is appropriate: The contract issues concerning these parties were decided in the *PPFA* case. Defendants' Copyright Act defense is insubstantial. NAF is entitled to a permanent injunction whose scope is cabined by the breach of contract claim. It may not enjoin conduct based on the broader set of claims that were proved in the *PPFA* case.

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BioMax, herein referred to as "defendants" – were defendants in the *PPFA* case along with others who worked for CMP and/or conspired with Daleiden and CMP.

## **BACKGROUND**

The parties are intimately familiar with the factual and procedural background of this case. In brief, there is no dispute that Daleiden and others working for CMP secured entrance to the 2014 and 2015 NAF Annual Meetings using aliases and purporting to be exhibitors from a front company, defendant BioMax. While at those Annual Meetings, Daleiden and others surreptitiously recorded hundreds of hours of footage of NAF staff, presenters, exhibitors, and attendees. These recordings were secured and portions of them were released as part of defendants' Human Capital Project (HCP), whose goal was to expose abortion providers that allegedly sold aborted fetal tissue for profit in violation of state and federal laws or who altered abortion procedures in violation of state and federal laws to procure specimens to be sold to researchers.

After NAF learned that defendants had secured access to its meetings, it sued defendants in this court, secured a temporary restraining order (Dkt. Nos. 15, 27),<sup>2</sup> and then sought and secured a preliminary

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<sup>2</sup> The TRO, entered initially on July 31, 2015, 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

injunction (Preliminary Injunction). The Preliminary Injunction enjoined defendants 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. 354 (Preliminary Injunction) at 42.<sup>3</sup>

At that juncture, NAF adequately demonstrated a likelihood of success on the merits of its breach of contract claim, showing that defendants agreed to and then violated NAF's Exhibitor Agreements (EA) and Confidentiality Agreements (CA) (collectively NAF Agreements) that were required for access to NAF's

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- (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.

<sup>3</sup> The material covered by the first section of the Preliminary Injunction ("any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF annual meetings") is referred to herein as NAF Material.

2014 and 2015 Annual Meetings. NAF showed that defendants: (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. Preliminary Injunction Order at 20-26.<sup>4</sup>

At various points during the pendency of this litigation, the contours of the Preliminary Injunction have been discussed and refined. In July 2017, when I held that Daleiden and his criminal defense counsel were in civil contempt for violating the terms of the Preliminary Injunction and releasing NAF Materials to the public, Dkt. No. 482, I ordered that CMP and Daleiden "turn over to counsel all materials covered by the PI Order and must not retain control over any of that material, 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 [his criminal defense counsel] or his civil defense counsel." *Id.* at 23-24. With respect to the pending criminal proceedings against Daleiden, that Order emphasized:

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<sup>4</sup> The Ninth Circuit affirmed the Order Granting the Preliminary Injunction at *Natl. Abortion Fedn., NAF v. Ctr. for Med. Progress*, 685 Fed. Appx. 623 (9th Cir. 2017) (unpublished). In July 2018, NAF voluntarily dismissed some of its claims. Dkt. No. 542. The remaining claims in the operative First Amended Complaint (FAC) are: (i) Third Cause of Action for Civil Conspiracy; (ii) Fourth Cause of Action for Promissory Fraud; (iii) Fifth Cause of Action for Fraudulent Misrepresentation; and (iv) Sixth Cause of Action for Breach of Contract(s).

As the criminal case progresses, I will not interfere with Judge Hite's determinations concerning 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.

*Id.* at 20.

In November 2018, I again considered the Preliminary Injunction's scope when addressing defendants' motions to dismiss and strike and their request that the Preliminary Injunction be dissolved, modified, or clarified in light of Daleiden's argument that the injunction infringed on his constitutional rights to present his defense to the state criminal charges. Dkt. No. 572. I declined to modify or dissolve the injunction. I reiterated:

[N]othing in the Preliminary Injunction interferes with [the criminal proceedings in Superior Court]. If Daleiden believes he needs to use Preliminary Injunction materials to support his defense, he can notify Judge Hite in advance of the specific portions of the materials he wants to use and seek leave from Judge Hite to file those materials under seal or in the public record or show those materials in open or closed court. If Judge Hite orders that some of the Preliminary Injunction materials may be released in some public manner to allow Daleiden to fully contest the criminal charges, Judge Hite may

do so without my interference. That determination rests with Judge Hite, not with defendants.

*Id.* at 30-31; *see also id.* 30 n.26 (noting also, “[a]s Judge Hite is presiding over the criminal proceedings, he will have a better sense of what portion of the Preliminary Injunction materials Daleiden legitimately needs to use for his defense, whether any of those materials should be publicly disclosed in open court or unsealed filings, and if disclosed whether any further restrictions should be placed on the materials’ use or dissemination.”). I further emphasized that:

If Judge Hite rules that specific portions of the Preliminary Injunction materials may be used in open court or in unsealed pleadings, then defendants may come to me on an expedited basis under Civil Local Rule 7-11 (governing motions for administrative relief) for a modification or clarification of the Preliminary Injunction Order with respect to the collateral use they would like to make of the materials.

*Id.* at 31.

After my order denying defendants’ motions to dismiss and strike and to modify or dissolve the Preliminary Injunction were affirmed by the Ninth Circuit, and in light of the fact that the *PPFA* case had been tried and a final judgment would be entered, I agreed with NAF’s proposal that its motion for summary judgment on the breach of contract claim and request for permanent injunctive relief be determined separately from the rest of its remaining claims. NAF repeatedly committed that “in the event it secures

summary judgment on its contract claim and a permanent injunction, NAF will dismiss all remaining claims with prejudice, ending this case.” Dkt. Nos. 620 at 3; 538 at 3.

During the *PPFA* case, the issue of Daleiden, CMP, and BioMax’s breach of the NAF Agreements was resolved against them. I found based on undisputed facts at summary judgment that in order to gain access to NAF’s 2014 and 2015 Annual Meetings, Daleiden (acting on behalf of CMP and purporting to be an exhibitor from BioMax) signed and then breached provisions of both NAF’s Exhibitor Agreements (EAs) and Confidentiality Agreements (CAs). Dkt. No. 753 (*PPFA* Order on Summary Judgment) at 43; *see also id.* at 45-49 (rejecting defendants’ arguments that the NAF Agreements were void for lack of consideration or vagueness).<sup>5</sup> During trial, I granted plaintiffs’ Rule 50 motion regarding the NAF contracts, concluding that the undisputed evidence showed:

that Plaintiffs’ Rule 50 motion should be granted as to the breach of the NAF Agreements, specifically as to defendants Merritt, Daleiden, BioMax, and CMP in 2014 and defendants Daleiden, Lopez, BioMax, and CMP in 2015 concerning the first term of the 2014 and 2015 Confidentiality Agreements prohibiting “Videotaping or Other Recording” and as to defendants Daleiden, BioMax, and CMP with respect to the NAF Exhibitor

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<sup>5</sup> In connection with these motions, exemplars of the CA and EAs signed by defendants are attached as Exhibits 11-13 in connection with NAF’s Motion for Summary Judgment and Permanent Injunction. Dkt. Nos. 666-11 through 666-13.

Agreements in 2014 and 2015 concerning the requirement to provide “truthful, accurate, complete, and not misleading” information. I reject defendants’ arguments as to ambiguity, the liability of CMP and BioMax through their agents (Daleiden, Lopez, Merritt), and lack of consideration. A reasonable jury would not have a legally sufficient basis to find otherwise.

*PPFA* Rule 50 Order, Dkt. No. 994, at 1-2.<sup>6</sup>

The jury subsequently found that defendants’ breach of the 2014 and 2015 NAF Agreements caused PPFA \$49,360 in damages. *PPFA* Verdict, Dkt. No. 1016 at 7. In April 2020, I entered judgment following the Rule 50 Order, the jury’s Verdict, and my findings and conclusions on plaintiffs’ Unfair Competition Law Claim (UCL). *PPFA* UCL Order, Dkt. No. 1974. I also granted plaintiffs’ request for a permanent injunction based on their success on their illegal recording, fraud, trespass, and UCL claims, entering an injunction that was narrower than plaintiffs sought.<sup>7</sup> *PPFA*

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<sup>6</sup> The trial testimony and evidence PPFA cited to support the Rule 50 motion on breach of the NAF Confidentiality and Exhibitor Agreements included: Trial Exs. 228, 248, 352, 370, 568, 1012, 6064; Trial Tr. 413:20-415:23, 426:1-6, 445:22-446:24, 447:6-10, 487:25, 611:23-615:17, 2088:1-15, 2172:22-2173:5, 2173:10-23; 2112:12-16, 2198:10-12, 2209:6-2211:6, 2212:21-2213:5, 2233:21-2235:15, 2468:9-13, 2469:13-15, 3588:23-3589:13. See *PPFA* Dkt. No. 979 at 2-3.

<sup>7</sup> The *PPFA* permanent injunction provides:

A. Upon service of this Order, all Defendants (except Lopez, unless he is acting in concert or participation with another Defendant) and their officers, agents, servants, employees, owners, and representatives,

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and all others persons who are in active concert or participation with them are permanently enjoined from doing any of the following, with respect to PPFA, PPNorCal, PPPSW, PPOSBC, PPCCC, PPPSGV, PPRM, and PPGC/PPCFC:

- (1) Entering or attempting to enter a PPFA conference, or an office or health center of any plaintiff identified above, by misrepresenting their true identity, their purpose for seeking entrance, and/or whether they intend to take any video, audio, photographic, or other recordings once inside; and
- (2) recording, without the consent of all persons being recorded (where all party consent is required under the laws of the state where the recording is intended):
  - (a) any meeting or conversation with staff of a plaintiff identified above that Defendants know or should know is private; or
  - (b) in a restricted area at a PPFA conference or restricted area of an office or health center of any plaintiff identified above. “Restricted area” is defined as areas not open to the general public at the time of the recording, for example areas requiring registration or an appointment to access.

B. In addition, Defendants shall serve a copy of this injunction on any person who, in active concert or participation with Defendants, either has or intends to enter a restricted area at a PPFA conference or property of any plaintiff identified above or to record the staff of any plaintiff identified above without securing consent of all persons being recorded (where that consent is required under the laws of the state where the recording is intended), and provide Plaintiffs with proof of service thereof.

*Id.* at 9-10.

Judgment, Dkt. No. 1074. I denied defendants' post-trial motions in August 2020. *PPFA* Order on Post-Trial Motions, Dkt. No. 1116.

Returning to this case, I agreed for purposes of efficiency to resolve the narrow issue of the preclusive effect of the *PPFA* Verdict and Judgment on NAF's breach of contract claim and the permanent injunctive relief to which NAF might be entitled under that claim here on the evidence presented in the *PPFA* trial and in this case. This motion followed.

## **DISCUSSION**

### **I. Summary Judgment Based on Preclusion**

NAF moves for entry of summary judgment on its breach of contract claim. It argues that principles of issue preclusion prevent defendants from relitigating their breaches of the NAF EAs and CAs.

#### **A. Legal Standard**

Issue preclusion, or collateral estoppel, is appropriate when: "(1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated in that action; (3) the issue was lost as a result of a final judgment in that action; and (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action." *In re Palmer*, 207 F.3d 566, 568 (9th Cir. 2000).

#### **B. Factors**

Defendants do not dispute NAF's showing – and my independent conclusion having presided over the

*PPFA* case – that defendants had a full and fair opportunity to litigate the issue of defendants' breaches of the NAF Agreements. That issue was actually litigated and determined against defendants, and the defendants here were defendants there.

Instead, defendants argue that collateral estoppel is not appropriate because the NAF breach of contract claim in the *PFFA* case was not identical to the alleged breach of the NAF Agreements here. *See, e.g., Grimes v. Ayerdis*, 16-CV-06870-WHO, 2018 WL 3730314, at \*5 (N.D. Cal. Aug. 6, 2018) (“For collateral estoppel to apply, defendants must show that the estopped issue is identical to an issue already litigated and that the issue was decided in the first case.”). Defendants point out that the breach claim that supported the Preliminary Injunction in this case was based on three portions of the NAF EAs and CAs: (i) misrepresentation prohibitions (EA, ¶ 15), (ii) taping/recording prohibitions (CA, ¶ 1), and (iii) non-disclosure provisions (CA ¶ 17, CA ¶ 3).<sup>8</sup> Defendants contrast that with the *PPFA* case, where the breach of the NAF Agreements Judgment and Verdict was based only on the (i) misrepresentation prohibitions (EA, ¶ 15) and the (ii) taping/recording prohibitions (CA, ¶ 1). That is a distinction without a difference: the identical issue

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<sup>8</sup> The EAs required exhibitors to affirm they (1) have a legitimate business interest in reaching reproductive health care professionals (*id.* ¶ 1); (2) will “truthfully [and] accurately” represent their business at the meetings (*id.* ¶¶ 15, 19); and (3) will keep all information learned at the meetings in confidence and not disclose that information to third parties without NAF’s consent. *Id.* ¶ 17. The *PPFA* Verdict and Judgment were based on violation of (1) and (2) only and did not reach (3).

– breach of the NAF EAs and CAs – was established in the *PPFA* case<sup>9</sup>

Defendants also argue that there is a material dispute over whether NAF suffered “actionable harm.” Oppo. at 12-13. Not so. The NAF EAs provide that “monetary damages would not be a sufficient remedy for any breach” of the EAs and that “NAF [would] be entitled to specific performance and injunctive relief as remedies” for any breach. EA ¶ 18. Defendants do not separately challenge that provision of the EAs except with respect to the scope of appropriate relief.<sup>10</sup>

Defendants maintain that NAF failed to show a knowing and voluntary waiver of their First Amendment rights when defendants signed the EAs and CAs to attend the 2014 and 2015 Annual Meetings. Oppo. at 13-14. That does not prevent application of issue preclusion or undermine NAF’s “success on the merits” showing. I rejected that argument at the Preliminary Injunction stage and defendants had a full opportunity to raise it in the *PPFA* case. *See, e.g., Paulo v. Holder*, 669 F.3d 911, 918 (9th Cir. 2011) (“If

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<sup>9</sup> Defendants’ arguments in their Opposition identifying “issues of material fact” regarding breach of the non-disclosure provisions in the EAs or CAs are irrelevant, as those provisions are not relied on by NAF as bases for preclusion here. Reply at 2-3. But, defendants’ arguments regarding the non-disclosure and the other provisions of the NAF Agreements (as void for lack of mutual assent, as adhesive, and as unconscionable) were rejected in this case at the Preliminary Injunction stage. Oppo. at 8-12; *see also* Preliminary Injunction Order, Dkt. No. 354 at 23-26, 28-29.

<sup>10</sup> Moreover, actionable harm is readily established given that, “nominal damages [] are presumed as a matter of law to stem merely from the breach of a contract.” *Sweet v. Johnson*, 169 Cal. App. 2d 630, 632 (Cal. App. 3d Dist. 1959).

a party could avoid issue preclusion by finding some argument it failed to raise in the previous litigation, the bar on successive litigation would be seriously undermined.”). The defendants’ First Amendment arguments do not defeat preclusion or otherwise weigh against entry of judgment on the breach of contract claim.<sup>11</sup>

Summary judgment is GRANTED and entered in NAF’s favor on the breach of contract claim.

## **II. Permanent Injunction**

### **A. Legal Standard**

According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

*eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). In addition, to establish standing plaintiffs

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<sup>11</sup> Contrary to defendants’ characterization, just because NAF seeks injunctive relief and cites evidence from the *PPFA* trial and the record in this case to address the relevant injunction factors (*i.e.*, irreparable injury, balance of hardships, public interest), that does not mean that NAF is seeking to remedy a “reputational injury” through its breach of contract claim. Oppo. at 12-13.

must demonstrate a “real and immediate” threat of future injury without an injunction to justify injunctive relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

## **B. NAF’s Proposed Injunction**

NAF asks me to enter the following permanent injunction based solely on its breach of contract claim:

All Defendants and their officers, agents, servants, employees, owners, and representatives, and all other persons, firms, or corporations acting in concert or participation with them, are hereby permanently 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 meeting;
- 2) Publishing or otherwise disclosing to any third party the dates or locations of any future NAF meeting;
- 3) Publishing or otherwise disclosing to any third party the names or addresses of any NAF members learned at any NAF meeting;
- 4) Entering or attempting to enter a NAF office, NAF meeting, or other NAF event by misrepresenting their true identity, their purpose for seeking entrance, and/or whether they intend to take any video, audio, photographic, or other recordings once inside;
- 5) Retaining possession of any materials covered by this permanent injunction. Any

and all such materials covered by this permanent injunction must be turned over to counsel of record in this matter, the identity of whom shall be disclosed to this Court. Access to any and all such materials by individuals covered by this permanent injunction shall occur only onsite at the offices of said counsel and subject to the supervision of said counsel, absent further order of this Court or the court in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.).

Nothing in this permanent injunction shall prevent the court in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.) from making orders about how materials covered by this injunction can be used in those proceedings.

Dkt. No. 665-4.

The scope of the requested permanent injunction is broader than the Preliminary Injunction. It effects a permanent dispossession of the recordings and NAF Materials from defendants and adds a provision barring defendants and their agents from entering or attempting to enter NAF offices or events by misrepresenting their identity or with the intent to take video or audio recordings.

### **C. Defendants' General Arguments on the Remedy**

Defendants make threshold arguments over whether an injunction is an appropriate remedy in the first place. They contend that injunctive relief is not an appropriate form of relief for NAF's breach of contract claim because NAF is seeking to protect itself

from “reputational harm.” I disagree; the relief granted below is directly related to and stems from defendants’ breach of specific provisions in the NAF Agreements. Relatedly, defendants assert that any permanent injunction would impermissibly trample on their First Amendment rights to disclose what they learned and recorded at the NAF Annual Meetings. But to repeat what I wrote earlier, the EAs, specifically provide that exhibitors agree that “monetary damages would not be a sufficient remedy for any breach” of the EAs, and that “NAF [would] be entitled to specific performance and injunctive relief as remedies” for any breach. EA ¶ 18.

As noted, I rejected defendants’ argument at the Preliminary Injunction stage that NAF has not shown that defendants knowingly and intelligently signed the EAs, such that they voluntarily waived their First Amendment rights. Defendants also had a full and fair opportunity to litigate that defense in the *PPFA* case.<sup>12</sup> The evidence at the *PPFA* trial established that Daleiden knew what he was signing when he signed the two EAs and signed at least one CA for the 2014 NAF conference given his own, personal experience with NDAs. His testimony that he had a different, subjective understanding of what the NAF CA covered or what the NAF EAs meant was not reasonable nor relevant to enforceability. *See, e.g.*, Trial Tr., 2487:5-25, 2489:4-2490:4, 2491:1-22, 2509:10-22,

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<sup>12</sup> Defendants raised a host of arguments as to why the NAF Agreements were otherwise void or unenforceable on summary judgment in the *PPFA* case. Those arguments were rejected. *PPFA* Summary Judgment Order, Dkt. No. 753, at 43, 45-49. As noted above, similar arguments were rejected at the Preliminary Injunction stage in this case.

2510:15-2511:13, 2660:3-6, 2722:7-14. Defendants' general arguments against permanent injunctive relief fail.

#### **D. Irreparable Injury and Inadequate Remedies at Law**

NAF argues that evidence in the *PPFA* trial and the declarations submitted and depositions taken in this case demonstrate the emotional harm that defendants' prior release of NAF Materials inflicted on NAF's own staff and NAF members; it caused NAF's staff worry and concern over their own and their colleagues' safety and their ability to have full and frank conversations and to share information at future NAF meetings.<sup>13</sup> NAF also points to evidence that its members suffered a "significant" increase in harassment, threats, and violent incidents following defendants' 2015 and 2017 releases of the NAF Materials and argues that these results are more than likely to recur if defendants are not enjoined from future disclosures.<sup>14</sup> It explains that following the 2015 and 2017 releases, it had to divert significant resources that otherwise would have been used to provide support for NAF members and their services to investigating, responding to, and providing additional security resources in response.<sup>15</sup> NAF contends these

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<sup>13</sup> Declaration of Melissa Fowler, Dkt. No. 665-1, ¶¶ 6-8, 10; Declaration of Michelle Davidson, Dkt. No. 665-2, ¶¶ 3-5; *see also* *PPFA* Trial Tr. 993:10-994:14, 1378:10-1379:6, 1490:13-22, 1513:14-20, 1558:13-21, 1978:6-7.

<sup>14</sup> *See* Davidson Decl., ¶¶ 10-13, 15-16, 18, 21-22; *see also* Pl. Ex. 9 Deposition of Vicki Saporta at 39:13-20; *PPFA* Trial Tr. 1516:6-1517:7, 1675:24-1676:19.

<sup>15</sup> *See* Fowler Decl. ¶¶ 11-12; Davidson Decl., ¶¶ 14, 17, 19-21, 23-24, 26.

are irreparable injuries that are not adequately addressed through remedies at law and that justify permanent injunctive relief. I agree.

Defendants attempt to dispute some of NAF’s evidence by relying on their security expert, Jonathan Perkins. Dkt. No. 707-6, (“Expert Report of Jonathan Perkins”). He attacks the opinions of NAF’s Security Director Michelle Davidson concerning the increase in threats and incidents of violence following the 2015 and 2017 release of recordings because: (i) Davidson lacked formal “training” in security and NAF did not adhere to the FBI’s standard for categorizing criminal incidents, meaning that NAF and Davidson are not able to “properly evaluate and classify security incidents,” *id.* ¶¶ 15-18, 26; (ii) NAF lacked a form for recording security incidents and Davidson took member reports at their word and conducted no further investigation, *id.* ¶¶ 15, 17; and (iii) NAF’s reporting system did not allow for an “accurate assessment” of what security resources are necessary to address the purported harm or threat. *Id.* ¶¶ 15, 17, 20.

According to Perkins, these deficiencies result in a “faulty data set” that does not consistently or accurately distinguish between “true threats” and incidents that pose no “real risk.” *Id.* ¶ 20. He also points to data tracking serious incidents taking place directly “at” health centers in California as reflected in the California’s Department of Justice’s data tracking “Anti-Reproductive Rights Crimes (ARRC),” which showed a lack of “significant” criminal activity during the two-year period prior to and after the CMP videos containing NAF Materials were released in 2015. According to Perkins, the California DOJ data shows a decrease in property damage and no violent crimes

occurring “at health centers in California” during those timeframes. *Id.* ¶¶ 29-31, 33.

These arguments do not undermine NAF’s showing. The California DOJ data is not persuasive because the incidents of threats and harassment on which NAF relies are primarily “threats” and “harassment” directed at the individuals highlighted in the CMP videos (and not necessarily towards the property of the health centers where they worked), as well as incidents outside of California. Perkins does not show that those types of incidents would be tracked by the California DOJ. *See* Davidson Decl. ¶ 16 (“In total, during the last half of 2015, NAF reported 69 threats we had uncovered through our monitoring to the [federal] DOJ for investigation. This number far exceeded any other time period during my time at NAF up to that point.”). More significantly, Perkins disputes only whether some of the incidents experienced by NAF members following the 2015 and 2017 releases of the CMP videos containing NAF Materials were “true threats” or mere protests or angry responses to the activities of NAF members. Perkins Report ¶¶ 27-28. Perkins does not dispute that following the 2015 and 2017 releases, NAF members received significant, actual threats, some of which directly referenced the content of the CMP videos. Instead, he simply disputes the number by arguing that some did not rise to the level of true criminal threats or criminal harassment.

Having presided over the *PPFA* trial, which included testimony of NAF staff and NAF members, and having reviewed all of the evidence identified by NAF on this motion, I find that NAF has adequately alleged irreparable injury as well as the likelihood of

future irreparable injury if defendants are not permanently enjoined from releasing the NAF Materials. These injuries are not adequately addressed at law. This significant showing of irreparable and unredressable injury – disputed by defendants only to its extent but not fully to its existence – is sufficient. *See also* UCL Order, Dkt. No. 1073 in *PPFA* case, 16-236 at 21-22. My conclusion is only strengthened by the provision in the EAs, discussed above, where defendants agreed that “monetary damages would not be a sufficient remedy for any breach” of the EAs, and that “NAF [would] be entitled to specific performance and injunctive relief as remedies” for any breach. EA ¶ 18. NAF has satisfied these factors in support of permanent injunctive relief.<sup>16</sup>

### **E. Balance of Hardships**

The balance of hardships weighs in favor of permanent injunctive relief preventing defendants from disclosing the NAF Materials. As noted above, ample evidence exists supporting NAF’s claim of irreparable injuries following the 2015 and 2017 CMP video releases. Similar injuries would likely occur again if there were future releases of NAF Material.

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<sup>16</sup> Defendants argue that there is no “causal relationship” between the 2015 release and the alleged instances of harm and threats because any such incidents are – according to defendants – attributable to the “negative sentiment surrounding the abortion industry” and that NAF failed to identify which specific portions of the CMP videos led to specific threats or violence to NAF’s members. Oppo. at 24. Defendants provide no support for requiring that granular level (and likely unproveable) showing to support permanent injunctive relief.

Defendants contend that the balance of hardship tips in their favor because they have a First Amendment right to publish the recordings and any permanent injunction would constitute an impermissible prior restraint. Oppo. at 25-26. But as the Ninth Circuit recognized in affirming the Preliminary Injunction, “[e]ven assuming arguendo that the matters recorded are of public interest, however, the district court did not clearly err in finding that the defendants waived any First Amendment rights to disclose that information publicly by knowingly signing the agreements with NAF.” *Natl. Abortion Fedn., NAF v. Ctr. for Med. Progress*, 685 Fed. Appx. 623, 626 (9th Cir. 2017) (unpublished). Defendants point to no *new* evidence to support a theory that Daleiden’s signing of the EAs and CAs was not voluntary and knowing and that it did not effectuate a full waiver of any First Amendment rights he might otherwise have possessed. Indeed, the *PPFA* trial testimony demonstrated Daleiden’s intimate familiarity with and his own frequent use of NDAs. His attempt to downplay that experience by claiming that he had a subjective belief that the NAF CAs were not as broad as they were expressly drafted was unreasonable and unpersuasive.

In terms of hardship and the public interest (addressed in more depth below), it bears emphasizing that there is no evidence that the Preliminary Injunction – which has been in place since 2015 – has ever stood in the way of law enforcement or governmental investigations or that it has hindered any part of the criminal prosecution of Daleiden in California state court. I have repeatedly offered to make and made myself available on an expedited basis to hear the defendants’ or investigatory requests for access to the

NAF Materials and to address any concerns with the scope of the Preliminary Injunction. *See, e.g.*, Dkt. Nos. 374, 378, 382, 572; *see also* Dkt. No. 155 at 3:12-14. Likewise, I have repeatedly confirmed Judge Hite's authority to make decisions about how the NAF Materials should be treated in his court, including regarding defendants' access to the Materials and for their use in court. *See, e.g.*, Dkt. Nos. 572, 594.<sup>17</sup>

Finally, in considering the Unfair Competition Law claim (Cal. Bus. & Prof. Code § 17200 *et seq.*) and granting injunctive relief in the *PPFA* case, I identified numerous facts that supported injunctive relief in that case and that likewise support injunctive relief here. Those facts include: the steps defendants took to effectuate their fraudulent scheme of misrepresentation and surreptitious recordings at the NAF Annual Meetings; their goal to create “maximum negative impact – legal, political, professional, public – on [Planned Parenthood]” and others in the “abortion industry;” their “ability to continue the activities found to be illegal by the jury; and Daleiden and CMP’s intent to release more videos through CMP from their surreptitious recordings. *PPFA* UCL Order, Findings of Fact 3, 56, 58-60; *id.* at 22-25 (finding balance of hardships tips sharply in favor of injunctive relief); *see also* *PPFA* Trial Tr. 2294:20-22

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<sup>17</sup> Daleiden nonetheless argues that the Preliminary Injunction has harmed his ability to prepare his defense. *See Declaration of David Daleiden (Dkt. No. [707-9]) ¶¶ 106-108.* But Judge Hite has determined what is necessary and relevant for Daleiden to prepare and present his defense with respect to the NAF Materials. Daleiden is free to seek further relief from Judge Hite as his criminal defense counsel see fit.

(expressing intent to release more recordings); Fowler Decl. ¶ 14.

The balance of hardships here tips sharply in favor of injunctive relief, albeit not as broadly as sought by NAF.<sup>18</sup>

## **F. Public Interest**

The public interest also weighs in favor of permanent, injunctive relief. Defendants argue to the contrary by pointing to the various federal, state, and local investigations that their HCP videos prompted, resulting in investigations, prosecutions, and regulatory terminations and guidance.<sup>19</sup> Defendants do not, however, identify any NAF Materials specifically

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18 Defendants' First Amendment arguments are not irrelevant. As discussed below, they weigh against restricting the future conduct of defendants beyond that expressly covered by the NAF Agreements at issue.

19 On the federal level, the investigations included an investigation by the House of Representatives' Select Investigative Panel (within the Energy and Commerce Committee), and an investigation by the Senate Judiciary Committee that led to "criminal and regulatory referrals to federal, state, and local law enforcement entities," including an investigation by the federal Department of Justice. Oppo. at 3-4. Defendants note that the U.S. Department of Health & Human Services terminated the FDA's contract with NAF-member Advanced Bioscience Resources because ABR had not assured HHS that it was not selling fetal tissue for valuable consideration. The National Institutes of Health published "new considerations for researchers to make sure they understand their duty to comply with the prohibition on selling fetal tissue." *Id.* at 4-5. At the state level, defendants add that the Texas Health and Human Services Division ("Texas HHS") terminated the enrollment of various NAF-member Planned Parenthood franchises in the Texas Medicaid Program, a decision affirmed by the Fifth Circuit in *Planned Parenthood*

identified by or relied on by those entities that led directly to any of the prosecutions or regulatory actions.<sup>20</sup> Defendants also neglect to mention that my personal review of the NAF recordings (those identified by defendants that, in their view, showed NAF members willing to engage in or admitting to illegal conduct) and other information defendants secured at the 2014 and 2015 NAF Annual Meetings, disclosed no criminal activity. Defendants do not identify any overlooked or unidentified-before-now NAF recordings to support their repeated claims about the contents of those recordings.<sup>21</sup> Simply put,

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*of Greater Texas Family Planning & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347 (5th Cir. 2020). At the local level, defendants state that the Orange County, California, District Attorney prosecuted two companies for illegally re-selling fetal tissue and that the Arizona Attorney General prosecuted a NAF-member Camelback Family Planning for illegally transferring fetal tissue to a NAF-member company and NAF tradeshow sponsor StemExpress, LLC. *Id.* at 4.

20 For example, the Texas proceedings and Fifth Circuit opinion focused on recordings made and information secured in Texas and the prosecutions in Orange and Maricopa Counties presumably relied on recordings of StemExpress staff, all of which fall outside the enjoined NAF Materials.

21 The “expert report” of Dr. Forrest Smith does not alter that conclusion. Dkt. No. 707-7. I had excluded it from the *PPFA* trial as irrelevant, but he amended it and submitted it here to support defendants’ public interest argument. The Smith Report is mentioned only in passing in defendants’ opposition brief as supporting defendants’ arguments that the NAF recordings show “information concerning violations of law, willingness to violate the laws, public health and safety, and matters of great public importance.” Oppo. at 13-14. As defendants do not themselves rely on specific portions of the Smith Report, it is not appropriately considered on this motion.

while some part of the HCP resulted in government investigations, criminal prosecutions, and regulatory activity, there is at most a weak connection between those activities and the specific NAF Materials covered by the Preliminary Injunction.

As I recognized in the *PPFA* case when entering the permanent injunction there and in issuing the Preliminary Injunction here, future release of additional NAF Materials creates a significant risk of future threats and harassment with the irreparable and unredressable consequences identified above. While enjoining the release of the recordings from the 2014 and 2015 Meetings will not ensure that the next NAF Annual Meeting will be a safe and secure space for participants to discuss their work and concerns, release of the past recordings will continue to harm that aim. The public interest will be served by enforcing the NAF Agreements, including EA provision allowing for injunctive relief.

#### **G. Copyright Defense**

Defendants also claim that Daleiden's copyright in the recordings taken at the 2014 and 2015 NAF Annual Meetings bars any permanent injunction that would prevent his use of the recordings, dispossess him of those recordings, or prevents him from registering his works with the Copyright Office under 17 U.S.C. § 407(a)(1) to fully benefit from the protections of the Copyright Act. They have not raised this issue before. Daleiden argues that under Section 201(e) of the Copyright Act, his rights to the recordings and his

ability to make derivative works therefrom are protected and cannot be infringed by the requested injunction.<sup>22</sup>

NAF does not dispute that the audio recordings Daleiden took could theoretically possess the minimal degree of creativity required to be copyrightable or that Daleiden could theoretically be considered the “author” of the recordings.<sup>23</sup> Instead, it argues that its contract rights trump potential Copyright Act rights. *See* 17 U.S.C. § 301 (“(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to . . . (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106”); *see also Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1089 (9th Cir. 2005) (“Most courts have held that the Copyright Act does not preempt the enforcement of contractual rights.”). The relevant contract rights are the CAs and EAs that defendants have violated, which were entered into as a condition of Daleiden gaining access to the Annual Meetings and

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22 17 U.S.C. § 201(e) provides: “Involuntary Transfer.-When an individual author’s ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.”

23 NAF does reserve its right to contest Daleiden’s ownership of copyrights in the NAF Materials, if any, in a future proceeding. Reply at 10 n.5.

that he signed before he made any of the recordings at issue.

Defendants cite no authority that recordings made in violation of a contract can be copyrighted when but-for the breach (established here) the recordings would not have been made. The cases defendants rely on – dealing with content that the law might consider illegal, *e.g.*, obscene materials or gambling games (Oppo. at 19-20) – do not establish that content can be copyrighted if it was illegally procured and the other contracting-party has a right to enjoin or restrict its distribution.<sup>24</sup>

NAF also argues that Section 201(e) of the Copyright Act cannot apply to these recordings for two independent reasons. First, the section only precludes involuntary transfers. Here, Daleiden voluntarily gave up his right to record and disseminate information by signing the EAs and CAs. *See, e.g., Hendricks & Lewis PLLC v. Clinton*, 766 F.3d 991, 997 (9th Cir. 2014) (noting section 201(e) is concerned with involuntary transfers of works owned by the author). Second, the recordings must be vested in an “individual author” who cannot be a corporate entity. NAF contends that Daleiden repeatedly testified in this and the *PPFA* case that CMP owns the “recordings.” *Intl. Code Council, Inc. v. UpCodes, Inc.*, 17 CIV. 6261 (VM), 2020 WL 2750636, at \*14 (S.D.N.Y. May 27, 2020) (“Claims regarding the Copyright Act are equally inapposite, as

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24 Defendants’ made-in-passing argument – that I am without power to enjoin defendants from submitting illegally obtained materials to the Copyright Office because registering copyrights is an act in furtherance of a person’s constitutionally protected right to petition under California’s anti-SLAPP law (Cal. Code of Civ. Proc. § 425.16) – is wholly without support.

17 U.S.C. Section 201(e) applies only to copyrights held by individual rather than corporate authors and more fundamentally ‘addresses government actions avowedly intended to coerce a copyright holder to part with his copyright, so that the government itself may exercise ownership of the rights.”).

On the second issue, at oral argument Daleiden contended that while the CMP possesses the copyrights to the HCP videos (the produced videos released as part of the HCP), he still owned the rough footage. That dispute is not material. The point remains that a permanent injunction covering recordings that were only created in violation of an express contract does not effectuate the sort of involuntary transfer prohibited by Section 201(e).

Finally, defendants’ attempt to draw distinctions between the “confidential” material that in their view might be covered by the EAs and CAs and other material captured on the recordings (e.g., conversations between Daleiden or his co-conspirators pretending to be exhibitors for BioMax and individuals who voluntarily approached their exhibitor table) does not assist defendants. All conversations in the Exhibitor Hall – restricted space that was part of the NAF Annual Meetings – were covered by the EA and CA and only occurred as a result of the defendants’ violations of the EA and CA.

In short, the Copyright Act does not bar a permanent injunction restricting the dissemination of and access to the NAF Materials, even if that injunction restricts the ability of Daleiden to submit the NAF Materials to the Copyright Office.

## H. Scope

Considering all of the relevant factors, and the evidence in support, I agree that NAF is entitled to permanent injunctive relief that precludes defendants and their agents from publishing or otherwise releasing the recordings they took at NAF's 2014 and 2015 Annual Meetings. That the injunction might benefit Planned Parenthood affiliates who did not attempt to enjoin distribution of recordings taken at the NAF Meetings through the *PPFA* case does not mean that the requested injunction is overbroad or that NAF is precluded from seeking it. NAF is asserting its own rights that also benefit its members as third-party beneficiaries to the NAF Agreements, as noted throughout this case and the related *PPFA* case. This includes the Planned Parenthood affiliates who litigated the *PPFA* case and hundreds of other NAF members who were not involved in the *PPFA* litigation. In the end, the benefit to third-party beneficiaries does not mean that separate relief cannot be sought by NAF as the first-party beneficiary, especially considering that the EA provides specifically for equitable relief. NAF has its own significant interests in preventing disclosure of the NAF Materials.<sup>25</sup>

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25 The posture of this case with respect to the *PPFA* case, as well as the nature of the relationship between NAF and PPFA and the Planned Parenthood affiliates who litigated the *PPFA* case are significantly different from the situation the Ninth Circuit addressed in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regl. Plan. Agency*, 322 F.3d 1064 (9th Cir. 2003). There, the Ninth Circuit applied *res judicata* in light of a previous lawsuit by an association to bar a subsequent suit brought on the same facts by members of the association. The court noted where "there is no conflict between the organization and its members, and if the organization provides adequate representation on its

That said, the permanent injunction must be based solely on NAF's breach of contract claim and must be supported by the evidence in this case (submitted at the Preliminary Injunction stage, depositions taken in this case, and declarations submitted in connection with this motion) and by the relevant evidence from the *PPFA* case. The scope of the *PPFA* Permanent Injunction is not directly relevant to the scope of an appropriate injunction here because the Judgment in the *PPFA* case was based on RICO, fraud, trespass, recording statute, conspiracy, and UCL claims not litigated here. I note defendants' uncontested position that they are committed to their mission of opposing abortion and intend to continue their use of surreptitious recordings in circumstances where they believe one-party recording is legal. While defendants' First Amendment rights do not defeat a permanent injunction restricting their access to and use of the NAF Materials they secured only because of the breach of the NAF Agreements, those rights do require a significant narrowing of the scope of relief.

The persons and entities NAF seeks to enjoin ("All Defendants and their officers, agents, servants, employees, owners, and representatives, and all other persons, firms, or corporations acting in concert or

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members' behalf, individual members not named in a lawsuit may be bound by the judgment won or lost by their organization. A finding of privity in such circumstances is particularly appropriate in cases involving interests in real property. . . ." *Id.* at 1082. Here NAF is seeking injunctive relief based on the breach of its own contracts on its own behalf and also to benefit members who were not represented in the *PPFA* case. There are no apposite similarities with the *Tahoe-Sierra* case to support defendants' apparent request to find that *res judicata* precludes the relief NAF seeks here.

participation with them, are hereby permanently restrained and enjoined from") are appropriately tailored. NAF's request to prevent these persons and entities from "[p]ublishing or otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF meeting" is appropriate if limited to the 2014 and 2015 Annual Meetings that defendants only gained access to and from which they secured information and recordings due to their breaches of the NAF Agreements.

The request to cover "any" NAF meeting no matter where or when held or how defendants may access them is overbroad, unsupported, and not appropriate. Similarly, NAF's request to prevent these persons and entities from "[p]ublishing or otherwise disclosing to any third party the dates or locations of any future NAF meeting" irrespective of how or where that information is learned is likewise overbroad, unsupported, and not appropriate.<sup>26</sup> Likewise, a prohibition on "[p]ublishing or otherwise disclosing to any third party the names or addresses of any NAF members learned at any NAF meeting" is similarly deficient where that request is not tied to the 2014 and 2015 NAF Meetings. Even if it were, it would arguably cover "publishing" names or addresses of NAF members that have since been voluntarily and publicly disclosed.

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<sup>26</sup> This and other prohibitions were appropriate with respect to the Preliminary Injunction because the scope of defendants' activities, including how they accessed the NAF Meetings, was not fully known. At this juncture, and based only on the breach of contract claim, such broad relief is no longer warranted.

The prohibition of “[e]ntering or attempting to enter a NAF office, NAF meeting, or other NAF event by misrepresenting their true identity, their purpose for seeking entrance, and/or whether they intend to take any video, audio, photographic, or other recordings once inside,” suffers from numerous deficiencies. There is no evidence in the record that defendants attempted to access any NAF office or any NAF event other than the 2014 and 2015 NAF Annual Meetings. There is no evidence regarding how access to those facilities or events is or will be controlled. In addition, unlike in the *PPFA* case, here there are no fraud-based or conspiracy-based claims that have been litigated that could conceivably cover and extend to future misrepresentations. The appropriate relief here is constricted by the breach of contract claim and there is no information about the provisions of any current or future NAF EAs and CAs. This future prohibition is not justified.

Finally, NAF asks me to prevent these persons and entities from “[r]etaining possession of any materials covered by this permanent injunction. Any and all such materials covered by this permanent injunction must be turned over to counsel of record in this matter, the identity of whom shall be disclosed to this Court. Access to any and all such materials by individuals covered by this permanent injunction shall occur only onsite at the offices of said counsel and subject to the supervision of said counsel, absent further order of this Court or the court in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.).” NAF further proposes that “[n]othing in this permanent injunction shall prevent the court in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.) from making orders about

how materials covered by this injunction can be used in those proceedings.”

Under the Preliminary Injunction as modified by the Civil Contempt Order, defendants are already required to turn over the NAF Materials to their counsel and may access those materials only at counsel’s office, absent further order from this court or the Superior Court. *See* Dkt. No. 482 at 23-24. NAF’s proposal would further restrict defendants’ access to the NAF Materials by (apparently) eliminating the provision allowing access at Daleiden’s criminal defense counsel’s offices. That restriction is not justified considering the pending criminal proceedings.

Considering all of the above, the following permanent injunctive relief is appropriate:

All Defendants and their officers, agents, servants, employees, owners, and representatives, and all other persons, firms, or corporations acting in concert or participation with them, are hereby permanently 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 the 2014 and 2015 NAF Annual Meetings;
- 2) Retaining possession of any materials covered by this permanent injunction. Any and all such materials covered by this permanent injunction must be turned over to counsel of record in this matter or counsel of record in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.), the identity of whom shall be disclosed

to this Court. Access to any and all such materials by individuals covered by this permanent injunction shall occur only onsite at the offices of said counsel and subject to the supervision of said counsel, absent further order of this Court or the court in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.).

Nothing in this permanent injunction shall prevent the court in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.) from making orders about how materials covered by this injunction can be used in those proceedings.

### **III. Form of Judgment**

In its motion, NAF asked me to enter judgment on its breach claim and its requested injunctive relief under Federal Rule of Civil Procedure 54(b), so that any appeal of the core issues would be expedited. Mot. at 24. It proposed to stay its other claims, and if the breach claim and permanent injunction were preserved on appeal, it would then dismiss the remaining claims. *Id.*<sup>27</sup>

Following the hearing on this motion, NAF withdrew “its request for entry of partial final judgment pursuant to Rule 54(b)” and confirmed that it “would not seek to stay the remainder of this action if the Court grants its motion. Instead, should the Court grant NAF’s motion, NAF would seek to stipulate with Defendants to dismiss NAF’s three other claims prior to entry of judgment. This would allow the Court to

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<sup>27</sup> Other than the breach claim considered in this Order, NAF’s remaining claims are for civil conspiracy, promissory fraud, and fraudulent misrepresentation.

enter complete final judgment in this case and for a single appeal to proceed to the Ninth Circuit.” Dkt. No. 716.

Having withdrawn its request for partial judgment, within twenty (20) days of the date of this Order NAF shall file a stipulation dismissing its other claims (or a motion to voluntarily dismiss, if not stipulated) as well as a proposed form of final Judgment.

#### **IV. Motions to Seal**

NAF filed portions of its motion for summary judgment and many exhibits in support conditionally under seal because that information and those exhibits were either covered by the Preliminary Injunction or had been designated as confidential or attorney’s eyes only under the protective order in this or the related *Planned Parenthood* case. Dkt. No. 669. In opposition, defendants likewise filed a substantial amount of material under seal, likewise covered by the Preliminary Injunction or designated as confidential in this or the related case. Dkt. No. 707.

Having reviewed NAF’s motion and defendants’ opposition brief, nothing contained in the text of those documents should remain sealed. The redacted information is identical or materially similar to information disclosed to the public in the *PPFA* trial. The Clerk shall unseal Dkt. Nos. 669-3, 707-4.

The materials covered by the Preliminary Injunction and the Permanent Injunction outlined above shall remain under seal, including but not limited to the video and audio recordings submitted in connection with this motion by NAF and defendants

(Dkt. No. 707, Ex. 59), as well as the indices of those recordings. Dkts. Nos. 669-11, 669-12 (Exs. 37 & 38).

With respect to the other information (mainly deposition testimony, deposition exhibits, and expert reports from this and the related *PPFA* case), the parties shall meet and confer and within thirty (30) days of the date of this Order and shall submit one joint chart, supported by references to existing or newly filed declarations, designating the information by ECF Docket No. and by Exhibit or Appendix number the parties (i) agree may be unsealed, (ii) agree may remain sealed, or (iii) have a dispute about sealing. Two principles should guide the parties in conducting that review. First, information disclosed to the public in the *PPFA* trial should generally not remain under seal. Second, only information that was cited by the parties in the briefing on this motion, referred to during the February 17, 2021 argument, or cited in this Order needs to be reviewed. Because of concerns that more-than-necessary information designated as confidential was submitted to the court in connection with this motion, and that much of that information was not referred to by the parties nor considered by me, requiring the parties to review that information through this process is neither necessary nor efficient. This irrelevant or unconsidered evidence may remain under seal.

## **CONCLUSION**

Plaintiff's motion for summary judgment on its breach of contract claim is GRANTED. Plaintiff's request for permanent injunctive relief flowing from that judgment is GRANTED, as narrowed and amended in this Order. Plaintiff shall file a proposed final form of Judgment within twenty (20) days of the date of this Order.

IT IS SO ORDERED.

/s/ William H. Orrick  
United States District Judge

Dated: April 7, 2021

**ORDER OF THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT  
DENYING PETITION FOR REHEARING  
(DECEMBER 19, 2022)**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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NATIONAL ABORTION FEDERATION,

*Plaintiff-Appellee,*

v.

CENTER FOR MEDICAL PROGRESS; BIOMAX  
PROCUREMENT SERVICES, ORDER LLC;  
AND DAVID DALEIDEN, AKA ROBERT  
DAOUD SARKIS,

*Defendants-Appellants.*

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No. 21-15953

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

Before: S.R. THOMAS, McKEOWN, and CLIFTON,  
Circuit Judges.

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The panel has voted to deny the petition for re-hearing.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has

requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are denied.