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9
 10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA

13 NATIONAL ABORTION FEDERATION
 (NAF),

14 Plaintiff,

15 v.

16 THE CENTER FOR MEDICAL PROGRESS,
 17 BIOMAX PROCUREMENT SERVICES LLC,
 18 DAVID DALEIDEN (aka "ROBERT
 SARKIS"), and TROY NEWMAN,

19 Defendants.
 20

Case No. 3:15-cv-3522

Judge: William H. Orrick, III

**NATIONAL ABORTION FEDERATION
 (NAF)'S RESPONSE TO ORDER TO
 SHOW CAUSE RE CONTEMPT**

Hearing Date: June 14, 2017

Time: 2 p.m.

Location: Courtroom 2, Floor 17

Date Action Filed: July 31, 2015

Trial Date: TBD

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 24 **REDACTED – PUBLIC VERSION**
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1 **I. INTRODUCTION**

2 There has been an egregious and disturbing violation of this Court's Preliminary
3 Injunction Order, perpetrated by CMP, David Daleiden, and most shockingly by two members of
4 the California Bar, Steve Cooley and Brentford J. Ferreira. In the early hours of May 25, 2017,
5 Daleiden, CMP, Cooley and Ferreira published for all the world to see over 146 hours of illegal
6 video taken at NAF's meetings and expressly barred from disclosure by the Court's injunction.
7 Cooley and Ferreira, acting as Daleiden's agents, also published the identities of NAF members
8 that Daleiden and his cohorts met and taped at NAF's annual meetings. As the evidence
9 presented by NAF will show, the contemnors hatched their scheme to violate this Court's Order
10 weeks before May 25, starting at least as early as May 3.

11 This carefully coordinated, orchestrated violation of a Court order has led, inevitably, to
12 yet another vitriolic hate campaign directed against NAF and its members. While the Court
13 ordered an immediate takedown of these materials on May 25, it was too late to prevent their
14 dissemination. By then, Preliminary Injunction materials circulated widely on the internet, and
15 continue to circulate to this day. NAF is now witnessing in real time a similar spike in incidents
16 of harassment and intimidation that presaged the murders at a NAF-member clinic in Colorado.
17 NAF's security staff and senior members of the organization have been diverted to deal with the
18 latest crisis to protect their members. The safety risk to NAF's members is real and ongoing.

19 Enough is enough. CMP, Daleiden, and their criminal attorneys should be held in
20 contempt for launching a coordinated campaign to place NAF and its members in jeopardy, in
21 violation of this Court's lawful order. And while it is of course impossible to compensate NAF
22 for this violation (that was the whole point of the preliminary injunction), NAF respectfully urges
23 the Court to sanction them for their willful violations, and to refer them to the United States
24 Attorney for criminal prosecution.

25 **II. STATEMENT OF FACTS**

26 **A. CMP, Daleiden, and His Criminal Defense Counsel Engage in a Coordinated**
27 **Campaign to Publicly Disclose Preliminary Injunction Materials.**

28 While the timing is not exactly clear, in the early hours of May 25, 2017, a "media" page

1 on the website of Steve Cooley & Associates (“SCA”), went live. (Declaration of Derek F. Foran
2 in Support of NAF’s Response to Order to Show Cause re Contempt (“Foran Decl.”) Ex. B.)
3 Steve Cooley and Brentford J. Ferreira represent David Daleiden in the related criminal
4 proceedings initiated by the California Attorney General, alleging fifteen felony violations arising
5 out of CMP and Daleiden’s unlawful videotaping campaign. (*Id.* ¶ 2; Ex. A.) Many of these
6 alleged felonies occurred at NAF’s Annual Meeting in San Francisco. (*Id.* Ex. A.)

7 The “media” link on Mr. Cooley’s website contained a press release stating that Cooley
8 and Ferreira were “proud to announce the defense of a true American journalist, David Daleiden.”
9 (*Id.* Ex. B at 1.) The lawyers’ statement expressly referenced NAF’s lawsuit and this Court’s
10 Preliminary Injunction. (*Id.* at 2.) They stated that NAF’s “civil suit resulted in an injunction . . .
11 preventing David from posting any videos taken at the 2014 and 2015 NAF conventions held in
12 San Francisco and preventing David from naming or otherwise identifying anyone he filmed at
13 those conferences.” (*Id.*)

14 Having expressly referenced this Court’s Order, SCA’s “media” page then disclosed
15 materials in violation of that Order in the following ways:

16 (1) **CMP’s “Preview” Video:** Embedded on SCA’s “media” page was a “Preview” video
17 that is 3 minutes and 9 seconds long. (Foran Decl. ¶ 4.)¹ The “Preview” video contains all the
18 hallmarks of Daleiden’s “journalism.” It is heavily and misleadingly edited, and it is replete with
19 ominous music throughout. (*Id.* ¶ 5.) The video is overlaid with written statements. It begins
20 with a statement that

[REDACTED]

25 All of the footage on the “Preview” video was taken by Daleiden and his cohorts at NAF’s

27 ¹ NAF has provided the Court with a copy of the “Preview” video. (*See* Foran Decl., Ex.
28 Z.)

1 2014 and 2015 Annual Meetings and is covered by the Court’s Preliminary Injunction. (*Id.* ¶ 6.)
 2 Designed to provoke maximum outrage, CMP’s “Preview” video is a misleadingly edited
 3 montage of footage that Defendants pointed to in opposing NAF’s Preliminary Injunction as
 4 supposedly evidencing criminal or callous conduct on the part of NAF members, a contention that
 5 both this Court and the Ninth Circuit rejected.² Specifically, there are 15 individual clips in
 6 CMP’s “Preview” video — *10 of those clips were heavily and repeatedly touted by Defendants*
 7 *in opposing NAF’s motion for a preliminary injunction.* (*Id.* ¶ 7; Dkt. 265-1 (Opp’n to PI Mot.)
 8 at 10:7-14:2 (describing excerpts of video recordings that Defendants claimed “exposed
 9 significant evidence of unlawful activity”); *id.* at 2:9-12 (claiming “CMP’s investigation
 10 uncovered extensive evidence in the abortion industry of willingness to engage in criminal
 11 practices . . .”).)

12 **(2) Identification of NAF Members:** SCA’s “media” page also identified, publicly, 14
 13 “Does” referenced in the California Attorney General’s criminal complaint. (Foran Decl. Ex. B;
 14 Ex. A at 1-4.) Eleven of the individuals publicly identified are NAF members. (*Id.* ¶ 8.) As a
 15 justification for identifying the “Does” by name, Daleiden’s lawyers stated that [REDACTED]
 16 [REDACTED]
 17 [REDACTED] To the contrary, those names were filed under
 18 seal by court order in the criminal case, and the California Attorney General has now moved for
 19 sanctions, for a referral to the State Bar of California, and for an order prohibiting further
 20 disclosures of the “Does.” (*Id.* Ex. X.)

21 **(3) The “Doe” Videos:** After identifying the 14 individual “Does” by name, SCA’s
 22 media page pointed visitors to a URL, stating [REDACTED]
 23 [REDACTED] (Foran Decl. Ex. B at 4.)

24 The URL linked to a [REDACTED] playlist. (*See id.*) The URL was publicly available to
 25

26 ² Dkt. 354 at 30:10-19 (“I have reviewed the recordings relied on by defendants and find
 27 no evidence of criminal wrongdoing”); No. 16-15360, Dkt. 154-1 ¶ 10 (the district court’s
 28 determination that recordings did not evidence criminal wrongdoing is “amply supported by the
 record.”).

1 anyone who clicked on it, and anyone who did so was directed to a [REDACTED]
2 [REDACTED]
3 [REDACTED] Fourteen of the seventeen videos [REDACTED] were
4 taken at NAF's Annual Meetings in San Francisco and Baltimore, and contain [REDACTED]
5 [REDACTED]

6 Each of these videos was published by the "Center for Medical Progress." (*Id.*) All of the
7 footage on the 14 CMP videos (approximately 2 hours 9 minutes), is expressly covered by this
8 Court's injunction. (*Id.* ¶ 10.)

9 **(4) 144 Hours of NAF Footage:** Separately, SCA's "media" page contained links to a

10 [REDACTED]
11 [REDACTED]
12 [REDACTED] SCA's statement encouraged visitors to its "media" page to [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

26 _____
27 ³ Cooley and Ferreira also provided a [REDACTED]
28 [REDACTED] (Foran Decl. ¶ 12.)

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[REDACTED]

Separately,

[REDACTED]

Despite being under Court Order not to disclose these materials, neither Daleiden nor his attorneys sought this Court’s permission before doing so. They did not notify the Attorney General, and they did not seek to seal it in the San Francisco Superior Court. (*Id.* ¶ 13.)

B. The Contemnors Were Planning to Violate This Court’s Orders as Early as May 3.

How did this happen? As it would turn out, the scheme to violate this Court’s Preliminary Injunction Order began as early as May 3. That day, David Daleiden and Susan Merritt aka “Tennenbaum” attended a court hearing in San Francisco Superior Court regarding the charges brought by the California Attorney General. (Foran Decl. ¶ 14.) The same day, Daleiden’s criminal attorneys [REDACTED]

[REDACTED]. (*Id.* ¶ 11, Ex. D.) We do not know exactly when CMP uploaded the 144 hours of raw footage [REDACTED] those videos must have been uploaded by at least May 3.

What is certain is that on May 3, CMP uploaded the “Preview” video [REDACTED] Unlike other online media platforms, [REDACTED] posts the date of the original upload and does not change this date for subsequent actions, by for example uploading a more recent version. (*Id.* ¶ 14.) Accordingly, the Court can see for itself the dates that CMP uploaded the Preliminary Injunction materials to its [REDACTED] (*Id.* Ex. G.) The

1 “Preview” video was not visible on CMP’s website to the public, because CMP marked it as
2 either “private” or “unlisted.” (*Id.* ¶ 4.) Starting on May 12 and continuing through May 24,
3 CMP then uploaded the over 2 hours of “Doe” footage taken at NAF’s meetings, and once again
4 marked those videos as “private” or “unlisted,” [REDACTED]
5 [REDACTED] (*Id.* ¶ 9, Ex. G.)

6 Sometime around May 24 (we do not know the exact date), CMP’s criminal attorneys (or
7 far more likely, Daleiden), [REDACTED]
8 [REDACTED] (*Id.* ¶¶ 9, 12, Exs. C, E.) The next day,
9 May 25, SCA’s “media” page went live.

10 **C. Daleiden Uses the Online Anti-Choice Ecosystem to Spread the Preliminary**
11 **Injunction Materials on the Internet.**

12 What is also clear now is that CMP and David Daleiden, at minimum, used various anti-
13 choice outlets on the internet to spread the news about the disclosure of Preliminary Injunction
14 materials as quickly as possible, and most particularly the “Preview” video, even before SCA’s
15 “media” page went live on May 25.

16 Specifically, at approximately 8:43 p.m. East Coast Time on May 24, 2017, [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 Various anti-choice outlets, many of whom have known associations with David
24 Daleiden, quickly began publishing the “Preview” video on multiple social network fora. Shortly
25 after midnight, at 12:01 a.m., [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The “Preview” video spread from there.

The inescapable inference from this evidence is that the contemnors contacted one or more media outlets sympathetic to their cause before SCA’s media page went live to spread the “Preview” video as far and as wide as possible, in order to gain maximum exposure and render NAF and this Court helpless to stem the flood.

D. NAF Seeks and the Court Grants Emergency Relief While Defendants and Counsel Do Nothing.

With online instances of threats and harassment proliferating and NAF shifting into emergency security mode (of which more below), Defendants and their civil and criminal counsel stood by and did nothing.

At 8:31 a.m. PDT on Thursday, May 25, after being apprised of the disclosures, counsel for NAF wrote to Katie Short, civil counsel for David Daleiden, demanding the immediate removal of Preliminary Injunction materials published by her client and his agents. (Foran Decl. Ex. O.) We received no response. (*Id.* ¶ 22.) At 9:23 a.m. PDT on the same day, counsel for NAF wrote to Daleiden’s criminal lawyers making the same demand. (*Id.*, Ex. P.) We received no response. (*Id.* ¶ 23.) Counsel for NAF followed up with an urgent phone message to Steve Cooley’s office. (*Id.* ¶ 24.) We received no response. (*Id.*)

At the same time counsel for NAF wrote to this Court to inform it of the violations of its Preliminary Injunction. (*Id.*, Ex. Q.) The Court set a telephone hearing for 4 p.m. on the same day, ordering David Daleiden and inviting his criminal counsel to appear. (*Id.*, Ex. R; Dkt. 408.) Simultaneously, NAF and its counsel were working urgently behind the scenes to have YouTube block access to the Preliminary Injunction materials posted by CMP and Daleiden’s criminal attorneys. (*Id.* ¶ 26.) As a result of those efforts, YouTube began blocking access to the materials published by Daleiden’s lawyers that afternoon, shortly before and during the Court’s telephonic hearing. (*Id.*) Those materials were accessible for all to see before YouTube took

1 action, despite NAF's demands to Daleiden and his counsel, issued hours before, that they be
2 removed. And as explained above, CMP's "Preview" video had been published and viewed
3 numerous times across multiple social media platforms by then.

4 During the telephonic hearing, neither David Daleiden nor his criminal attorneys were
5 present, but civil counsel for Daleiden confirmed the accuracy of the statements in NAF's letter.
6 (*Id.*, Ex. R at 4:3-8; 6:4-9.) After the telephonic hearing, the Court ordered that Daleiden require
7 his criminal counsel to "IMMEDIATELY . . . take down from their website all links to recordings
8 covered by the Preliminary Injunction and remove all references to the identities of any NAF
9 members who were subjects of the recordings covered by the Preliminary Injunction." (*Id.* at 2:3-
10 7.) "Daleiden and his counsel" were also ordered to "IMMEDIATELY . . . undertake all efforts
11 to remove from YouTube the recordings covered by the Preliminary Injunction." (*Id.* at 2:7-9.)
12 The Court set an Order to Show Cause hearing for June 14 and ordered counsel for NAF to serve
13 its order on Daleiden's criminal attorneys (*id.*, 2:19-22), which they promptly did. (*Id.*, Exs. T,
14 U.)

15 Minutes after the Court's telephonic hearing, but before it issued a written order, the list of
16 "Does" and the embedded "Preview" video disappeared from the SCA media page (*Id.* ¶ 28),
17 damning evidence that Daleiden and his criminal lawyers could have, but simply chose not to,
18 remove these materials earlier and before they were widely disseminated. The URL links that the
19 Court ordered be removed "IMMEDIATELY," however, remained open and accessible on SCA's
20 "media" page on May 26. (*Id.*) On Friday, May 26, counsel for NAF wrote to counsel for
21 Daleiden (Ms. Short and his criminal counsel), and demanded that these links be removed. (*Id.*
22 Ex. S at 2.) Daleiden's criminal attorneys never responded. Ms. Short responded blithely that
23 "all of the videos were removed from YouTube prior to the teleconference." (*Id.*) On Saturday,
24 May 27, counsel for NAF again pointed out that the URL's were still posted on SCA's "media"
25 page. (*Id.* at 1-2.) SCA's "media" page disappeared altogether sometime over the Memorial Day
26 weekend (the timing is unclear). (*Id.* ¶ 28.)

E. Preliminary Injunction Materials Continue to Circulate Publicly After YouTube Blocks Access.

1 While Defendants and their counsel stood by and did nothing, Friday, May 26, and
2 Memorial Day weekend turned into a massive and potentially deadly game of online whack-a-
3 mole unleashed by CMP, Daleiden, Cooley, and Ferreira.

4 Specifically, while [REDACTED] acted on May 25 to block access to the links posted by
5 Daleiden’s criminal attorneys, various outlets had by then copied these links and re-posted them
6 on multiple internet and publicly-accessible fora, including [REDACTED]
7 [REDACTED] (Foran Decl. ¶ 31.)

8 In one horrific instance, [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

17 Not all of the content hosting websites, however, have agreed to remove material covered
18 by the Preliminary Injunction. [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 Daleiden’s “Preview” video, moreover, had circulated widely in the hours before NAF
22 was able to alert the Court of the violation, and it continues to receive significant attention and re-
23 posts on the internet, most especially on Facebook. (Foran Decl. ¶ 33; [REDACTED]
24 [REDACTED]

25 [REDACTED] NAF and its counsel worked furiously throughout the holiday weekend and into the following
26 week to contact the relevant social media platforms to block access to the “Preview” video, but it
27 was impossible to prevent its dissemination. (Foran Decl. ¶ 33; [REDACTED] To take
28 just one of many examples, [REDACTED]

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[REDACTED]

F. The Impact of the Disclosure of Preliminary Injunction Materials on NAF and its Members.

The results of the campaign unleashed by CMP, Daleiden, and his criminal lawyers are as predictable as they are appalling. They are ongoing and will continue for weeks and months. All NAF can do at this juncture is provide the Court with a snapshot.

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The monetary impact to NAF as a result of the Preliminary Injunction violation is also ongoing. As of Thursday, June 1, NAF has incurred \$1,568.26 in direct security costs and it has

1 spent approximately \$15,400 in staff time responding to the violation. [REDACTED]
2 This is not to even mention the disruption to its members' lives and the individual security
3 expenses they have incurred. [REDACTED] As of the close of business on Wednesday, May 31,
4 attorney fees incurred on behalf of NAF as a result of the violation amount to \$96,610.50. (Foran
5 Decl. ¶ 35.)

6 **III. ARGUMENT**

7 **A. CMP, Daleiden, Cooley, and Ferreira Willfully Disobeyed a Court Order.**

8 A Court may hold a party in civil contempt if the complaining party shows by clear and
9 convincing evidence that the contemnor "violated a specific and definite order of the court." *FTC*
10 *v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999). "A person fails to act as ordered
11 by the court when he fails to take all the reasonable steps within his power to insure compliance
12 with the court's order." *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir.
13 1987) (internal quotation marks and alterations omitted). In addition, a party may be held in
14 contempt for aiding and abetting a violation of a court order by a non-party. *Inst. of Cetacean*
15 *Research v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 948-50 (9th Cir. 2014).

16 The complaining party is not required to show that the contemnor's violation of the court
17 order was "willful." *Crystal Palace*, 817 F.2d at 1365 (citing *Perry v. O'Donnell*, 759 F.2d 702,
18 704-706 (9th Cir. 1985)). Indeed, the intent of the contemnor when violating the court order is
19 irrelevant. *Id.* Neither advice of counsel nor "exceptional circumstances" constitute a defense to
20 civil contempt. *Sea Shepherd*, 774 F.3d at 955 ("A party's good faith reliance on the advice of
21 counsel does not excuse the violation of a court's order"); *Crystal Palace*, 817 F.2d at 1365 (The
22 "'exceptional circumstances' offered by the appellants are irrelevant. If a person disobeys a
23 specific and definite court order, he may properly be adjudged in contempt.").

24 A Preliminary Injunction order binds not only "the parties," but also "the parties' officers,
25 agents, servants, employees, and attorneys," as well as "other persons who are in active concert or
26 participation with" the parties or their agents, so long as such persons have "actual notice" of the
27 order. *See Fed. R. Civ. Proc.* 65(d)(2). Rule 65(d) codifies the common law principle that non-
28 parties may be held in contempt, if they "either abet the defendant, or [are] legally identified with

1 him.” *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930); *see also Regal Knitwear Co.*
 2 *v. N.L.R.B.*, 324 U.S. 9, 14 (1945) (Rule 65(d) “is derived from the common law doctrine that a
 3 decree of injunction not only binds the parties defendant but also those identified with them in
 4 interest, in ‘privity’ with them, represented by them or subject to their control”).

5 **1. NAF Has Presented Clear and Convincing Evidence of a Violation of**
 6 **Court Order.**

7 The contempt here speaks for itself, and while intent is irrelevant, the contempt evidenced
 8 here is not just willful, it is shocking. Acting with no regard for the law or for the safety and
 9 security of NAF’s members, CMP, Daleiden, and two members of the California Bar hatched a
 10 scheme, beginning at least since May 3, to willfully violate this Court’s Order, once again
 11 sparking a firestorm of hate and vitriol directed against NAF and its members.

12 The contemnors knowingly and purposefully violated the order’s prohibition on
 13 “publishing or otherwise disclosing to any third party any video, audio, photographic, or other
 14 recordings taken, or any confidential information learned, at any NAF annual meetings.” (Dkt.
 15 354 at 42.) They did so by publishing the “Preview” video on SCA’s “media” page, and by
 16 publishing on SCA’s media page [REDACTED] over 146 hours of raw footage taken
 17 at NAF’s Annual Meetings, all of which are expressly covered by this Court’s injunction. (*Supra*
 18 p. 3-5.) The misleadingly edited “Preview” video is especially appalling in as much as it
 19 constitutes a highlight reel of the content that Defendants pointed to in opposing entry of an
 20 injunction, *i.e.*, the content that Defendants believed would provoke maximum outrage. It is a
 21 professional hit job, purposely designed to instigate a backlash against NAF and its members.
 22 Daleiden and CMP spread their “Preview” video via anti-choice news outlets far and wide so as
 23 to speed the dissemination of the wrongly disclosed materials. (*Supra* p. 6-7.)

24 The contemnors also violated the Court’s injunction by “publishing or otherwise
 25 disclosing to any third party the names or addresses of any NAF members learned at any NAF
 26 annual meetings.” (Dkt. 354 at 42.) Of the fourteen “Does” outed by the contemnors, eleven of
 27 them are NAF members, eight of whom Daleiden and his cohorts met and taped at NAF’s Annual
 28 Meetings. (*Supra* p. 3-4.) It is no defense that the NAF members were referenced in the

1 California Attorney General’s criminal complaint as “Does” or that “there is no protective order
2 in place in state court” that would protect the names of the NAF members, as SCA’s “media”
3 page boldly proclaimed. Those names were under seal in state court, and whether or not a state
4 court order prohibits disclosure of the NAF members’ names, this Court’s Preliminary Injunction
5 Order clearly does.

6 CMP and Daleiden are of course expressly subject to the Court’s Preliminary Injunction.
7 So too are Daleiden’s agents, including his criminal counsel. Under Rule 65(d), a party’s
8 “attorney” and “other persons who are in active concert or participation with” a party are bound
9 by a Preliminary Injunction Order if they have notice of it. Cooley and Ferreira unquestionably
10 had notice of this Court’s Order, they expressly referenced and discussed it on the same “media”
11 page that splashed materials covered by that Order all over the internet for the world to see.
12 (*Supra* p. 2.) Cooley and Ferreira are therefore responsible for their violations of the Court’s
13 order both as a party’s “attorneys” and as “persons who are in active concert or participation”
14 with a party. Fed. R. Civ. P. 65(d)(2)(B), (C). That two members of the Bar would knowingly
15 participate in a violation of a federal court order beggars belief.

16 In short, the contemnors blatantly “violated a specific and definite order of the court,” by
17 which they were each bound. *Affordable Media, LLC*, 179 F.3d at 1241. There is no defense for
18 this affront to the rule of law.

19 **2. Neither the *Younger* Doctrine Nor Daleiden’s Sixth Amendment Right**
20 **Remotely Justifies the Willful Violation of Court Order.**

21 While it remains to be seen what the contemnors have to say for themselves (having
22 refused to present themselves before this Court at the May 25 hearing), Cooley and Ferreira
23 asserted on Daleiden’s behalf in [REDACTED] that, under *Younger v. Harris*,
24 401 U.S. 37 (1971), this Court cannot [REDACTED]

25 [REDACTED]
26 [REDACTED]
27 This Court’s injunction in no way “interferes” in the prosecution of Daleiden and Merritt
28 in Superior Court. It simply prohibits the Defendants and their agents from publicly disclosing

1 the enjoined materials. Moreover, *Younger* abstention has no application where, as here,
2 “proceedings of substance on the merits have [already] taken place in the federal court.” *Hicks v.*
3 *Miranda*, 422 U.S. 332, 349 (1975); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 238
4 (1984) (holding that the issuance of a preliminary injunction constitutes “a substantial federal
5 court action” rendering *Younger* abstention in applicable); *Doran v. Salem Inn, Inc.*, 422 U.S.
6 922, 929-31 (1975) (federal court action in which a preliminary injunction is granted has
7 preceded well beyond the “embryonic stage” rendering *Younger* inapplicable). This Court
8 entered its Preliminary Injunction Order over a year before the California Attorney General
9 brought charges. Far from remotely justifying their gross misconduct, this ridiculous argument is
10 conclusive proof (as if more were needed), that Cooley and Ferreira planned all along to take the
11 law into their own hands, despite being on notice of this Court’s order.

12 To the extent Cooley and Ferreira claim that Daleiden’s right to a public trial somehow
13 allows them to violate a federal court order that binds them and their client, they are flat wrong.
14 The Sixth Amendment right to a public trial is by no means inviolable, gives way “in certain
15 cases to other rights or interests,” *Presley v. Georgia*, 558 U.S. 209, 213 (2010), and may be
16 overcome when necessary to protect a “higher value” or “overriding interest.” *Waller v. Georgia*,
17 467 U.S. 39, 45 (1984). Accordingly, trial courts retain “broad discretion to control courtroom
18 proceedings” in criminal trials, which “may be subjected to reasonable restrictions” so as to
19 protect “the safety of witnesses” and other overriding confidentiality and safety concerns. *People*
20 *v. Esquibel*, 166 Cal. App. 4th 539, 552 (2008). Accordingly, in dumping NAF materials subject
21 to the injunction all over the internet, the contemnors effectively attempted an end-run around not
22 just this Court’s Preliminary Injunction Order, but the state court’s lawful authority to impose
23 reasonable restrictions on any public proceedings in the California Attorney General’s case.

24 Last, and most remarkably, Cooley and Ferreira have [REDACTED]

25 [REDACTED]
26 [REDACTED]
27 [REDACTED] Cooley has also claimed that, because
28 the NAF footage [REDACTED]

1 [REDACTED]
2 [REDACTED] If Cooley and Ferreira think these
3 statements amount to a justification for their conduct they are sorely mistaken. To the contrary,
4 they constitute express admissions of their knowing and purposeful violation of a federal court
5 order.

6 These assertions are also profoundly dishonest. [REDACTED]

7 [REDACTED] Nor did he publicly disclose the identities
8 of the “Does” referenced in the criminal complaint, which were filed under seal in Superior Court
9 pursuant to a lawful order based on that court’s finding that public disclosure would “endanger
10 the life” of the Does. (Foran Decl., Ex. X.) Acting as Daleiden’s agent, Cooley and Ferreira did
11 that on their website. The California Attorney General is now seeking sanctions and for an order
12 referring Cooley and Ferreira to the State Bar for their misconduct. (*Id.*)

13 Nor can Cooley and Ferreira rely on their own misconduct in [REDACTED]

14 [REDACTED] itself a separate violation. Daleiden and
15 his counsel were prohibited by this Court’s order from doing so, and were therefore required to
16 come before this Court to request permission before [REDACTED]

17 [REDACTED] That they did not do that
18 speaks volumes. The Preliminary Injunction materials, moreover, emphatically are [REDACTED]

19 Beyond all that, the entire thing was an outrageous, pre-planned gambit designed to lay
20 the groundwork for a subsequent, public attack on NAF on its members via the internet. If

21 Daleiden’s criminal attorneys provided the [REDACTED]

22 [REDACTED] The answer is none.

23 And nothing can remotely justify Cooley and Ferreira’s subsequent publication on the internet of
24 the enjoined materials for the entire world to see, including Daleiden’s “Preview” video designed
25 to provoke maximum backlash. Not only did they purposefully violate a federal court order,
26 Cooley and Ferreira also violated Professional Rule of Conduct 5-120, prohibiting members of
27 the Bar from making public materials in violation of “a lawful ‘gag’ order, or protective order.”
28 Cal. Rules of Professional Conduct 5-120.

1 No principle of ethics or logic, no principle of positive or normative law, and nothing the
2 contemnors can now say for themselves could possibly justify their purposeful violation of this
3 Court's order.

4 **B. The Character and Magnitude of the Willful Violation of This Court's**
5 **Preliminary Injunction Warrant Significant Sanctions.**

6 It is of course impossible to compensate NAF for this gross violation. The damage is
7 irreparable and ongoing. *See Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir.
8 2014) ("intangible injuries" constitute irreparable harm); *Regents of Univ. of Cal. v. Am. Broad.*
9 *Cos., Inc.*, 747 F.2d 511, 520 (9th Cir. 1984) (harm to reputation is irreparable injury); *Harris v.*
10 *Bd. of Supervisors, Los Angeles Cnty.*, 366 F.3d 754, 766 (9th Cir. 2004) (physical harm
11 constitutes irreparable injury).

12 As the Court found in enjoining the disclosure of NAF materials, if they were "publicly
13 released, it is likely that the NAF attendees shown in those recordings would not only face an
14 increase in harassment, threats, or incidents of violence, but also would have to expend more
15 effort and money to implement additional security measures." (Dkt. No. 354 36:8-11.) That is
16 exactly what is happening right now. The "irreparable injury to its members' freedom of
17 association . . . to its and its members' security, and to its members' ability to perform their
18 chosen professions," (*id.* at 38:1-5), is unspooling in real time and cannot be fully known.

19 Nevertheless, the Court has broad power to sanction the contemnors. Judicial sanctions in
20 civil contempt proceedings may be employed either "to coerce the defendant into compliance
21 with the court's order" or "to compensate the complainant for losses sustained." *United States v.*
22 *United Mine Workers of America*, 330 U.S. 258, 303-04 (1947). The broad range of sanctions
23 available to the Court includes "fine[s], imprisonment, receivership, and a broader category of
24 creative, nontraditional sanctions." *Jones v. All Am. Auto Prot., Inc.*, No. 3:14-cv-00199-LRH-
25 WGC, 2016 U.S. Dist. LEXIS 69409 (C.D. Cal. May 24, 2016).

26 Compensatory sanctions include attorney's fees and costs incurred by the complaining
27 party in litigating the contemnors' contempt, as well as resources expended or wasted as a result
28 of the contumacious conduct. *See Sea Shepherd*, 774 F.3d at 949-50 (allowing recovery of

1 attorney's fees and costs expended in contempt proceedings as well as resources wasted because
2 of contumacious conduct); *Crystal Palace*, 817 F.2d at 1363 (allowing recovery of funds
3 expended because of contumacious conduct).

4 The Court may also order disgorgement of ill-gotten gains stemming from a violation of a
5 court order. *Jerry's Famous Deli, Inc. v. Papanicolaou*, 383 F.3d 998, 1004 (9th Cir. 2004)
6 (approving of disgorgement of profits as measure for contempt sanction); *Fed. Trade Comm'n v.*
7 *Leshin*, 618 F.3d 1221, 1237 (11th Cir. 2010) (disgorgement is an appropriate "civil sanction for
8 contempt" because it is "remedial in nature," and "attempts to restore the status quo before the
9 contempt"). CMP continues to solicit donations since May 25, and Daleiden's civil counsel is
10 openly fundraising based on the latest violation of this Court's Order. (Foran Decl., Exs. AA,
11 BB.)

12 In seeking to compel compliance with its order, moreover, the Court may also impose
13 sanctions designed to ensure present as well as future compliance. *See CBS Broad. Inc. v.*
14 *FilmOn.com, Inc.*, 814 F.3d 91, 103 (2d Cir. 2016) ("The district court's 'civil contempt powers
15 are particularly adapted to curb recidivist offenders' where future noncompliance is a well-
16 founded concern."). When a court imposes such a sanction, it must consider "the character and
17 magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any
18 suggested sanction in bringing about the result desired." *United Mine Workers of America*, 330
19 U.S. at 303; *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 516 (9th Cir. 1992).

20 Last, the conduct at issue here was willful and constitutes criminal contempt. *United*
21 *States v. Hoover*, 240 F.3d 593, 596 (7th Cir. 2011) ("The essential elements of criminal
22 contempt are a lawful and reasonably specific order of the court, and a willful violation of that
23 order."). Accordingly, the Court has the authority to refer the contemnors to the United States
24 Attorney for investigation and prosecution. *See Fed. R. Crim. P. 42; A.V. By Versace, Inc. v.*
25 *Gianni Versace S.p.A.*, 446 F. Supp. 2d 252, 275-76 (S.D.N.Y. Aug. 30, 2006) (relying on
26 Federal Rule of Criminal Procedure 42 to "refer [the] case to the United States Attorneys' Office
27 for investigation and, if the United States Attorney deems it appropriate, prosecution" where it
28 appeared that party "is in criminal contempt of the Court's orders").

1 The character and magnitude of the violations evidenced here speak for themselves, and
2 justify, at minimum, sanctions as follows:

3 **First**, the Court should order CMP, Daleiden, Cooley, and Ferreira to confirm under oath
4 that they have taken down any material covered by the Order or anything that links to and/or
5 discusses the material covered by the Order, in whatever form, including whether it is marked as
6 “private,” “unlisted,” or otherwise. Counsel for NAF have asked counsel for Daleiden for an
7 accounting of all steps he and they have taken to comply with this Court’s May 25 takedown
8 order. (Foran Decl., Exs. S-U.) We have received no response to those requests save for a
9 statement from Ms. Short that [REDACTED] acted to block access. (*Id.*, Ex. S.) As it currently stands
10 neither NAF nor the Court have any means of knowing what the contemnors and Ms. Short did to
11 comply with its May 25 Order, or what else is out there on a “privately” marked website or
12 otherwise.

13 **Second**, the contemnors and anyone acting on their behalf should be required to turn over
14 to this Court for safekeeping all materials covered by the Order, in whatever form, and to certify
15 under oath that they have done so.

16 This relief is most critical for NAF and its members. The violation that occurred here is a
17 direct result of Daleiden’s and CMP’s continued possession and control of Preliminary Injunction
18 materials. NAF previously asked for this relief, after the Defendants violated this Court’s Order
19 to only disclose footage to Congress that had been “specifically requested.” (Dkt. 155 at 3:12-
20 14.) That violation led to the subsequent public disclosure of 10 hours of NAF materials, and to
21 yet another round of harassment and intimidation directed against NAF. (*See* Dkt. 222-9; 222-10;
22 222-11.) The contemnors should not be permitted to continue to mount a campaign of terror
23 against NAF and its members, placing them and their families in harm’s way each time.

24 **Third**, the contemnors should be referred to the United States Attorney’s Office for
25 investigation and potential prosecution for criminal contempt of court.

26 **Fourth**, Cooley and Ferreira should be referred to the California Bar for investigation and
27 potential disbarment.

28 **Fifth**, the contemnors, jointly and severally, should be required to compensate NAF for all

1 compensatory damages flowing from this contumacious breach, and to compensate NAF for the
2 resources expended or wasted as a result.” NAF’s losses to date are \$17,103.26. [REDACTED]

3 [REDACTED] NAF asks the Court for the opportunity to submit additional evidence by declaration
4 concerning its ongoing losses as NAF continues to deal with this violation.

5 **Sixth**, the contemnors, jointly and severally, should be required to pay all attorneys’ fees
6 incurred by Morrison & Foerster on behalf of NAF for time spent responding to the violation,
7 attempting to ameliorate its impact, and for this contempt proceeding, in the amount of
8 \$96,610.50. (Foran Decl. ¶ 37.) Any fee award will be used to fund additional pro bono work,
9 including on behalf of NAF. (*Id.*)

10 Counsel for NAF asks the Court for the opportunity to submit additional evidence by
11 declaration concerning its ongoing attorney fees.

12 **Seventh**, the contemnors and anyone acting on their behalf, including their civil counsel,
13 should be required to disgorge any “donations” received in any form since the date of the
14 violation.

15 **Eighth**, for daily civil penalties and/or orders of imprisonment in the event any of the
16 contemnors refuse to comply with any order this Court issues finding them in contempt and
17 sanctioning them, unless and until they comply with any such order.

18 **Last**, the Court should issue any other relief or impose any further sanction that it deems
19 necessary to enforce compliance with its orders going forward.

20 **CONCLUSION**

21 For the reasons stated above, NAF requests that the Court hold CMP, Daleiden, Cooley,
22 and Ferreira in contempt of court.

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Dated: June 1, 2017

MORRISON & FOERSTER LLP

By: /s/ Derek F. Foran
Derek F. Foran

Attorneys for Plaintiff
NATIONAL ABORTION FEDERATION