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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CITY OF FULLERTON, Plaintiff, v. FRIENDS FOR FULLERTON'S FUTURE, JOSHUA FERGUSON, DAVID CURLEE, and CHRISTOPHER TENNYSON, and DOES 1 through 20, inclusive, Defendants,	Case No.: 30-2019-01107063-CU-NP-CJC *Assigned to the Hon. Thomas A. Delaney* **OPPOSITION TO PLAINTIFF'S *EX PARTE* APPLICATION FOR AN UNCONSTITUTIONAL PRIOR RESTRAINT** Date: October 24, 2019 Time: 1:30 p.m. Dept.: C24

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OPPOSITION TO MOTION FOR UNCONSTITUTIONAL PRIOR RESTRAINT

I. INTRODUCTION

Defendant Friends for Fullerton's Future, is a website/blog dedicated to covering news, politics, and government affairs in the City of Fullerton ("City"). Two weeks ago, Joshua Ferguson, a frequent contributor to the blog, filed a lawsuit against the City for its repeated obstruction of the disclosure of public records, including numerous records related to police and employee misconduct. (Orange County Superior Court, Case No. 30-2019-01103679-CU-WM-CJC.) Yesterday, in an attempt to silence the blog and in retaliation for Mr. Ferguson's recent lawsuit, the City sued the blog, Mr. Ferguson, and David Curlee, who has also posted on the blog in the past.[1]

The City also noticed this *ex parte* application without complying with the notice requirements in California Rule of Court 3.1203, which provides that "[a] party seeking an *ex parte* order must notify all parties no later than 10:00 a.m. the court day before the *ex parte* appearance, absent a showing of exceptional circumstances that justify a shorter time for notice." The City has not complied with this notice requirement and has made no showing of any exceptional circumstances, nor could this showing be made since the City has been in possession of the information that it claims justifies this *ex parte* application for over four months. (Complaint, Exs. A-B.) The City's claims that it needed to wait to secure its network does not suffice – the City's allegations relate to access of its Dropbox, not its network. Moreover, the Lee declaration states that it advised the City wait until the network was secure to file this lawsuit, which it estimated was 30 days. The declaration notably does not state when it was retained or when it so advised, but given that the City has known about the basic issue underlying this lawsuit since **at least** June, or over 120 days, this argument does not hold water.

The lawsuit seeks to restrain the publication from using documents the City claims were disclosed without authorization, and obtain an order to "remove the inappropriately

[1] The City also sued one Christopher Tennyson, someone not connected with the blog in any way. The only allegation made against him is for the crime of working in the same camera store as Mr. Ferguson.

published…City documents from their Blog," and ultimately require the blog to destroy any records it may have that the City deems it is not "authorized" to possess. (See Proposed Order, p. 2, at (1)(k); Complaint, p. 10, at 27; p. 19, at 2.(d), (e), (f).). This request is an unconstitutional prior restraint. (See *Alexander v. United States* (1993) 509 U.S. 544, 550 [an order prohibiting the press from publishing a news article is a "classic example[s] of prior restraint"].)

Prior restraints violate both the California and United States Constitutions and have been struck down by our courts time and time again. (*Association for Los Angeles Deputy Sheriffs v. Los Angeles Times Communications LLC* (2015) 239 Cal.App.4th 808, 824 ("*ALADS*") ["[f]or more than 100 years, federal and state courts have refused to allow the subjects of potential news reports to stop journalists from publishing reports about them"]; *see also In re Providence Journal Co.* (1st Cir. 1986) 820 F.2d 1342, 1348–1349 [noting that in its nearly two centuries of existence, the Supreme Court has never upheld a prior restraint on the publication of news].) "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors." (*New York Times Co. v. United States* (1971) 403 U.S. 713, 717 ("*New York Times*").)

As the Supreme Court repeatedly has made clear, courts may not enjoin or punish the publication of public records, even when those records reveal allegedly confidential information. (*See, e.g.*, *Florida Star v. B.J.F.* (1989) 491 U.S. 524, 537 [reversing judgment against newspaper that published name of rape victim inadvertently disclosed in police report]; *ALADS*, 813, 821-823 [similar demand to return confidential records was an unconstitutional prior restraint subject to anti-SLAPP motion]; *FMC Corp. v. Capital Cities/ABC.* (7th Cir. 1990) 915 F.2d 300, 301 [applying California law, Seventh Circuit rejected demand that ABC news return all copies of documents that plaintiff alleged were "stolen" from it; court held that ABC was "free to retain copies of any of…documents in its possession (and to disseminate any information contained in them) in the name of the First Amendment"].)

Here, any order that operates to punish or prevent the publication or dissemination of information that the Blog has lawfully obtained is a prior restraint that is presumptively unconstitutional. The City has made no showing - nor could it - satisfying the strict constitutional burdens for orders like the one the City seeks here, that effectively operate as prior restraints on speech. The City's interest in preserving allegedly confidential information and information it claims violates the privacy of third parties does not come close to justifying the extraordinary remedy of a prior restraint. (*See Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, 1243 [prior restraint on speech cannot be justified by allegations of a "threatened violation of the physician-patient privilege, *or any other privilege*" (emphasis added)].)

The City's request that this Court appoint a "third-party forensic expert to examine the computers, servers, and storage media within Defendant's possession, custody or control, or within the possession, custody or control of any members, employees, writers, volunteers, agents, and any persons action in concert with them…" is just as problematic. (Proposed Order, p. 2-3.) This overbroad request is prohibited by the Shield Law, which protects journalists from disclosing unpublished information or sources of information obtained in the course of gathering and reporting on the news. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 796-97.) The federal Reporter's Privilege provides independent protection from the City's overreach. The California Supreme Court has recognized that this First Amendment-based protection applies in state court, as a complement to the state's Shield Law. (*See New York Times Co. v. Superior Court* (1990) 51 Cal.3d 453, 469 (Mosk, J., concurring and dissenting); *Mitchell v. Superior Court* (1984) 37 Cal.3d 268, 277-79.) Under the qualified federal privilege, a party cannot compel a journalist to provide testimonial information or produce notes and related materials unless the party first demonstrates that the information sought "goes to the heart" of the case, is "non-cumulative," and the party "has exhausted all alternative sources of obtaining the needed information." (*Mitchell*, 37 Cal.3d at 280, 282; *Shoen v. Shoen* (9th Cir. 1995) 48 F.3d 412, 416 ("*Shoen II*").) The Ninth Circuit has emphasized that the federal constitutional standard must be rigorous to "ensure that compelled disclosure is the

exception, not the rule. … Indeed, if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished." (*Shoen II*, 48 F.3d at 416.).

If the Constitutional issues underlying the City's *ex parte* application were not enough, the City's lawsuit is also a Strategic Lawsuit Against Public Participation - a SLAPP. The claims arise from a multitude of protected activity – the filing of a public records request (a constitutional right that underlies our democratic system of governance), newsgathering, reporting on issues of great public concern, and filing a petition to compel the disclosure of records. Had the Defendants been provided with proper notice of this *ex parte*, a Special Motion to Strike under Code of Civil Procedure, section 425.16, (anti-SLAPP motion) would have already been filed, setting forth the wealth of authorities that support Defendants' position – precisely why the City attempted to avoid proper notice.

While the City has previously articulated the position that the Blog is not a news organization and warrants no protections, this is incorrect. (*See O'Grady v. Sup.Ct. (Apple Computer, Inc.)* (2006) 139 Cal.App.4th 1423, 1457 [noting that it could think of no workable test or principle that would distinguish 'legitimate' from 'illegitimate' news" and "decline[d] the implicit invitation to embroil ourselves in questions of what constitutes "legitimate journalism"]; *People v. Von Villas* (1992) 10 Cal.App.4th 201, 231-32 [applying shield law protections to freelance writer].)

Finally, the arguments are factually unsupported. The City's declarations are objectionable[2] - filled with logical fallacies, unwarranted and unsupported conclusions, and baseless allegations that cannot be properly addressed on an *ex parte* basis, especially one without proper notice. Essentially, the City argues that it has determined that the Defendants are criminals because they accessed a Dropbox link sent by the City to Mr. Ferguson with his name on it. (*Ex Parte* App., p. 3.) The declarations make numerous

[2] Defendants intend to file objections to the City's declarations for a variety of reasons, but have not yet had the opportunity to do so given the length of the declarations and the City's lack of notice.

allegations that someone using a VPN or a TOR (both ways in which to make one's self unidentifiable online[3]) accessed files through the City's Dropbox account that the City did not intend to be public. Despite the fact that the declarations explain that a person using a VPN or TOR cannot be identified, they make the outrageous leap that it was Joshua Ferguson or "his accomplices." The City has merely complied a bunch of technical information into its declarations, hoping that this Court will not understand that there is no actual evidence that the people it has named in this lawsuit have anything to do with accessing the files it claims were confidential, even though they were apparently maintained in such a careless manner that completely undermines the claim that the information is confidential. The City provides no factual support for its requested relief. For example, the documents that the City claims are confidential and that were posted on the Blog could have been leaked by any number of people. No can the City demonstrate what files the Blog has, if any, in its possession, undermining any threat of publication in the future and the need for any restraining order, much less one issued on an emergency basis.

Given the City's questionable "evidence," untenable legal theories, and the immense weight of the rights at issue, Defendants respectfully request that this Court deny the City's *ex parte* application in its entirety and postpone any further action on this case until after Defendants' Anti-SLAPP motion can be heard.

II. ARGUMENT

A. The City Seeks An Unconstitutional Prior Restraint.

As the United States Supreme Court repeatedly has recognized, prior restraints constitute "the most serious and the least tolerable infringement on First Amendment rights." (*Nebraska Press Ass'n v. Stuart* (1976) 427 U.S. 539, 559.) At its core, the prior-restraint doctrine expresses a constitutional aversion to government censorship of the

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[3] See https://www.pcmag.com/roundup/296955/the-best-vpn-services for an article describing the importance of internet security and why people need VPNs. Spoiler alert: it's not because they are hackers.

press. The Supreme Court has explained that prior restraints against speech must be held to a stricter standard than even post-publication criminal penalties because:

> a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

(Southeastern Promotions v. Conrad (1975) 420 U.S. 546, 559.)

When the government, including the judiciary, censors the press, it harms the "main purpose" of the First Amendment, which is "to prevent all such previous restraints upon publications as [have] been practiced by other governments." (*Nebraska Press,* 427 U.S. at 557.) It is widely agreed that "[t]here is, indeed, something peculiarly totalitarian about government systems of prior restraint." (R. Smolla, Smolla & Nimmer on Freedom of Speech § 15:10 (2004).) The Supreme Court has "learned…from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers." (*Nebraska Press,* 427 U.S. at 560.) This core principle is critical here; "the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." (*New York Times,* 403 U.S. at 717 (Black, J., concurring).)

Because prior restraints are so antithetical to the First Amendment, they are "presumptively unconstitutional." (*Id.* (emphasis added).) The Court has declared that prior restraints may be justified, if at all, only in the most exceptional circumstances, such as to limit dissemination of information about troop movements in wartime, *Near v. Minnesota* (1931) 283 U.S. 697, 716, or to "suppress[ ] information that would set in motion a nuclear holocaust." (*New York Times,* 403 U.S. at 726 (Brennan, J., concurring).) Similarly, in granting an emergency stay of a prior restraint against a news organization, Justice Blackmun declared that such orders are a "most extraordinary remedy" that may be used "only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures." (*CBS v. Davis* (1994) 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers).) Absent a "clear and

present danger," (*Nebraska Press*, 427 U.S. at 563) to a "state interest of the highest order," (*Smith v. Daily Mail Publishing Co.* (1979) 443 U.S. 97, 102), such restraints cannot be upheld.

To date, those circumstances have remained purely hypothetical[4]; the Court without exception has invalidated prior restraints, even where substantial interests would be impaired by the publication sought to be enjoined. (*See, e.g.*, *Near*, 283 U.S. at 716-718 [invalidating prior restraint against defamatory and racist publication that allegedly disturbed the "public peace"]; *Nebraska Press*, 427 U.S. at 556-561 [invalidating prior restraint against publication of information about criminal defendant's confession, despite alleged risk to Sixth Amendment rights]; *New York Times*, 403 U.S. at 714 [invalidating prior restraint against publication of the "Pentagon Papers," despite the government's argument that disclosure of that information posed a "grave and immediate danger" to national security.] In fact, the Court "has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial." *Procter & Gamble Co. v. Bankers Trust Co.* (6th Cir. 1996) 78 F.3d 219, 227; *accord South Coast Newspapers, Inc. v. Superior Court* (2000) 85 Cal. App. 4th 866, 870 [court observed that it was "unaware of any case, in either federal or state court, that has upheld a prior restraint under the *Nebraska Press* criteria"].)

California's state constitutional guarantee of free speech and free press "is more definitive and inclusive than the First Amendment"; as a consequence, the burden on a party seeking a prior restraint in this state is even more onerous and may be insurmountable. (*In re Marriage of Candiotti* (1995) 34 Cal. App. 4th 718, 724.) More than a century ago, the California Supreme Court explained the breadth of the state's protection of speech and press rights:

[4] Courts have yet to identify an interest that would satisfy the "state interest of the highest order" standard. As one commentator has explained, "*Florida Star* itself raised the presumptive level [of this standard] beyond realistic reach." (J. Mintz, The Remains of Privacy's Disclosure Tort, 55 Md. L. Rev. 425, 455 (1996).)

> The wording of [Article I, section 2(a)] is terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely ... publish his sentiments is unlimited[.] ... He shall have no censor over him…,but he shall be held accountable to the law for…what he publishes.

(Dailey v. Superior Court (1896) 112 Cal.94, 97.)

Not surprisingly, California courts have also uniformly struck down prior restrains, which the California Supreme Court has denounced as "the most severe method of intellectual suppression known in modem times." (*Flack v. Municipal Court* (1967) 66 Cal.2d 981, 988 n.5. *See, e.g., KCST-TV Channel 39 v. Municipal Court* (1988) 201 Cal.App.3d 143, 144-145 [refusing to restrain publication of information that was lawfully obtained, noting that "long-standing Supreme Court precedent establishes the court's prohibitory order is an unconstitutional prior restraint violating the First Amendment"]; *KGTV Channel 10 v. Superior Court* (1994) 26 Cal.App.4th 1673, 1677 [striking down order barring press from publishing photographs of criminal defendants as an unconstitutional prior restraint]; *Freedom Communications v. Superior Court* (2008) 167 Cal.App.4th 150, 251 [finding that order preventing a news organization from publishing lawfully obtained information was "unconstitutional under both the United States and California Constitutions," and, consequently, "must immediately fall"].)

Most recently, in a nearly identical situation, the court of appeal granted an anti-SLAPP motion after a union tried to clawback and stop the publication documents about police officers, which the union claimed were confidential and could not be released under various protective statutes. (*ALADS,* 239 Cal.App.4th at 920.) The court summed up its decision affirming the trial court's grating of the anti-SLAPP motion:

> [The union] has cited no case permitting the kind of injunction it seeks here, to restrain a newspaper from publishing news articles on a matter of public concern….because there is no such case. For more than 100 years, federal and state courts have refused to allow the subjects of potential news reports to stop journalists from publishing reports about them. (*Providence Journal, supra*, 820 F.2d at pp. 1348–1349 ["In its nearly two centuries of existence, the Supreme Court has never upheld a prior restraint on pure speech"; the Supreme Court has never upheld a prior restraint on the publication of news.])

(Id., at 824.) The request by the City in this case is no different. It is a prior restraint that the is presumptively unconstitutional and must be rejected.

B. Prior Restraints Are Presumptively Unconstitutional.

As the cases cited in the preceding section shows, a request for a prior restraint comes "with a heavy presumption against its constitutional validity." (*Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415, 419; *see also Freedom Communications,* 167 Cal. App. 4th at 154 [holding prior restraint is a "most extraordinary remedy that may be used only in exceptional cases"].) A court may not issue even a temporary prior restraint unless the restriction is necessary "to further a state interest of the highest order," (*Smith*, 443 U.S. at 102), and the publication "threaten[s] an interest more fundamental than the First Amendment itself." (*Procter & Gamble,* 78 F.3d at 227.)

This is an extremely strict standard. The court must find evidence of a "clear and present danger" of harm to a paramount state interest; "speculati[on]" or "factors unknown and unknowable" never will justify a prior restraint. (*Nebraska Press,* 427 U.S. at 563.) Thus, for example, "[i]t is not enough for a court to decide that the fair trial may be affected by the exercise of free speech." (*Hurvitz*, 84 Cal. App. 4th at 1241.) Instead, the proponent of the restraint bears "the burden of producing evidence to establish the prejudice." (*Ibid.*) The City did not come close to meeting this standard, nor could it.

C. A Prior Restraint Is Not Justified Even Where Information Is Confidential Or Obtained Illegally By A Third Party And Disclosed To The Press.

There is a long line of cases from the Supreme Court which have held that the constitutional presumption against prior restraints applies regardless of whether the information is confidential or obtained illegally. In the landmark *New York Times* case, the Supreme Court rejected a prior restraint to prevent the newspaper's publication of the Pentagon Papers, even though the Court acknowledged that it was a "classified study" the disclosure of which was not authorized. 403 U.S. at 714. (*See also Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469 [1st Amend. protected reporter who published rape victim's name in violation of state criminal statute]; *Oklahoma Publishing Co. v. District Court* (1977) 430 U.S. 308 [reversing injunction which prevented the reporting of the name or likeness of a juvenile criminal defendant, in spite of a state law that required juvenile proceedings to be held in private]; *Landmark Communications v. Va.* (1978) 435 U.S.

829, at 831-32 [invalidating newspaper's punishment for publishing information from confidential judicial disciplinary proceedings]; *Smith v. Daily Mail Publishing,* 443 U.S. 97 [invalidating state law that criminalized publication of juvenile murder suspect's name without court permission]; *Florida Star,* 491 U.S. 524 [1st Amend. protected newspaper that published rape victim's, which violated state criminal statute]; *Bartnicki v. Vopper* (2001) 532 U.S. 514, 517, 535 [1st Amendment protected journalists who reported contents of illegally intercepted telephone conversations even though they knew "or at least had reason to know" the interceptions were unlawful because bargaining negotiations between school board and union were matters of public concern].)

Relying on this unbroken line of United States Supreme Court authorities and the broader state constitutional guarantee of free speech,[5] California courts have also held that the constitutional presumption against prior restraints applies regardless of whether the information is confidential or obtained illegally. In *Nicholson v. McClatchy Newspapers* (1986) 177 Cal.App.3d 509, 521, the plaintiff alleged that the newspapers' reporting of the fact that the State Bar had found him unqualified for appointment to the bench, which was required to be kept confidential under the Government Code, violated his right of privacy. (*Ibid.*) In ruling for the newspapers, the court of appeal recognized both the plaintiff's expectation of confidentiality and that someone undoubtedly "acted in violation of this law in disclosing the evaluation to the media defendants." (*Id.* at 516.) But, the court said, "the First Amendment protects the ordinary news-gathering techniques of reporters and those techniques cannot be stripped of their constitutional shield by calling them tortious." (*Id.* at 513.) The court stated that ordinary news-gathering techniques "of course, include asking persons questions, including those with confidential or restricted information." (*Id.* at 519.) "While the government may desire to keep some proceedings confidential and may impose the duty upon participants to maintain confidentiality, it may

[5] *See, e.g., Gilbert v. National Enquirer, Inc.* (1996) 43 Cal. App. 4th 1135, 1144, "the California Constitution provides an even broader guarantee of the right of free speech and the press than does the First Amendment."]

not impose criminal or civil liability upon the press for obtaining and publishing newsworthy information through routine reporting techniques." (*Id*. at 519–520.)

Most recently, in *ALADS,* 239 Cal.App.4th at 826-827, the court of appeal upheld a trial court ruling which granted an anti-SLAPP motion in circumstances very similar to this case. The Los Angeles Times received information about the qualifications of police officers, including information about past instances of misconduct, records which arguably may be withheld from public disclosure pursuant to certain statutes. (*Ibid*.) With no evidence of wrongdoing, the union claimed that the Los Angeles Times had obtained the records "through criminal means." But the court found that the union "ha[d] not distinguished, and cannot distinguish, the 'wealth of both State and Federal case law, discussing the protection journalists and the press enjoy under the First Amendment where there have been allegations that published or disclosed content had been illegally obtained.'" (*Id*. at 819.)

In *Florida Star*, the Supreme Court explained that it is the responsibility of the government to deal with the fallout from its failure to protect confidential information:

> Where, as here, the government has failed to police itself in disseminating information, it is clear under *Cox Broadcasting*, *Oklahoma Publishing*, and *Landmark Communications* that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity. Once the government has placed such information in the public domain, 'reliance must rest upon the judgment of those who decide what to publish or broadcast.

(Id. at 538 (citations omitted); *see also Ashcraft v. Conoco* (2000) 218 F.3d 288, 303 ["No citizen is responsible, upon pain of criminal and civil sanction, for ensuring that the internal procedures designed to protect the legitimate confidences of government are respected"].)

As Justice Stewart once explained, the "government cannot take it upon itself to decide what a newspaper may and may not publish," and that although "*government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press*, unless the

need for secrecy is manifestly overwhelming." (*Landmark Communications*, 435 U.S. at 849 (Stewart, J., concurring) (emphasis added).)

As these cases demonstrate, whether information is released by mistake, obtained in violation of criminal or civil statutes, or even stolen by a third party, courts have consistently held that both pre-publication restraints and post-publication sanctions violate the First Amendment, absent exceptional circumstances. Here, the Blog did nothing improper, much less illegal, to obtain the information at issue here and its publication of that information cannot be lawfully restrained.[6]

D. Privilege, Privacy, Or Even Competing Constitutional Rights Are Insufficient To Justify The Extraordinary Remedy Of A Prior Restraint.

The City argues the documents at issue contain privileges and confidential information in an attempt to justify its presumptively unconstitutional request. These justifications have all been previously rejected.

In a case where the trial court issued an order barring the disclosure of information protected by the patient/physician privilege, which the trial court found would have violated the patients' rights of "privacy and dignity," the court of appeal found that sparing citizens from embarrassment, shame, or even intrusions into their privacy has never been held to outweigh the guarantees of free speech in our federal and state Constitutions. *Hurvitz,* 84 Cal.App.4th at 1244. The court also noted that "[r]espondent can point to no case where any court in the nation has held that a threatened violation of the patient/physician privilege or any other privilege justifies a prior restraint of speech." *Id.* at 1243. The court recognized that while there are "statutes prohibiting health care providers from disclosing confidential health care information," "they cannot support a prior restraint on speech." *Ibid.*

[6] Contrary to the City's argument, the Blog has no burden to demonstrate how it got access to any information it published. That information is protected by the Shield Law. Any inference that the invocation of one's Constitutional rights is akin to suggesting that there should be a negative inference from a criminal defendant's decision not to testify, which is clearly erroneous. Moreover, that burden of proof in this case and the burden to meet the high showing necessary for any TRO, sits squarely on the shoulders of the City.

The Supreme Court has also made clear that merely "[d]esignating the conduct as an invasion of privacy" does not warrant a prior restraint. (*Organization for a Better Austin*, 402 U.S. at 419-420 [rejecting claim that privacy interests justified restraint against distribution of leaflets].)

Courts have also denied requests for prior restraints even when competing constitutional rights are at stake. (*See, e.g.*, *United States v. McKenzie* (5th Cir. 1984) 735 F.2d 907, 910 [describing prior proceedings in which an order enjoining CBS from airing a segment of "60 Minutes" involving an ongoing criminal case was stayed as an unconstitutional prior restraint]; *United States v. Salameh* (2d Cir. 1993) 992 F.2d 445, 446 ["[a] prior restraint on constitutionally protected expression, even one that is intended to protect a defendant's Sixth Amendment right to trial before an impartial jury, normally carries a heavy presumption against its constitutional validity"]; *Menendez v. Fox Broadcasting* (C.D. Cal. April 19, 1994) 22 Med. L. Rep. 1702, 1703 [denying request to enjoin docudrama about highly-publicized murders while retrial of defendants was pending]; *Providence Journal,* 820 F.2d 1342, 1345, modified on reh'g en banc, 820 F.2d 1354 (1st Cir. 1987), cert. dismissed on other grounds, *United States v. Providence Journal Co.* (1988) 485 U.S. 693 [reversing "temporary restraining order barring publication of [FBI] logs and memoranda" to protect surveilled citizen's Fourth Amendment rights…].)

Nebraska Press highlights the extraordinarily heavy constitutional presumption against prior restraints that prevent the press from disseminating information about criminal proceedings. In that case, the Supreme Court struck down a prior restraint that barred the media from publishing information about a defendant's alleged confession in a highly-publicized mass-murder case in rural Nebraska, rejecting the argument that the potential prejudice to the defendant's Sixth Amendment right to a fair trial trumped the press' First Amendment right to be free of government censorship. (427 U.S. at 556-561.) If the defendant's fair-trial rights did not justify a prior restraint in those circumstances – the imminent disclosure of highly inculpatory information about an emotionally-charged

crime in a county with a relatively small jury pool – then the presumption against such orders is virtually insurmountable.

E. <u>An Order Compelling Return Lawfully Acquired Documents Is Itself A Prior Restraint</u>.

The constitutional prohibition against prior restraints extends to requests for court orders to review or confiscate editorial materials, just as it does to direct orders forbidding publication. For example, in *FMC Corp.,* 915 F.2d 300, 301, the Seventh Circuit applied California law in addressing a claim that an ABC news report featured stolen documents. The court held that ABC was "free to retain copies of any of … documents in its possession (and to disseminate any information contained in them) in the name of the First Amendment." (*Ibid.*; *see also Goldblum v. NBC* 584 (9th Cir. 1978) F.2d 904, 907 [vacating order requiring NBC to submit film for prebroadcast review because "[t]he order to produce the film in aid of a frivolous application for a prior restraint suffers the constitutional deficiencies of the application for an injunction"]; *Council of the City of New Orleans v. Washington* (La. App. 2009) 13 So.3d 662 [vacating judgment compelling return, and restraining publication, of privileged records that agency had released pursuant to a public records request, when records were widely disseminated over a ninety-day period].)

Here, too, the Blog is entitled to retain copies of the records it acquired in the course of its newsgathering.

F. <u>The City Provides No Evidence Supporting Its Unconstitutional Request</u>.

Yet another insurmountable hurdle to the City's request – the City can provide no admissible evidence of what the Blog or its reporters actually have in their possession. Instead, the City asks this Court to enjoin the Blog from publishing any records it *might* have in its possession. But the *mere possibility* that a party's interest *could* be impacted could never be sufficient to satisfy the strict constitutional requirements for a prior restraint. (*Nebraska Press,* 427 U.S. at 563.) It is not enough for a court to decide that some right *may* be affected by the exercise of free speech. (*Hurvitz*, 84 Cal.App.4th at

1241.) Because there is *no* evidence whatsoever of what information the Blog may or may not have, the City cannot show there is any threat.

G. **The Requested Relief Is Ineffective Since The Information Has Already Been Published.**

Prior restraints are particularly inappropriate where, as here, the information sought to be suppressed already has been made available to the public. Simply put, once "the cat is out of the bag," any request to restrain publication or to seal the information is "ineffective" in advancing the countervailing compelling interest in secrecy. As this Second District explained when it denied a request for a prior restraint in *Hurvitz*, 84 Cal. App. 4th at 1245, "neither the state nor the federal Constitution permits the court to lock the barn door after the horse is gone."

The Fourth Circuit's decision in *In re Charlotte Observer* (4th Cir. 1990) 921 F.2d 47 is instructive. There, the district court enjoined two reporters from publishing the name of the target of an ongoing grand jury investigation after it was inadvertently disclosed in open court in violation of confidentiality laws. Id. at 49-50. The appellate court vacated the injunction as an impermissible prior restraint, noting that "[o]nce announced to the world," "the cat [was] out of the bag" and "the information lost its secret characteristic, an aspect that could not be restored by the issuance of an injunction." (*Id*. at 50; *see also Bank Julius Baer & Co. Ltd. v. WikiLeaks* (N.D. Cal 2008) 535 F.Supp.2d 980, 985 [refusing to enjoin further publication of bank records and related documents that had been posted on defendant's website]; *In re Continental Illinois Securities Litig*. (7th Cir. 1984) 732 F.2d 1302, 1312-13 [references and scattered quotes made public were sufficient to support public access; it did not matter that entire report was not read aloud in court); *Kamakana v. City and County of Honolulu* (9th Cir. 2006) 447 F.3d 1172, 1184 [because "many names or references for which the United States sought redaction were either already publicly available or were available in other documents being produced" to the press, government could not meet its burden of showing the information could remain confidential].)

Whether the genie is out of the bottle, the cat is out of the bag, or the chicken has flown the coop, an injunction could no longer protect the interest that the City seeks to protect, even if it were worthy of such an extraordinary remedy. The publication of information that the City asks this Court to restrain has already occurred. Since no injunction can change that, the City's requested relief would be ineffective and should be denied.

H. The City's Requested Restraining Order Violates the Shield Law.

The City's request that this Court appoint a "third-party forensic expert to examine the computers, servers, and storage media within Defendant's possession, custody or control, or within the possession, custody or control of any members, employees, writers, volunteers, agents, and any persons action in concert with them…" violates the Shield Law and the First Amendment based Reporter's Privilege. (Proposed Order, p. 2-3.)

The Shield Law provides in pertinent part:

> (b) a publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, *shall not be adjudged in contempt by a judicial…body having the power to issue subpoenas* for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper …*or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.*
>
> As used in this subdivision, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, out takes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication whether or not published information based upon or related to such material has been disseminated.

(Cal. Const., Art. I, § 2, emphasis added; *see also* Evid. Code § 1070 [constitutional provision adopted in response to court rulings attempting to limit the scope of Evidence Code section 1070].)

The purpose of the Shield Law (Cal. Const., Art I, Sect. 2., Cal. Evidence Code 1070) is to keep newspersons from becoming agents of discovery, to maintain their neutrality and objectivity, and "to protect [their] ability to gather and report the news." (*Id*. at 806,

fn. 20.) This protection "reflects a strong interest in the Legislature and the people of this state to afford newspersons the highest possible level of protection from compelled disclosure of confidential sources and confidential information." (*Playboy Enterprises, Inc. v. Superior Court* (1984) 154 Cal.App.3d 14, 27.) "[N]othing in the shield law's language or history to suggest the immunity from contempt is qualified such that it can be overcome by a [civil litigant's] showing of need for unpublished information[.]" (*Miller v. Superior Court* (1999) 21 Cal.4th 883, 890.) Nor can a journalist lose his or her shield law immunity against being compelled to disclose how information came into the journalist's possession merely by reporting some of the information obtained. (*In re Jack Howard* (1955) 136 Cal.App.2d 816, 818-19.)

The shield law is, by its own terms, *absolute* rather than qualified in immunizing a newsperson from contempt for revealing [sic] unpublished information obtained in the news gathering process." (*Miller v. Superior Court* (1999) 21 Cal.4th 883, 890-91.) The immunity contained in California's Shield Law is absolute in a civil lawsuit. (*Id.* at 901.)

In addition to the constitutional and statutory protections offered by California's Shield Law, journalists have a qualified testimonial privilege that derives from the First Amendment to the United States Constitution. The Ninth Circuit has expressly recognized a qualified privilege, grounded in the First Amendment, permitting journalists to resist the disclosure of unpublished information obtained during the course of newsgathering activities:

> Rooted in the First Amendment, the privilege is a recognition that society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.

Shoen v. Shoen ("*Shoen I")* (9th Cir. 1993) 5 F.3d 1289, 1292 (internal quotations and citation omitted.) Likewise, the California Supreme Court expressly has recognized a qualified journalists' privilege arising from the First Amendment. (*See Mitchell*, 37 Cal. 3d at 274-84.)

In *Shoen I*, the Ninth Circuit Court of Appeals explained that it, along with eight other federal circuits, had established a "qualified privilege for journalists" under the First Amendment against compelled disclosure. (*Shoen I*, 5 F.3d at 1292 & n.5.) The court also held that this qualified federal privilege applies even to non-confidential information. (*Id.*) at 1295. In *Shoen II* (on appeal after remand), the Ninth Circuit set forth the stringent test that a party seeking disclosure must satisfy:

> where information sought is non-confidential, a civil litigant is entitled to requested discovery notwithstanding a valid assertion of the journalist's privilege by a nonparty only upon a showing that the requested material is (1) unavailable despite exhaustion of all reasonable alternative sources; (2) non-cumulative; ***and*** (3) clearly relevant to an important issue in this case.

(*Shoen II*, 48 F.3d at 416 (emphasis added).)

The City makes no attempt to even address these prongs.

I. <u>This Is A SLAPP Lawsuit</u>.

The City's egregious and meritless Complaint amounts to a retaliatory strategic lawsuit against public participation, and is prohibited by Code of Civil Procedure, section 425.6.

At the first prong, "the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) A party meets this burden by demonstrating that the act underlying the claim fits one of the categories spelled out in section 425.16(e). (*Braun v. Chronicle Publ'g Co.* (1997) 52 Cal.App.4th 1036, 1043.)

Section 425.16(e) defines an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" to include:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law,
>
> (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law,

(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or

(4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

At the first prong, "the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity." (*Navellier,* 29 Cal.4th at 89.) A party meets this burden by demonstrating that the act underlying the claim fits one of the categories spelled out in section 425.16(e). *Braun v. Chronicle Publ'g Co.,* 52 Cal.App.4th at 1043.

Here, the City's claims all arise from protected activity. The act of filing a CPRA request, newsgathering, reporting on issues of public interest, the exercise of its right to Petition in filing the CPRA lawsuit are all protected by Section 425.16(e). *(See e.g. Lieberman v. KCOP Television* (2003) 110 Cal.App.4th 156, 162, 166 (2003) [SLAPP statute broadly applies to claims arising from allegedly tortious television newsgathering activities; "conduct" within the meaning of the SLAPP statute "is not limited to the exercise of [the] right of free speech, but to all conduct in furtherance of the exercise of the right of free speech"]; *Lafayette Morehouse v. Chronicle Publ. Co.* (1995) 37 Cal.App.4th 855, 864 [anti-SLAPP statute protected a newspaper and its reporters in a lawsuit "based on [their] news reporting activities"]; *Braun, supra*, 52 Cal.App.4th at 1043-45 [applying anti-SLAPP statute to media defendants; affirming order striking claims arising from articles about a state investigation]; *Sipple v. Found. for Nat'l Progress* (1999) 71 Cal.App.4th 226, 240 [granting anti-SLAPP motion as to libel claim arising from article about custody dispute); *Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1117 [citing with approval Lafayette court's holding that statute applies to media defendants]; *Thomas v. Los Angeles Times Communs., LLC* (2002) 189 F.Supp.2d 1005, 1013-1015 [striking lawsuit asserting claims of defamation based on article that raised questions about plaintiffs alleged World War II activities].

Once it is determined that the subject matter of litigation arises out of the Blog's protected activity, the City must show a probability of prevailing on its claim. In this case,

for all the reasons set forth above, the City could never meet its burden because the relief it seeks is an unconstitutional prior restraint and an order to identify and confiscate journalists' unpublished and source material. There is no authority, either in this state or in the nation, that would allow a government agency to stop the press from publishing information it lawfully obtained. (*ALADS,* 239 Cal.App.4th at 819 [noting the wealth of both State and Federal case law, discussing the protection journalists and the press enjoy under the First Amendment where there have been allegations that published or disclosed content had been illegally obtained by the source].)

In order to avoid the obvious application of the anti-SLAPP statute, the City alleges that the Defendants' have committed criminal acts – a serious and completely unfounded legal claim. However, the mere allegation of illegal activity is wholly insufficient to defeat an anti-SLAPP motion. If mere allegations of criminal conduct were sufficient to overcome these fundamental protections or an anti-SLAPP motion, allegations of criminal conduct would be in every complaint. But case law undermines such a result.

While illegal conduct has been long held to fall outside of protected speech, to defeat an anti-SLAPP motion, the criminal illegality must be conceded or the evidence must be "uncontroverted and conclusive" to trigger an exemption from anti-SLAPP because "to find otherwise would eviscerate the anti-SLAPP statute's protections because the plaintiff could preclude the statute's application simply by alleging criminal conduct by the defendant. (*Safari Club International v. Rudolph* (9th Cir. 2017) 845 F.3d 1250, 1259.)

In *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320, the California Supreme Court first confirmed that the protections of the anti-SLAPP statute are not applicable when "the defendant concedes, or the evidence conclusively establishes, that the assuredly protected speech or petition activity was illegal as a matter of law." (*Id.* at 320.) While the Flatley court ultimately held that the conduct in that case was uncontested and illegal as a matter of law, it emphasized that the holding was "based on the specific and extreme circumstances" of the case. (*Id.* at 332.)

In *Flatley*, the Court differentiated between illegal conduct which can be proven as a matter of law "either through defendant's concession or by uncontroverted and conclusive evidence" and contested allegations of illegal conduct.

In cases where the illegal conduct is ***uncontested***, it is a preliminary question relevant to analysis of the first prong of an anti-SLAPP motion. "In such a narrow circumstance, where either the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence, the motion must be denied." (*Id.* (citing *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1365.)

However, this case does not involve a situation where the allegations of illegal conduct are uncontested. In fact, at every stage, Defendants have vigorously disputed that there was anything improper or illegal. In such a case, the California Supreme Court specifically held that the narrow exception cannot be resolved in the first step. "If... a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits." (*Flatley*, at 316.)

In so ruling, the Court in *Flatley* relied on *Paul for Council,* 85 Cal.App.4th at, 1367-1368. In *Paul for Council*, an appellate court denied an anti-SLAPP motion but noted it was only because the defendants conceded the illegal nature of their activities, as a matter of law. (*Id.* at 1367.) The court the court then explicitly cautioned that if, "unlike the case here" illegality cannot be demonstrated as a matter of law, "then the claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's burden to provide a prima facie showing of the merits of the plaintiff's case....[T]his is an *additional* burden which the plaintiff must address." (*Id.* at 1367-1368.)[7]

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[7] The cases following *Paul for Council* have unanimously headed this warning, overwhelmingly finding that mere allegations of illegal activity are insufficient to deny an otherwise meritorious motion to strike. (*See, e.g., Zucchet v. Galardi* (2014) 229 Cal.App.4th 1466, 1477–1480, [exemption not satisfied because the allegedly false testimony and statements to federal authorities were "still very much in dispute"]; *Reed v. Gallagher* (2016) 248 Cal.App.4th 841, 853 [claim of violation of Pen. Code § 115.2 was insufficient because no proof of intent to deceive or evidence of malice]; *Hansen v. California Dept. of Corrections and Rehabilitation* (2008) 171 Cal. App. 4th 1537, 1542 [allegations that defendant was involved in a "web of lies" that resulted in the search of

The proper analysis was once again confirmed by the California Supreme Court in the recent decision, *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 424, a case conveniently ignored by the County, which held that contested allegations of illegal conduct were insufficient to overcome the first prong of the anti-SLAPP statute.

The City sued three of its former council members and a former city administrator, claiming they violated Government Code section 1090, by voting on a waste hauling contract in which they held a financial interest. (*Id.* at 412-413.) The defendants moved to strike the complaint under the anti-SLAPP statute, claiming that voting on the contract constituted protected activity. (*Id.)* In response, the City made the same claim that the County asserts here: that the anti-SLAPP statute does not apply because the allegations in the litigation were based on illegal conduct, which is not protected speech. (*Id.* at 424.)

However, the California Supreme Court found the "assertion of illegality" to be "premature." (*Id.)* "The first step of the anti-SLAPP analysis is limited to whether a claim arises from protected activity. We made it clear in *Flatley* that conduct must be illegal *as a matter of law* to defeat a defendant's showing of protected activity. The defendant must concede the point, or the evidence conclusively demonstrate it, for a claim of illegality to defeat an anti-SLAPP motion at the first step." (*Id.*) The Court noted that "defendants vigorously dispute [the allegations of criminal wrongdoing], both as a matter of law and a question of fact" and that when a "factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step.... Instead, it must be

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the plaintiff's home was insufficient]; *Cabral v. Martins* (2009) 177 Cal.App.4th 471, 482 [attorney's modification of an estate plan that allegedly assisted in the evasion of child support was "neither inherently criminal nor otherwise outside the scope of normal, routine legal services" to bar the defendant's use of the anti-SLAPP statute]; *M.F. Farming, Co. v. Couch Distributing Co.* (2012) 207 Cal. App. 4th 180, 195–197 (disavowed in part, on other grounds, in *Baral v. Schnitt* (2016) 1 Cal.5th 376, 396, fn. 11) [submitting allegedly fraudulent plans to a city in connection with permitting process did not trigger illegality exemption and bar use of the anti-SLAPP statute]; *Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 711–713 [allegation that therapist conspired to falsify evidence insufficient because the therapist did not concede that she engaged in any unlawful activity nor was there any uncontroverted evidence that her activities were unlawful as a matter of law].)

raised by the County "in connection with [its] burden to show a probability of prevailing on the merits." (*Id.*)

Such is the case here. Despite the City's claims, Defendants vigorously contest the City's baseless and unfounded allegations.

III. CONCLUSION

The basic purpose of the First Amendment is to prevent the government from imposing prior restraints against the press. "Regardless of how beneficent-sounding the purposes of controlling the press might be," the Court has "remain[ed] intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." (*Nebraska Press*, 427 U.S. at 560-561.)

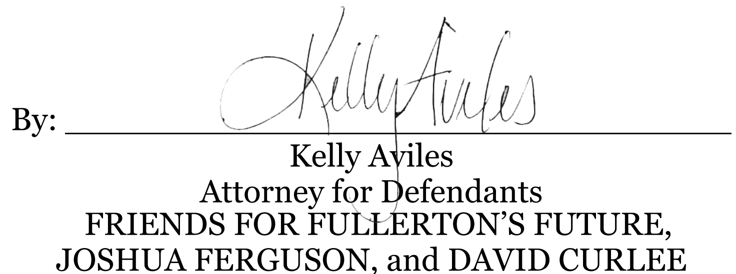
Consistent with that principle, over the last 75 years, the United States Supreme Court repeatedly has struck down prior restraints that limited the press' right to report about court proceedings. The Court has made clear that a prior restraint may be contemplated only in the rarest circumstances, such as where necessary to prevent the dissemination of information about troop movements during wartime, *Near*, 283 U.S. at 716, or to "suppress[] information that would set in motion a nuclear holocaust." (*New York Times*, 403 U.S. at 726 (Brennan, J., concurring).)

This case does not come close to presenting such extraordinary circumstances. Thus, the City cannot prevail as a matter of law, regardless of how the records were originally obtained. The City's requests are flatly unconstitutional in and Defendants, therefore, respectfully request this Court denying the City's request in its entirely.

Respectfully submitted,

DATED: October 25, 2019

LAW OFFICES OF KELLY AVILES



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