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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

MICHAEL BOOKER, CLEVELAND BROWN, ALEC GRIFFIN, JAMES JENKINS, EUGENE McBRIDE, SHAWN PICKETT, JOHAN SIMON and ARNOLD THREETS,

Plaintiffs,

v.

CITY OF RICHMOND, a California Governmental Entity; RICHMOND POLICE DEPARTMENT, a California Governmental Entity; CHRIS MAGNUS, an individual; LORI RITTER, an individual, and DOES 1 through 50, inclusive,

Defendants.

CASE NO. MSC07-00408

LIMITED SPECIAL APPEARANCE BY NON-PARTIES NAACP AND NAACP RICHMOND BRANCH PRESIDENT KEN NELSON IN OPPOSITION TO MOTION TO EXPAND INJUNCTION

Date: January 7, 2011
Time: 9:00 pm
Judge: Hon. Barry P. Goode
Dept: 17
Special Master: Catherine Yanni
Documents filed herewith:

1. Declaration of Joshua Koltun

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INTRODUCTION

The City of Richmond has petitioned this Court to enter an injunction that would bar non-party Ken Nelson, the President of the NAACP's Richmond Branch, from speaking about this litigation to the press, and which would also require him to retrieve copies of a DVD that he distributed on issues of substantial import to the NAACP. The NAACP and Nelson specially appear for the limited purposes of challenging the jurisdiction of this Court to issue an injunction binding them, and to urge the Court to deny the motion.

The City sought unsuccessfully to obtain the same relief in federal court. It concedes that the federal Court lacked the authority under Fed. R. Civ. P 65(d) to enter this injunction against Nelson and/or the NAACP, but it contends that this Court has broader equitable powers than that of the federal court, and may therefore bind Nelson and the NAACP. The contention is without merit. A court's power to enjoin a nonparty under the federal rules is based on traditional common law equitable principles. The standard is precisely the same as in state court.

Even if this Court's equitable powers were otherwise broad enough to bind nonparties like Nelson and/or the NAACP, however, the First Amendment would preclude entering the proposed injunction. The U.S. Supreme Court has repeatedly recognized the NAACP's and its members' First Amendment rights to advocate and to associate, free from governmental intrusion into its communications or associations. Those rights cannot be abridged by prior restraints such as the proposed gag order, especially where, as here, neither Nelson nor the NAACP is a trial participant. This is true, under well settled U.S. Supreme Court authority, even if the plaintiffs acted wrongfully in disclosing the DVD to the NAACP. Indeed, a separate line of Supreme Court authorities similarly makes clear that Nelson and the NAACP cannot even be punished after the fact for disseminating such information, much less enjoined from doing so.

Moreover, the City has made no equitable showing that it is entitled to this injunction. Instead, the City recycles a series of factual contentions already disproved in the companion federal proceeding, and they have no more merit here. This Court should decline to enter the requested gag order and mandatory injunction.

FACTUAL AND PROCEDURAL BACKGROUND

A. The NAACP and Richmond Branch President Ken Nelson.

The NAACP is one of the oldest and largest civil rights organizations in the United States, and has consistently advocated against racial discrimination for over 100 years. The NAACP has local branches throughout the United States, including in Richmond. Ken Nelson is the President of the Richmond Branch. *See* Koltun Decl., Ex. A/Ex. 2 (Nelson Dep.) 29:18-21, 35:3-36:1. Consistent with the NAACP's national mission, Nelson focuses on a full-time, volunteer basis on a number of issues that are important to the NAACP. *See, e.g., id.* 29:8-17, 37:5-10, 103:3-104:6. Among his many responsibilities, Nelson also conducts initial interviews of people who ask the NAACP for legal representation. In late 2006 or early 2007, certain plaintiffs in this action approached Nelson seeking representation by the NAACP in the present litigation, which the NAACP ultimately decided not to provide, given its limited resources. Koltun Decl., Ex. B (Nelson Decl.) ¶3, *id.* Ex. A/Ex. 2 at 95:6-97:11.

Long before this action commenced, the NAACP and Nelson have worked on issues of discrimination by the Richmond Police Department, both internally with respect to its employees and externally with respect to the African American community in Richmond. The NAACP has continued to follow this lawsuit's progress, given its ongoing interest in allegations that the Police Department engaged both in extensive racial discrimination against African American police officers and in retaliation against them for asserting their claims. However, in pursuing issues of racial discrimination within the Richmond Police Department, Nelson was not doing the bidding of plaintiffs or their counsel.[1] Indeed, the NAACP's involvement in that issue extends much more broadly than the issues raised in this case, including based on information and requests for

[1] *See, e.g.*, Koltun Decl., Ex. A/Ex. 2 45:7-18 ("Q: Did Mr. Dolan ask you to write this letter [to the Richmond Police Department raising issues related to allegations racial discrimination] . . .? A: Oh, no. . . . Q: Did any of the plaintiffs in this action . . . ask you to write this letter? No."); *id.* 78:2-78:18 (regarding NAACP's Public Records Act request to Richmond Police Department, "Q: . . . Did Mr. Dolan write this letter for you? A: No. Q: . . . Were [the document categories] given to you by Dolan? A: No. . . . Q: Who created these 12 categories of documents that are on here? A: Actually, it was a culmination of myself, Lawyers Committee for Civil Rights and Darnel Turner [an NAACP Executive Board member].").

assistance Nelson receives from many quarters (including in meetings with the Police Chief and other City officials). Thus, Nelson is advancing the NAACP's agenda which, while in certain respects overlapping with plaintiffs' claims, is decidedly its own. *See, e.g., id.*, 48:9-15; 49:11-50:7; 50:8-21; 102:3-103:12.

B. The Dolan Firm's Brief and Limited Representation of Nelson and the NAACP

In an effort to demonstrate that Nelson and the plaintiffs are acting in concert such that Nelson can be enjoined, the City asserts that plaintiffs and Nelson have "shared the same litigation attorney for at least two years." Mot. at 4:16-21, 7:22-23. This is simply incorrect. Dolan only represented Nelson very briefly as a courtesy, when Nelson was subpoenaed in this case. His representation was strictly for that limited purpose, and had certainly concluded at least six months before Nelson received the DVD at issue.[2] Moreover, the City misleadingly attempts to suggest that Dolan represented Nelson as early as 2007 (*see, e.g.* See Mot. 4:19-27), but this is assertion is flatly incorrect.[3]

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[2] Although Nelson is not a percipient witness to the allegations of discrimination at issue in this action, he was, in his role as NAACP Branch President, served with a subpoena *duces tecum* in December 2008 in the federal action for testimony and documents. *See* Mot. Ex. C (Nelson Dep. v. 1) at 8:15-22; 15:3-8. Plaintiffs' counsel Dolan, as a courtesy to the NAACP, agreed to represent him with regard to that subpoena. That deposition took place in March 2009. *Id.* Nelson was also subpoenaed in this proceeding shortly before his deposition in the federal proceeding. Judge Flinn quashed the subpoena because it was "very broad" and because the information it sought interfered with the plaintiffs' and the NAACP's various rights. Koltun Decl., Ex. A/Ex. 5 (2-25-09 Transcript) 18:11-14. Although Dolan moved to quash that subpoena on behalf of *plaintiffs*, he indicated in passing to the Court that he also represented the NAACP and Nelson in connection with that subpoena. At the deposition, Dolan asserted various objections and privileges, including for example (a) NAACP members' rights to associational privacy and (b) the attorney-client privilege protecting citizens' requests for legal representation by the NAACP. *See, e.g.*, Koltun Decl., Ex. A/Ex. 2 (Nelson Dep.) at 47:2-48:1. Nelson and the NAACP also produced 1,423 pages of the Branch's documents at his deposition. Mot., Ex. C (Nelson Dep., vol. 1) at 15:3-17:5. The City thereafter moved to compel Nelson to submit to further questioning and challenged the objections interposed on his and the NAACP's behalf. On June 1, 2009, the federal court denied the motion. Koltun Decl., Ex. A/Ex. 3 (6-1-09 Transcript) 23:23-25:9. Immediately thereafter, an attorney in Dolan's office informed Nelson that the discovery matter was over, and he and the NAACP understood any representation by Dolan to be concluded. Koltun Decl., Ex. B (Nelson Decl.) ¶ 2.

[3] The sole basis for this contention is not evidence, but faulty inferences the City purports to draw from Dolan's objections at Nelson's deposition. The City asked Nelson about conversations he had with plaintiffs in 2007, to which Nelson objected on attorney-client privilege grounds. The City contends that if the conversations were "privileged, the only conclusion is that Nelson is aiding and abetting the litigation effort." Mot. at 4:22-5:2. But counsel for the City is fully aware that this is not "the only conclusion" that can be drawn. Nelson's conversations with plaintiffs in

C. Nelson's Receipt and Dissemination of, and Comments on, the DVD.

Aside from the fact that Dolan represented Nelson briefly in defending against a subpoena in this case, the City puts forward only the following facts in support of this motion to gag Nelson and the NAACP. That in January 2010, plaintiffs Threets and Pickett gave Nelson a copy of the DVD at issue, and told him to watch it; that Nelson, after watching the DVD, decided to disseminate it further within the community; and that when Threets learned ***after the fact*** that Nelson had begun distributing the DVD, he indicated that he was pleased with Nelson's decision to do so. Mot., Ex. C (Nelson Dep., v. 2) 151:18-152:6; 168:3-169:22; 170:19-171:7; *see also* Koltun Decl., Ex. B (Nelson Decl.) ¶ 4.

There is absolutely no evidence that Nelson discussed disseminating the DVD with plaintiffs before deciding to do so, much less that they had reached an agreement that Nelson would do so. On the contrary, Nelson's decision to distribute was based on his independent determination that it contained information of significant public concern for the community, including because it rebutted numerous public statements by the City and its police chief about the allegations in this case and, more generally, allegations of racism within the police department. *Id.* ¶ 4.[4] He therefore distributed copies of the DVD – together with his and the NAACP's views concerning the police department's treatment of African Americans – to other citizens, including NAACP officers and members, as well as federal, state, and local public officials. *Id.* At the time he did so, he was not aware of the protective order entered in this Court concerning the report of Ray Marshall. *Id.*

D. The City Unsuccessfully Seeks This Injunction in Federal Court.

On or about March 9, 2010, Nelson and the NAACP learned that the federal court had

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2007 are privileged because the conversations took place when plaintiffs ***sought legal representation from the NAACP – representation which the NAACP declined to provide, as explained above in the text.*** This was fully explained by Dolan in the federal proceeding. Koltun Decl., Ex. E (3-25-10 Transcript) at 4:24-11:3; *compare, e.g.* Mot. Ex. C (Nelson Dep.) at 20:14-22; 24:7-22 *with* Koltun Decl. Ex. A/Ex. 2 (Nelson Dep.) at 95:6-97:11; *see also* note 1 *supra* regarding Lawyers Committee for Civil Rights involvement in NAACP's CPRA request. That the City persists in this contention highlights the frivolousness of this motion.

[4] *See also* Koltun Decl. Ex. C (Nelson Dep.) 168:3-169:22. Nelson specifically denied that plaintiffs had asked for his or the NAACP's assistance with the case. *Id.* at 155:25-156:7. At no time did any plaintiff suggest to Nelson to whom he should distribute the DVD, nor did any comment by any plaintiff have any impact on his decision to do so. *Id.* 170:19-171:7; 212:6-213:9.

orally at a hearing appeared to indicate that Nelson was bound by an injunction on the grounds that he was a person "in active concert and participation" with plaintiffs under Rule 65(d). By that time, the full contents of the DVD had been available on YouTube, and had in addition received significant coverage in news reports aired on the KRON-4 and KPIX-5 television stations. *Id.* ¶ 6. The City has never attempted to seek an injunction gagging media dissemination of the DVD.

Nelson and the NAACP promptly filed objections to the federal court's jurisdiction and authority to issue such an injunction. These federal pleadings are re-filed and incorporated herein (*see* Koltun Decl. Exs. A & B). At a hearing on March 25, 2010, the federal Court clarified that Nelson was not subject to any court order, and permitted the City to take a limited deposition of Nelson to test the assertions in his Declaration and to attempt to show that Nelson was indeed "in active concert and participation" with plaintiffs. Koltun Decl., Ex. E (3-25-10 Transcript) at 13:19-15:5, 17:10-20, 18:10-13; 21:23-22:15. That deposition took place on April 23, 2010; excerpts of which have been submitted herein. On April 25, while this Court was considering the earlier draft of this proposed injunction, the Court was informed that injunction would be amended to clarify that it ***did not*** cover Nelson, to which the City responded, "We do agree with that. I mean, under the state of the evidence at the present time, that is correct." Koltun Decl., Ex. D (4-28-10 Transcript) at 3:2-20.

ARGUMENT

I. THE CITY'S ADMISSION THAT NELSON CANNOT BE BOUND UNDER FED. R. CIV. P. § 65(d) IS FATAL, FOR THIS COURT'S EQUITABLE JURISDICTION IS NO GREATER THAN THE FEDERAL COURT.

The City concedes that Nelson is not bound by this injunction under the standards of Fed. R. Civ. P. 65(d). Mot. at 4:5-6. That provision provides, in relevant part, that an order thereunder binds "persons who are in active concert or participation with" the parties. Fed. R. Civ. P. 65(d)(2)(C). The City now contends, for the first time, however, that this Court's jurisdiction to enter an injunction is greater than that of the federal court. The City's ***sole*** authority for this proposition is *dictum* in *Berger v. Superior Court,* 175 Cal. 719 (1917), as follows:

> In matters of injunction, however, it has been a common practice to make the injunction run also to classes of persons through whom the enjoined party may act, such as agents, servants, employees, ***aiders, abettors***, etc., though not parties to the

> action, and this practice has always been upheld by the courts, and any of such parties violating its terms with notice thereof are held guilty of contempt for disobedience of the judgment. But the whole effect of this is simply to make the injunction effectual against all through whom the enjoined party may act, and to prevent the prohibited action ***by persons acting in concert with or in support of the claim*** of the enjoined party, who are in fact his ***aiders and abettors***.

Id. at 721 (emphasis added). The City argues that the court's use of the term "persons acting in concert with or ***in support of***" created a completely different standard than the federal "in active concert ***or participation with***." Mot. at 7. Specifically, the City contends that Nelson is liable under this *dictum* as an "aider and abettor," a category of persons the City apparently contends are not covered by Fed. R. Civ. P. 65(d). Mot. at 7:16-18.

The contention is without merit. There is no category of "aider and abettor" that is covered under the state standard but not under the federal standard; the two courts employ the same common law equitable standard. Fed. R. Civ. P. 65(d) simply restates "the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). As the Court explained, that standard means, in essence, "that defendants may not nullify a decree by carrying out prohibited acts ***through aiders and abettors***, although they were not parties to the original proceeding." *Id.* (emphasis added). The standard referred to in *Berger* is *precisely* the same common law equity standard incorporated into the federal rules, a standard that federal and California courts cite interchangeably. *See, e.g., In re Berry,* 68 Cal. 2d 137, 156 n.14 (1968) (expressing "grave doubts as to the jurisdictional validity of an injunctive order directed to persons other than the parties defendant, their representatives, and persons in active concert or participation with them. (*See and compare* Fed. R. Civ. P. 65(d).)").

There is no evidence that plaintiffs asked Nelson to distribute the DVD. The evidence is simply that they suggested that Nelson should view the DVD. To the extent that Nelson has distributed the DVD further, he did so in pursuit of the NAACP's independent interest in investigating and drawing public attention to serious issues of racial discrimination.

On these facts, there is no meaningful difference between giving the DVD to an NAACP official and giving the DVD to a television reporter or a newspaper columnist interested in these

issues – even if each is given with the hope and expectation that the DVD's contents would be disseminated and discussed further. To seek to gag Nelson on the theory that he is an "aider and abettor" of plaintiffs would raise grave constitutional concerns, as explained in the next section.

II. THE FIRST AMENDMENT BARS THE IMPOSITION OF A "GAG ORDER" RESTRAINING NELSON OR THE NAACP FROM DISCUSSING THIS CASE OR DISSEMINATING THE DVD.

A. The City Cannot Overcome the Heavy Presumption Against Prior Restraints on Speech.

The City seeks to impose a "gag order" barring Nelson, a nonparty, from disseminating the DVD and indeed, from discussing this case in the media. The First Amendment imposes a heavy – indeed insurmountable in this case – presumption against the constitutionality of gag orders or other prior restraints that enjoin the speech of non-parties about ongoing court proceedings. The First Amendment protects the rights of the NAACP to speak publicly and privately, to petition and to associate in opposition to racial discrimination – just as it protects the right of the media to report on such issues of public interest.[5]

Prior restraints constitute "one of the most extraordinary remedies known to our jurisprudence" and are universally recognized to be "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 562 (1976). Thus, for example, the Supreme Court found unconstitutional a gag order restricting the media's ability to report on a court case. *Id.* at 570; *see also S. Coast Newspapers v. Super. Ct.*, 85 Cal. App. 4th 866, 870 n.4 (2000) (citing with approval commentary to the effect that "if the

[5] Thus, for example, in *NAACP v. Claiborne Hardware Co.*, the Court, confirmed that speech "'protest[ing] racial discrimination is essential political speech lying at the core of the First Amendment.'" *Id.*, 458 U.S. 886, 909-11, 915 (1982) (quoting *Henry v. First Nat'l Bank of Clarksdale*, 595 F. 2d 291, 303 (1979)). The Court similarly reaffirmed the NAACP's constitutional right of assembly and association, finding that a boycott to protest racial discrimination was protected by the First Amendment. *See id.*, 458 U.S. at 907-08 (emphasizing that "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American" tradition, for "by collective effort individuals can make their views known, when, individually, their voice would be faint or lost") (quotation omitted); *see also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.").

egregious facts presented to the *Nebraska Press* court did not satisfy the criteria articulated by that court for a valid prior restraint, then as a practical matter the *Nebraska Press* decision amounts to a complete bar against prior restraints on reporting criminal proceedings.").

More than eighty years ago the Supreme Court explained that a prior restraint may be imposed only in "exceptional cases," such as the intended publication of the sailing dates of military transports or the number and location of troops in time of war. *Near v. Minnesota ex rel. Olsson*, 283 U.S. 697, 716 (1931) (invalidating gag order against non-parties). "These principles have retained their vigor from 1931 to date. . . . [I]t has been consistently held that any prior restraint on expression bears a heavy presumption against its constitutional validity." *Wilson v. Super Ct.*, 13 Cal. 3d 652, 657 (1975) (citing authorities). Moreover, California's own constitutional protection of the right of free speech (art. I, § 1) is even "more definitive and inclusive" than the First Amendment. *Id.* at 658.

These standards apply not only to gag orders against the media but to any gag order against any citizen other than an attorney in a case.[6] The First Amendment recognizes no basis to distinguish dissemination of the DVD by the media and dissemination by Nelson or the NAACP. As the Supreme Court recently reiterated:

> There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not. . . . With the advent of the Internet and the decline of print and broadcast

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[6] In *Levine v. U.S. District Court*, 764 F.2d 590, 595 (9th Cir. 1985), the court upheld in part a gag order restricting the *parties' attorneys* from discussing the case in public. As the court noted, the Supreme Court had in *Nebraska Press* suggested that it may be "appropriate to impose greater restrictions on the free speech rights of trial participants than on the rights of nonparticipants." *Id.* at 595 (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 601 n.27 (1976)). In upholding state bar rules applicable to attorneys for publicly discussing a case, the Supreme Court subsequently held that a different standard could be applied to attorneys. *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991); *accord, Hurvitz v. Hoefflin*, 84 Cal. App. 4th 1232, 1242 (2000) (recognizing that a different standard applies to trial participants).

Indeed, even as to trial participants, the Court's power to issue gag orders is severely constrained. *See Freedom Commc'ns, Inc. v. Super. Ct.*, 167 Cal. App. 4th 150, 154 (2008) (declining to gag newspaper defendant from reporting on its own case because, *inter alia*, other members of the media could not be so enjoined); *Maggi v. Super. Ct.*, 119 Cal. App. 4th 1218, 1226 (2004) (even where party violates protective order, remedy fashioned by Court cannot infringe rights of party to discuss case with third parties).

> media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.

Citizens United v. FEC, 130 S. Ct. 876, 905-06 (2010).

In this case, the City cannot overcome the heavy presumption against a prior restraint on Nelson or on the NAACP. This is certainly so given that the DVD and its contents became available in the public domain – at television news stations' websites, in newspaper reports, and on the Internet.

Moreover, there has been no showing by the City that the broad panoply of alternative measures traditionally available to protect the fairness of a trial will not be effective in protecting the parties' interests here. *See Nebraska Press Ass'n*, 427 U.S. at 563-64; *see also CBS, Inc. v. U.S. Dist. Ct.*, 729 F.2d 1174, 1183 (9th Cir. 1984) (questioning whether, in light of the Supreme Court's pronouncements in *Nebraska Press Ass'n* regarding these alternative measures, there is "reason for courts ***ever*** to conclude that traditional methods are inadequate and that the extraordinary remedy of prohibiting expression is required.") (emphasis added).

B. Even if Plaintiffs Violated a Court Order in Giving the DVD to Nelson, the First Amendment Would Bar Holding Nelson Liable for Disseminating the DVD

The City asserts that plaintiffs, in disseminating the DVD to Nelson, violated this Court's Order. Even if this contention were correct, however, it is insufficient to hold Nelson liable for his further dissemination of the DVD – let alone to issue an injunction barring him from discussing the case. In a long line of First Amendment cases, the Supreme Court has held that where, as here, a person receives information about a matter of public concern that has been disclosed through the wrongful conduct *of someone else*, the recipient may not be punished for further disseminating that information. Most recently, for example, in *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001), a telephone call between two teachers' union officials, discussing possible violence against a school official, was intercepted and recorded in violation of the Wiretap Act. The recording was then provided to a radio station and a citizens group, each of which disseminated portions of the call. *Id.* at 519. In the resulting lawsuit, the Court held that, even with respect to information that the radio host and head of the citizens group had "reason to know" was unlawfully obtained, they could not

be sanctioned for its disclosure when the information relates to a matter of public concern. *See id.* at 535.[7] Similarly, in *Nicholson v. McClatchy Newspapers*, somebody violated the law by leaking the State Bar's evaluation of a judicial candidate to the media. *Id.*, 177 Cal. App. 3d 509, 514 (1986). But the fact that some third party had violated the law was insufficient to render the media liable for publication of that information. *Id.* at 516.

Since there can be no ***after-the-fact liability*** for disseminating such information, it follows *a fortiori* that no ***prior restraint*** may issue against such dissemination. In *New York Times Co. v. United States*, the Court rejected the government's request to enjoin publication of the Pentagon Papers despite allegations that the papers had been "purloined" and their publication would result in imminent impairment of the national security. *Id.*, 403 U.S. 713, 723-24 (1971) (*per curiam*); *see also CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) ("Nor is the prior restraint doctrine inapplicable because the videotape was obtained through . . . 'calculated misdeeds.'"). Thus, even if Threets acted unlawfully in giving Nelson the DVD, the First Amendment rights of Nelson and the NAACP to speak out on matters of public concern necessarily include the right to re-distribute copies of the DVD, and to speak about its contents. *See Bartnicki*, 532 U.S. at 535. Any injunction barring Nelson or the NAACP from doing so would run afoul of the First Amendment.

C. A Mandatory Injunction Requiring Nelson and the NAACP to Retrieve Copies of the DVD Is also Barred by the First and Fourth Amendments.

The proposed injunction would further require Nelson to return all copies of the DVD, identify for the Court and the City all persons to whom Nelson gave copies of the DVD, and to affirmatively demand of those recipients that they too disgorge any copy of the DVD that they received. Injunction, C.1-3. Insofar as these requirements are ancillary relief in support of the Court's prior restraint on dissemination of the DVD, they must fail for the reasons stated in Part I.

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[7] *See also, e.g., Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1991) (no liability for publication of identity of rape victim when such information was obtained from a police report released by law enforcement agency in violation of Florida statute); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (invalidating Georgia law restricting publication of rape victim's name because defendant had obtained information lawfully despite statute's prohibition against its release).

Moreover, these aspects of the order also violate the associational privacy interests of the NAACP and its members, which are protected by the First Amendment, as well as their Fourth Amendment rights against unreasonable seizure of First Amendment-protected expressive materials intended to remove them from public circulation. The First Amendment protects the right of the NAACP members to associate with likeminded individuals and to act through such associations to advance their collective petitions for redress of grievances. *See, e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The First Amendment also protects against the unwarranted disclosures of the identities of the members of advocacy organizations such as the NAACP – here, recipients of the DVD – exposure which is likely to subject the NAACP's members to retaliation or to otherwise discourage persons from participating in the NAACP's work. *See id.* at 462; *accord Bates v. City of Little Rock*, 361 U.S. 516, 524(1960); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1163 (9th Cir. 2010) (reversing trial court order requiring disclosures of political advocacy group information on the ground that such disclosures would chill association and advocacy).

In this regard, there is no compelling reason to disclose the identities of the persons to whom Nelson and the NAACP have provided the DVD, since the Court already knows who "leaked" the DVD to Nelson. *Compare, e.g., In re Willon*, 47 Cal. App. 4th 1080, 1085 (1996) (annulling judgment of contempt where journalist refused to disclose identity of person who provided information about a pending criminal prosecution in violation of a protective order).

The injunction's requirement that the NAACP disclose the downstream recipients of copies of the DVD would dramatically chill the advocacy and internal associational efforts of the NAACP. Koltun Decl., Exh. B (Nelson Decl.) ¶ 6. Such disclosures would expose members and friends of the NAACP to recriminations based solely on their wholly innocent receipt of a DVD that, as explained in Part II above, Nelson had a First Amendment right to disseminate. *Id.* In addition, the mandate to disclose recipients' identities also would expose the NAACP's petitioning efforts – including its contacts with state legislators, members of Congress, federal law enforcement authorities, and others – all of whom the NAACP attempts to work with on a cooperative and

sometimes confidential basis to advance the goals of the NAACP, making it that much more difficult for the NAACP to do so in the future. *Id.* [8]

IV. THE CITY CANNOT SATISFY ITS BURDEN OF SHOWING THAT IT IS ENTITLED TO INJUNCTIVE RELIEF AGAINST NELSON OR THE NAACP.

Even if the First Amendment did not otherwise bar the issuance of the requested injunction, the City would have to show that it was entitled to the injunction under ordinary equitable principles. The City does not even attempt to make such a showing, arguing that it need not do so because the injunction has already issued. Mot. at 6:11-12. But the injunction has not been issued ***against Nelson and the NAACP***, and this is their first opportunity to be heard by this Court. A Court must specifically find that injunctive relief is appropriate as to the person whose rights are affected. *Planned Parenthood Golden Gate v. Garibaldi*, 107 Cal. App. 4th 345, 357 (2003).

The "'extraordinary remedy of injunction' cannot be invoked without showing the likelihood of irreparable harm." *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1352 (2003). In determining whether or not to issue a preliminary injunction, a trial court must evaluate, on the one hand, "the likelihood that the [movant] will prevail on the merits," – which, for the reasons above, the City cannot establish here – and on the other hand "the interim harm the plaintiff may suffer if the injunction is denied as compared to the harm that the defendant may suffer if the injunction is granted." *Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Board*, 23 Cal. App. 4th 1459, 1470-71 (1994).

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[8] The Fourth Amendment expressly singles out "papers" as being protected from seizure by the Government. Where, as here, a court issues a subpoena or other order compelling the production of First Amendment materials, Fourth Amendment concerns are implicated as well. *In re Grand Jury Subpoena*, 829 F.2d 1291, 1295-96 (4th Cir. 1987), *rev'd on other grounds, United States v. R. Enters.*, 498 U.S. 292 (1991). Here, the proposed injunction would necessarily implicate those First and Fourth Amendment concerns. Nelson would be ordered to turn over any copy in his possession to the Court, and to seek to retrieve copies disseminated to other members of the community. The Fourth Amendment prevents the Government from "seizing" First Amendment materials in the absence of probable cause to believe that the speaker had engaged in a crime or other unlawful conduct, and particularly where the order is expressly designed to remove it from circulation and prevent discussion of a matter of public concern. *See Stanford v. Texas*, 379 U.S. 476, 485 (1965) (Fourth Amendment prohibitions must be applied with "scrupulous exactitude" when applied to seizures of expressive works); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 n.5 (1979) (there are "special constraints upon . . . seizures of material arguably protected by the First Amendment").

There Has Been No Showing of Irreparable Harm. The City has not shown that the injunction will prevent irreparable harm. It asserts in conclusory fashion that the jury ***pool*** has ***already been*** "irreparably prejudiced," Mot. at 8:11-15 (emphasis added). But the City has not shown that this Court will ultimately be unable to avoid any prejudice ***to Defendants*** at trial using the traditional tools available to do so, such as vigorous *voir dire* and jury admonitions. *Nebraska Press Ass'n*, 427 U.S. at 563-64; *CBS, Inc.*, 729 F.2d at 1183.

The Balance of Interim Harms Favors the NAACP. The injunction would impose a substantial hardship on Nelson and the NAACP, neither of whom is a party to this action, by interfering with and burdening their rights to associate (internally and with members of the community), speak out on issues of concern to the community, and to petition the government to obtain redress for the community's concerns. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.*, 729 F.2d at 1177 (citing *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)); *see also Nebraska Press Ass'n*, 427 U.S. at 559 ("prior restraint . . . by definition, has an immediate and irreversible sanction").

Moreover, the fact that the DVD has already been disseminated and discussed in the media and amongst the general public shows that the balance of equities is decidedly against issuing a gag order. Even where a disclosure was unethical or illegal, once the confidential material has entered the public domain, there is no basis to seek an injunction against further dissemination or disclosure. *DVD Copy Control Ass'n, Inc. v. Bunner*, 116 Cal. App. 4th 241, 254 (2004).

The Public Interest Favors Nelson and the NAACP. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *United States v. First Nat'l City Bank*, 379 U.S. 378, 383 (1965) (citing authorities). This "public interest" factor is separate from the balancing of interim harms, and is designed among other things to protect the interests of nonparties. *Loma Portal Civic Club v. Am. Airlines, Inc.*, 61 Cal. 2d 582, 588 (1964). The present case, involving as it does issues of racial discrimination and animosity within a local police department, is of vital concern to all members of that community. It is inevitable that such a case would generate considerable interest and controversy. The public interest in a full and robust

airing of issues raised by the allegations of this case, independent of any judicial adjudication – and including more systemic issues of community-wide policy that go beyond the specific claims of these particular plaintiffs – is paramount.

The City Cannot Meet the Even Heavier Burden Needed to Obtain the Mandatory Portions of the Injunction. Where an injunction would mandate "an affirmative act that changes the status quo," the granting of such a mandatory injunction "'is not permitted except in extreme cases where the right thereto is clearly established.'" *Shoemaker v. County of Los Angeles*, 37 Cal. App. 4th 618, 625 (1995) (quoting *Hagen v. Beth*, 118 Cal. 330, 331 (1897)). Here, the injunction would not only prohibit certain activities but would mandate affirmative conduct, such as returning copies of the DVD and requiring Nelson to seek the further return of DVDs that have been distributed. These aspects of the injunction cannot meet the more stringent scrutiny required, especially in the absence of any showing that these actions would have any impact whatsoever on any supposed prejudice to the City.

The City Has Lost Any Rights It May Have Had Through Laches. The equitable doctrine of laches bars relief where the party seeking equity unreasonably delays seeking its remedy and either acquiesces in the acts about which it complains or creates prejudice to the opposing party. *Conti v. Bd. of Civil Serv. Comm.*, 1 Cal. 3d 351, 360 (1969). In April, when this proposed injunction was first before this Court, the City indicated that it would not oppose Ms. Yanni's clarification that the injunction would not apply to Nelson. Having chosen not to pursue this injunction against Nelson in either federal or state court, the City should not now be allowed to seek to force Nelson to account for his distribution of the DVD, or to seek at this late date to restrain Nelson's rights to discuss the case in the media.

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CONCLUSION

Since the First Amendment does not permit, and equity does not permit, let alone require, the requested injunction to issue, Nelson and the NAACP respectfully request the Court to deny the motion in its entirety.

DATED: December 23, 2010

Respectfully submitted,

/s/ Joshua Koltun
JOSHUA KOLTUN

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