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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA

**FILED**  
ALAMEDA COUNTY

JAN 24 2019

People for the Ethical Treatment of Animals,

No. RG18907174

By *[Signature]*

Petitioner,

ORDER DENYING MOTION TO COMPEL  
RESPONDENT NATHAN WINOGRAD TO  
ANSWER DEPOSITION QUESTIONS

v.

Winograd et al.,

Respondents.

The Motion of petitioner People for the Ethical Treatment of Animals (“PETA” or “Petitioner”) to compel respondent Nathan Winograd (“Winograd”) to answer deposition questions came on for hearing on 1/10/19 at 9:00 a.m. in Department 511, Judge Jeffrey Brand presiding. All parties appeared by counsel.

The court, having reviewed the moving, opposition, and reply papers, and having considered the arguments given by counsel, and good cause appearing, IT IS HEREBY ORDERED THAT the Motion is DENIED.

PETA brings this motion to compel respondent Winograd, who resides in Oakland, to respond to certain deposition questions in connection with the Virginia action.

I. BACKGROUND

The Virginia action alleges, *inter alia*, that Winograd is an alleged co-conspirator who operates respondent 501(c)(3) No Kill Advocacy Center (NKAC) for his own

1 benefit. The Virginia action alleges that throughout 2014 and 2015, the named  
2 defendants and co-conspirators used an incident in which PETA mistakenly trapped and  
3 euthanized an unidentified dog (Maya) in a housing development to instigate a criminal  
4 prosecution against individuals who had provided animal trapping services at the housing  
5 development on behalf of PETA, and ultimately to injure PETA. (See Hirschkop Decl.,  
6 Exh.A (Complaint).)  
7

8 In his 11/30/18 deposition, Winograd refused to respond to PETA's questions  
9 seeking the identity of unnamed sources, including PETA employees, who Winograd  
10 claims provided him with information about PETA's alleged animal euthanasia practices,  
11 upon which Winograd relied to publish blog and other online articles and allegedly  
12 communicated to his co-conspirators as well as Virginia authorities.  
13

## 14 II. INFORMATION SOUGHT BY PETA

15 The information sought by PETA is (1) the identity of PETA employees who told  
16 Winograd they were instructed by PETA to lie to people about PETA's intention to adopt  
17 animals out instead of killing them (Winograd Depo., p.116:7-116:10), (2) the identity of  
18 a PETA employee who provided Winograd with a picture of syringes purportedly used by  
19 PETA to euthanize animals (Id., p.189:3-191:8), (3) the identity of PETA employees who  
20 told Winograd that PETA picks up feral cats to be killed (Id., p.206:3-206:9), and (4) the  
21 identity of PETA employees who spoke to Winograd about PETA's alleged practice of  
22 convincing low-income people to surrender their dogs to PETA (Id., p.236:25-237:12).  
23

## 24 III. APPLICABILITY OF SHIELD LAW TO WINOGRAD'S NEWS GATHERING 25 ACTIVITIES 26

1 Winograd opposes the motion on the ground he is protected by California's shield  
2 law and is entitled to invoke the qualified reporter's privilege to avoid disclosing the  
3 identities of his sources. (Cal.Const., Art. I, Section 2(b); Evid.C.§1070.)

4 Article I, Section 2(b) states:

5  
6 A publisher, editor, reporter, or other person connected with or employed  
7 upon a newspaper, magazine, or other periodical publication, or by a press  
8 association or wire service, or any person who has been so connected or  
9 employed, shall not be adjudged in contempt by a judicial, legislative, or  
10 administrative body, or any other body having the power to issue  
11 subpoenas, for refusing to disclose the source of any information procured  
while so connected or employed for publication in a newspaper, magazine  
or other periodical publication, or for refusing to disclose any unpublished  
information obtained or prepared in gathering, receiving or processing of  
information for communication to the public.

12 Nor shall a radio or television news reporter or other person connected  
13 with or employed by a radio or television station, or any person who has  
14 been so connected or employed, be so adjudged in contempt for refusing to  
15 disclose the source of any information procured while so connected or  
16 employed for news or news commentary purposes on radio or television,  
or for refusing to disclose any unpublished information obtained or  
prepared in gathering, receiving or processing of information for  
communication to the public.

17 As used in this subdivision, "unpublished information" includes  
18 information not disseminated to the public by the person from whom  
19 disclosure is sought, whether or not related information has been  
20 disseminated and includes, but is not limited to, all notes, outtakes,  
21 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.

22 PETA argues the reporter's privilege does not apply to Winograd because in  
23 gathering the information at issue, he was acting as an advocate rather than a journalist,  
24 and is not entitled to the protection of the shield law or the qualified privilege. PETA also  
25 argues that Winograd's blog does not qualify as a periodical or any other legitimate  
26 journalistic publication for purposes of the shield law.

1           Emails between Winograd, and animal rights activists Robin Starr (CEO of  
2 Richmond, VA SPCA), Debra Griggs, and Jean Linman, dated November 2014 – January  
3 2015 (Deposition exhibits 12-17), support the conclusion that in gathering information  
4 about PETA’s practices from unnamed sources including PETA employees, Winograd  
5 was attempting to support a civil lawsuit or possible criminal prosecution against PETA  
6 and its affiliates, or an AG complaint or legislative action intended to foreclose PETA’s  
7 shelter model, rather than as a journalist who intended to publish information regarding  
8 PETA’s activities.  
9

10           Winograd testified in deposition that he engaged in animal rights advocacy work.  
11 For instance, Winograd testified that in April 2013 he submitted a petition to the VA  
12 Department of Agriculture and Consumer Services to make a determination that PETA  
13 was not meeting the definition of private animal shelter under VA law, and stated he did  
14 not contact the Department of Agriculture as a “reporter.” (Winograd Depo., p.78.)  
15

16 Winograd testified that in December 2014, through NKAC, he contacted the VA state  
17 veterinarian as an advocate, not a reporter, and filed another petition with the new VA  
18 state veterinarian, to determine that PETA did not meet the definition of private animal  
19 shelter under VA law. (Winograd Depo., p.82.) Winograd testified that he contacted the  
20 state veterinarian “based on information that I got through the investigative journalistic  
21 work I do with regarding to PETA,” that the veterinarian supplying drugs used to  
22 euthanize animals did not directly supervise PETA’s vet techs. (Winograd Depo., p.82-  
23 83; 85.) Winograd testified that in December 2014, he contacted Senator Lewis “as an  
24 advocate to introduce legislation.” (Winograd Depo., p.92.) Winograd confirmed that in  
25  
26

1 January 2015, he took out an ad in the Virginia Pilot attacking PETA, and that he did so  
2 as an advocate, not a reporter. (Winograd Depo., pp.93-94.)

3 Winograd argues, however, that he is a legitimate journalist who studied  
4 journalism in school, and who blogs about issues including animal rights, PETA's animal  
5 treatment and euthanasia practices. He states he has used information obtained both from  
6 public "on the record" sources, and confidential sources, to lobby public authorities to  
7 halt PETA's alleged practice of rounding up and killing healthy animals, including the  
8 dog Maya in Virginia. He contends that by protecting the identity of his unnamed  
9 sources, whom he states are associated with PETA and fear retribution if PETA learns  
10 their identities, he is adhering to acknowledged journalistic practices.

11  
12 Winograd testified that he is not employed by any newspaper, or as a writer.  
13 (Winograd Depo, p.67.) However, during the relevant time period of 2013-2016,  
14 Winograd published articles and photos on his blog (nathanwinograd.com) and other  
15 media outlets concerning PETA's practices, that contained information gathered from  
16 confidential sources (Deposition exhibit 11; Winograd Decl., Exh.F (2/9/15 blog post  
17 citing unnamed sources), Exh.G (5/16/15 blog post citing unnamed sources)), and articles  
18 concerning PETA's practices and animal rights laws more generally (Winograd Decl.,  
19 Exh.B (4/2/13 article concerning PETA practices, published on Huffington Post), Exh.C  
20 (2/25/14 blog post), Exh.I (11/9/14 blog post regarding Winograd's debate with PETA  
21 counsel)), all of which were published and available to the public.  
22  
23

24 Winograd testified that he was contacted by multiple media outlets, including the  
25 New York Times, the Boston Globe, and Inside Edition, regarding an investigative piece  
26 he wrote for the Huffington Post about PETA's alleged killing practices. (Winograd

1 Depo., p.79.) Winograd testified that in November 2014, he followed leads regarding a  
2 relationship between the then mayor of Norfolk, VA, and a member of PETA's staff, for  
3 "investigative reporting purposes." (Winograd Depo., p.81.)

4 PETA relies on *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, in  
5 support of its argument that Winograd does not merit protection under the shield law  
6 because he only published articles on his personal blog.

7  
8 In *O'Grady*, Apple sued multiple online magazines for trade secret violations after  
9 they published articles disclosing alleged new Apple products, and sought to subpoena  
10 the online publishers to ascertain the identity of the sources, in order to determine the  
11 proper defendants. The publications moved for a protective order to prevent the  
12 discovery, arguing, in part, that the sources and unpublished information were protected  
13 under the reporter's shield and the reporter's privilege. Apple argued the privilege did not  
14 apply, and if it applied, Apple had overcome it by demonstrating a compelling need. The  
15 trial court denied the motion.  
16

17 The Court examined whether publishers of online news magazines devoted to  
18 news and information about Apple computers and software were entitled to invoke the  
19 shield law. The Court declined to parse whether the publishers were engaged in  
20 "legitimate" journalism, focusing instead on the language and intent of the shield law:  
21

22 The shield law is intended to protect the gathering and dissemination of  
23 news, and that is what petitioners did here. We can think of no workable  
24 test or principle that would distinguish "legitimate" from "illegitimate"  
25 news. Any attempt by courts to draw such a distinction would imperil a  
26 fundamental purpose of the First Amendment, which is to identify the  
best, most important, and most valuable ideas not by any sociological or  
economic formula, rule of law, or process of government, but through the  
rough and tumble competition of the memetic marketplace.

1  
2 (O'Grady v. Superior Court (2006) 139 Cal.App.4th 1423, 1457.)

3 The Court held that the online publishers were engaged in newsgathering, that  
4 there was no basis for distinguishing an online news magazine from a "magazine" or  
5 "publication" under Article 1, Section 2, and were "publishers" within the meaning of  
6 Article 1, Section 2.  
7

8 PETA has not provided a reasoned basis for distinguishing Winograd's  
9 newsgathering activities from the journalism activities the shield law is intended to  
10 protect from contempt liability, or distinguished Winograd's newsgathering activities for  
11 purposes of his blog publications from "legitimate" journalism.

12 PETA further argues Winograd's blog is not a "periodical" for purposes of the  
13 shield law because his articles are infrequent, and only contains his personal opinions,  
14 and conspiracy theories. O'Grady examined what constitutes a covered publication.  
15 While conceding the language "newspaper, magazine, or other periodical publication"  
16 was "ambiguous," the Court noted that although the Legislature was not prescient enough  
17 to include digital magazines within the term "magazine" because they did not yet exist  
18 when the law was created, but it "cannot have meant to exclude them." (Id. at 1461.)  
19 The Court analyzed whether the publications at issue could be considered "other  
20 periodical publications." The court concluded that the publications at issue were not  
21 published at regular intervals, but that "individual articles are added as and when they  
22 become ready for publication," and noted that many print publications universally viewed  
23 as "periodicals" do not appear with "absolute regularity," citing New Yorker Magazine.  
24 (Id. at 1465.)  
25  
26

1 The Court returned to the purpose of the statute to determine whether the term  
2 “periodical publication” must apply, and concluded that the Legislature intended the  
3 phrase “periodical publication” to include all ongoing, recurring news publications, while  
4 excluding non-recurring publications like books, pamphlets, flyers, and monographs. (*Id.*  
5 at 1466.) The Court thereby concluded that the online publications were entitled to the  
6 protection of the shield law. The Court further concluded that online journalists were no  
7 less entitled to its protections than the journalists who provide news to the public through  
8 traditional print and broadcast media. (*Id.* at 1467.)

10 Citing discovery obtained in the Virginia action, PETA also argues that  
11 Winograd’s use of the information he obtained was not protected activity because it was  
12 for non-journalistic purposes, including sharing the subject information with co-  
13 conspirators, using the information to lobby public authorities to shut down PETA’s  
14 animal shelter activities, and using the information to run self-promoting advertising  
15 against PETA (see Hirschkop Decl., Exh.B, C, D.)

17 In *Anti-Defamation League of B’nai B’rith v. Superior Court* (1998) 67  
18 Cal.App.4th 1072, the Court found, in relevant part, that the dissemination of otherwise  
19 confidential information by the ADL to a foreign government, and to an ADL network  
20 consisting of private persons who were not involved in journalism, did not constitute a  
21 protected activity, and did not merit the application of the reporter’s privilege in that  
22 context. (*Anti-Defamation League of B’nai B’rith v. Superior Court* (1998) 67  
23 Cal.App.4th 1072, 1093-1094.) In *B’nai B’rith*, the information shared with private  
24 persons and foreign governments was deemed confidential by law; in contrast, the case at  
25 bar concerns the identity of undisclosed sources, not the information obtained from them,  
26



1 or its use – indeed, of its use, there is no question, as Winograd admits, and PETA  
2 provides evidence, that the information was published on Winograd’s own blog, and on  
3 the Huffington Post. PETA does not appear to argue, or present evidence, that Winograd  
4 shared the sources themselves with any alleged co-conspirators, or with the public  
5 officials they contacted in connection with their efforts to highlight PETA’s alleged  
6 practices. Accordingly, the *B’nai B’rith* opinion appears distinguishable.  
7

8           Upon review of Winograd’s deposition testimony, and the declarations and  
9 evidence before the court, the court finds that Winograd was acting as a “publisher,  
10 editor, reporter, or other person connected with or employed upon a newspaper,  
11 magazine, or other periodical publication” in connection with his newsgathering activities  
12 during the time period covered in the underlying Virginia action, and is therefore covered  
13 by the shield law, and that Winograd’s blog qualifies as a periodical for purposes of the  
14 shield law. (*O’Grady v. Superior Court* (2006) 139 Cal.App.4th 1423; Winograd  
15 Deposition, testimony at pp.79, 81; Exhibit 11; Winograd Decl., Exh.B, C, F, G, I.)  
16

#### 17           IV. THE MITCHELL FACTORS

18           The court has determined that Winograd is entitled to protection under the shield  
19 law. Accordingly, the court must now determine whether he may invoke the qualified  
20 privilege, and if so, whether PETA has demonstrated facts sufficient overcome the  
21 privilege.  
22

23           The courts have developed a balancing test to determine whether the court may  
24 compel a reporter to disclose confidential sources and other protected information in the  
25 context of a lawsuit.  
26

1 In *Mitchell v. Superior Court* (1984) 37 Cal.3d 268, the California Supreme Court  
2 held that “in a civil action a reporter, editor, or publisher has a qualified privilege to  
3 withhold disclosure of the identity of confidential sources and of unpublished information  
4 supplied by such sources. The scope of that privilege in each particular case will depend  
5 upon the consideration and weighing of a number of interrelated factors.” (*Mitchell v.*  
6 *Superior Court* (1984) 37 Cal.3d 268, 279.)  
7

8 The Court identified the following interrelated factors:

9 (1) The nature of the litigation and whether the reporter is a party. “In general,  
10 disclosure is appropriate in civil cases, especially when the reporter is a party to the  
11 litigation.” (*Id.* at 279)

12 PETA argues that while Winograd is not a named party in the Virginia action, he  
13 is an alleged co-conspirator who actively conspired with the named defendants to harm  
14 PETA. Winograd argues that the fact that PETA specifically identified him as a co-  
15 conspirator, and not a party, weighs against disclosure. The court finds that this factor  
16 weighs against disclosure.  
17

18 (2) Whether the information sought goes to the heart of plaintiff's cause of  
19 action. “[M]ere relevance is insufficient to compel discovery; disclosure should be denied  
20 unless the information goes ‘to the heart of the plaintiff's claim.’” (*Id.* at 280.)

21 PETA's complaint asserts causes of action for (1) conspiracy to harm in trade,  
22 business, or profession, (2) common law conspiracy based on injury to PETA's business,  
23 (3) conspiracy to abuse process by pursuing a false and fraudulent lawsuit against PETA,  
24 (4) conspiracy to defame, and (5) punitive damages. PETA argues that it should be  
25 permitted to test the veracity of the alleged misinformation that Winograd published and  
26

1 provided to public officials concerning its alleged kill practices, and examine the quality  
2 of his sources, to establish that the co-conspirators acted with reckless disregard for the  
3 truth, and harmed PETA. The court finds that this factor weighs in favor of disclosure.

4 (3) Whether the plaintiff has exhausted all alternative sources of obtaining the  
5 needed information (*Id.* at 282)

6 PETA contends it cannot obtain the identity of the sources in any other way, and  
7 has exhausted all other discovery efforts, including numerous depositions and reviewing  
8 thousands of documents. (Hirschkop Decl., par.14-16.) Winograd admits he destroyed  
9 his notes of the alleged communications (Winograd Decl., par.9), and his emails with the  
10 PETA employees who purportedly gave him the information regarding PETA's kill  
11 practices (Winograd Depo, p.118), and that he regularly deletes all emails (Winograd  
12 Depo., pp.152-153). The court finds that this factor weighs in favor of disclosure.

13 (4) The importance of protecting confidentiality in the case at hand. "The  
14 investigation and revelation of hidden criminal or unethical conduct is one of the most  
15 important roles of the press in a free society—a role that may depend upon the ability of  
16 the press and the courts to protect sources who may justifiably fear exposure and possible  
17 retaliation. Thus when the information relates to matters of great public importance, and  
18 when the risk of harm to the source is a substantial one, the court may refuse to require  
19 disclosure even though the plaintiff has no other way of obtaining essential information."

20 (*Mitchell v. Superior Court, supra*, 37 Cal.3d at 282-283.)

21 PETA argues that Winograd's sources do not need protection, because PETA only  
22 seeks to obtain information to establish that the co-conspirators unreasonably relied on  
23 information that was demonstrably false, not to add the unnamed sources as defendants.  
24  
25  
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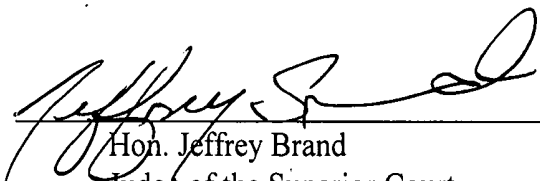
1 Winograd contends his sources “reasonably fear retribution from PETA,” citing his own  
2 declaration, in which he states that PETA sought to have the husband of former PETA  
3 employee Heather Harper-Troje fired from his U\$ Foreign Service job for conspiring  
4 with her to harm PETA, and attaches Ms. Harper-Troje’s blog post describing this  
5 occurrence. (Winograd Decl., par.9, Exh.N.) PETA does not provide any countervailing  
6 evidence for the court to weigh. The court finds that this factor weighs against disclosure.  
7

8 (5) Whether the plaintiff has made a prima facie showing that the alleged  
9 defamatory statements are false before requiring disclosure (*Mitchell v. Superior Court*,  
10 *supra*, 37 Cal.3d at 283)

11 Citing the declaration of its counsel, Philip Hirschkop, PETA argues it has made a  
12 prima facie case of the strength of its claims, because there is evidence Winograd  
13 personally participated in the conspiracy to put PETA out of business, and that he has  
14 been identified as the source of false statements made in furtherance of the conspiracy.  
15 Winograd argues that PETA has only submitted the complaint itself, and that it has failed  
16 to allege that any publications by Winograd were false, or that he knew they were false  
17 when published. The court finds that this factor weighs against disclosure.  
18

19 Because three of the five *Mitchell* factors weigh against disclosure, the court finds  
20 that PETA has not overcome the applicability of the qualified privilege. Accordingly, the  
21 motion is DENIED.  
22

23  
24 Date: January 24, 2019

25   
26 Hon. Jeffrey Brand  
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ALAMEDA

Case Number: RG18907174

Case Name: People for the Ethical Treatment of Animals vs. Winograd

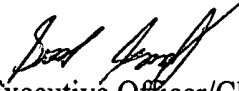
- 1) Order Denying Motion to Compel Respondent Nathan Winograd to Answer Deposition Questions

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing Order Denying Motion to Compel Respondent Nathan Winograd to Answer Deposition Questions was mailed first class, postage prepaid, in a sealed envelope, addressed as shown below by placing it for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

**I declare under penalty of perjury that the foregoing is true and correct. Executed on**

**1/25/2019**

  
Executive Officer/Clerk of the Superior Court  
By M. Scott Sanchez, Deputy Clerk

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