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8 UNITED STATES DISTRICT COURT FOR THE
9 NORTHERN DISTRICT OF CALIFORNIA
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12 Andrew G. Watters,
13 Plaintiff,
14 v.
15 Superior Court of the State of
16 California for the County of
San Mateo; Does 1-10,
17 Defendants.
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Case no. 3:21-cv-05601

**PLAINTIFF'S EX PARTE APPLICATION
FOR A TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW CAUSE
REGARDING PRELIMINARY INJUNCTION**

Date: TBD
Time: TBD
Place: TBD

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FACTS

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2 The purpose of this action is to rectify a blatant violation
3 of Plaintiff's freedom of speech by the court handling one of his
4 client's cases.

5 Plaintiff has been representing Respondent Eric Acosta in
6 San Mateo County Superior Court case number 20FAM01243-A and
7 20FAM01243 since September 2020. The -A case is a domestic
8 violence proceeding initiated by Petitioner Jennifer Acosta, and
9 the other case is a divorce initiated by Eric Acosta. Mr. Acosta
10 is a local general contractor, and Ms. Acosta is a stay-at-home
11 mother who is working on a paralegal program.

12 On June 24, 2021, Plaintiff took the deposition of Ms.
13 Acosta at her attorney's office pursuant to a valid notice of
14 deposition in both cases. The notices provided fair warning
15 that the proceedings would be video-recorded and audio-recorded
16 by Plaintiff. Plaintiff recorded the deposition on his own
17 equipment at his own expense, and he holds the copyright on the
18 footage.

19 The parties stipulated that Ms. Acosta would file an
20 application with the court for temporary orders restricting
21 dissemination of the video recording by July 9, 2021. Ms. Acosta
22 did not file the application as agreed, although she belatedly
23 filed an application on July 21, 2021. Mr. Acosta filed an
24 opposition detailing his First Amendment and Civil Code sec. 47
25 arguments. It was Plaintiff's intention to post the video on
26 his legal website and offer commentary and editorial about the
27 deposition and this case.

28 The application filed by Ms. Acosta was, shockingly, granted

1 by the Honorable Rachel Holt, Judge of the Superior Court. The
2 order enjoins Plaintiff and his client from disseminating the
3 video or any portion thereof, including posting it online.

4 The order violates Plaintiff's right to freedom of speech
5 under the Federal and State Constitutions, as well as the "true
6 reporting" privilege under state law, specifically Civil Code
7 sec. 47(d). The order must be declared void and its enforcement
8 must be enjoined.

9 **ARGUMENT**

10 I.

11 PLAINTIFF HAS NOT YET PUBLISHED HIS WEB PAGE, WHICH MAKES THE
12 PROTECTIVE ORDER ISSUED BY DEFENDANT AN UNLAWFUL PRIOR RESTRAINT
13 ON PLAINTIFF'S AND HIS CLIENT'S FREEDOM OF SPEECH

14 This is absolutely a free speech issue. The law of freedom
15 of speech is clear; virtually *any* prior restraint on freedom
16 of speech is unlawful, and those few prior restraints that may
17 be lawful are still *presumptively invalid* under the State and
18 Federal Constitutions. This protective order is a presumptively
19 invalid content-based restriction that would essentially give
20 Ms. Acosta special treatment compared to the many litigants
21 whose deposition videos are available online or on YouTube. A
22 YouTube search for "deposition" reveals thousands of depositions,
23 including but not limited to major antitrust cases such as *U.S.*
24 *v. Microsoft*, in which Bill Gates's nearly 12-hour deposition
25 is prominently featured. If even Bill Gates cannot manage to
26 restrain the distribution of his deposition video in a historic
27 antitrust case, that shows the magnitude of the proof required.
28 Defendant completely ignored, or willfully omitted, any

1 discussion of the free speech issue here, instead issuing a pre-
2 printed form with a single sentence enjoining Plaintiff.

3 Here, Plaintiff took the deposition video pursuant
4 to a valid notice and with his own equipment; he holds the
5 copyright in the footage and may do anything with it, including
6 broadcasting it if he so desires. In the underlying motion,
7 Ms. Acosta pointed to no law, case, or rule prohibiting the
8 distribution of a deposition video, despite Plaintiff's multiple
9 invitations to do so. The recent email exchange, in which Ms.
10 Acosta's counsel unlawfully threatened a State Bar referral
11 in an effort to coerce Plaintiff, is attached to Plaintiff's
12 declaration. Despite multiple invitations to do so, Ms. Acosta's
13 counsel has not once supplied any authority for the proposition
14 that it can silence Plaintiff and his client on this issue.

15 Sometimes a court will impose advance restrictions on
16 lawyers, parties, and on the press in reporting of trials,
17 particularly criminal trials. These restrictions are intended
18 to protect the right to a fair trial, and to avoid interference
19 with the judicial process. Nonetheless, they are a form of prior
20 restraint, and the press in particular has often objected to such
21 orders. In *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976),
22 the U.S. Supreme Court overturned such a "gag order." It ruled
23 that alternative methods to help ensure a fair trial, short of
24 prior restraints, might have been used, and that it was not all
25 clear, under the circumstances, that the gag order would have
26 the desired effect even if upheld. It also made a particular
27 point of asserting that orders restricting reporting on events
28 that occur in open court are not permissible. The Supreme Court

1 wrote:

2 “To the extent that this order prohibited the reporting
3 of evidence adduced at the open preliminary hearing, it plainly
4 violated settled principles: ‘[T]here is nothing that proscribes
5 the press from reporting events that transpire in the courtroom.’
6 *Sheppard v. Maxwell*, (384 U.S., at 362–363).”

7 The Supreme Court’s conclusion in that case reaffirmed
8 its general opposition to prior restraints, and indicated that
9 judicial gag orders would be sustained only in exceptional cases.
10 It wrote: “Our analysis ends as it began, with a confrontation
11 between prior restraint imposed to protect one vital
12 constitutional guarantee and the explicit command of another
13 that the freedom to speak and publish shall not be abridged. We
14 reaffirm that the guarantees of freedom of expression are not an
15 absolute prohibition under all circumstances, but the barriers to
16 prior restraint remain high and the presumption against its use
17 continues intact.”

18 Similar cases at the U.S. Supreme Court include *New York*
19 *Times Co. v. United States*, 403 U.S. 713 (1971), in which the
20 U.S. government tried to enjoin the newspaper from publishing
21 classified information. Even “top secret” materials were held to
22 be within the First Amendment right of publication, as affirmed
23 by the Supreme Court.

24 Here, the burden was on Ms. Acosta to prove that the
25 information is not subject to First Amendment rights. Not only
26 did she fail to do so, she failed to offer *any* analysis or
27 discussion of the First Amendment issue in the underlying motion,
28 perhaps because arguing this would be futile. Ms. Acosta’s

1 counsel even conceded at one point in the email exchange that
2 there may not be any authority for his position; instead of
3 pointing to any law, he resorted to claiming that Respondent's
4 counsel lacks professional judgment.

5 II.

6 VIDEO FOOTAGE OF THE DEPOSITION AND A WEB PAGE CONTAINING IT ARE
7 PRIVILEGED PUBLICATIONS OR BROADCASTS BECAUSE THEY ARE A FAIR AND
8 TRUE REPORT OF A JUDICIAL PROCEEDING

9 Separate and apart from freedom of speech, it should be
10 noted that a deposition transcript or a video recording of a
11 deposition may be released to any public persons unless a party
12 successfully utilizes Cal. Code Civ. Proc. § 2025.420 to obtain a
13 protective order preventing said release. See Code Civ. Proc. -§
14 2025.570.

15 In this case, Ms. Acosta obtained, and Defendant issued, a
16 protective order to preclude sharing or publishing of the video
17 footage taken at her deposition. However, the fair and true
18 reporting privilege protects the video as perfectly suitable for
19 publication or broadcast.

20 Under certain conditions, publications or broadcasts
21 of information are absolutely privileged speech. They earn
22 privileged status when, for example, the information presented
23 is any "fair and true report in, or a communication to, a public
24 journal, of (A) a judicial, (B) legislative, or (C) other public
25 official proceeding, or (D) of anything said in the course
26 thereof." Cal. Civ. Code § 47(d)(1) (emphasis added). The
27 protection outlined here is called the "fair and true reporting
28 privilege." See *Argentieri v. Zuckerberg* (2017) 8 Cal. App. 5th

1 768, 787.

2 “The fair and true reporting privilege . . . is an absolute
3 privilege – that is, it applies regardless of the defendants’
4 motive for making the report – and forecloses a plaintiff from
5 showing a probability of prevailing on the merits.” *Argentieri*
6 *v. Zuckerberg* (2017) 8 Cal. App. 5th 768, 787.

7 To be “fair and true”, a report in question must “capture
8 the substance, the ‘gist’ or ‘sting’ of the subject proceedings;
9 minor inaccuracies do not constitute falsity. See *GetFugu, Inc.*
10 *v. Patton Boggs LLP* (2013) 220 Cal. App. 4th 141, 154. Whether
11 the report captures the “gist” of the subject proceedings is
12 measured by “how those in the community where the matter was
13 published would reasonably understand it.” *Burrill v. Nair*
14 (2013) 217 Cal. App. 4th 357, 398.

15 The report does not even need to “track verbatim the
16 underlying proceeding.” *Microsoft Corp. v. Yokohama Telecom*
17 *Corp.* (C.D.Cal. 1998) 993 F. Supp. 782, 784. But in this case,
18 it is a video recording, and it does.

19 There is additionally no requirement that the communication
20 in question actually further the underlying litigation in any
21 way. See *Argentieri v. Zuckerberg* (2017) 8 Cal. App. 5th 768,
22 787. In essence, the threshold for what is considered “fair” and
23 “true” is very low.

24 In fact, “in measuring what constitutes a “fair and
25 true report” the defendant is “permit[ted] a certain degree
26 of flexibility/literary license.” See *J-M Manufacturing Co.,*
27 *Inc.* (2016) 247 Cal. App. 4th 87, 99-100, citing *Reader’s Digest*
28 *Assn. v. Superior Court* (1984) 37 Cal. 3d 244, 262 footnote

1 13. “A slight inaccuracy in the details will not prevent a
2 judgment for the defendant, if the inaccuracy does not change
3 the complexion of the affair so as to affect the reader of the
4 article differently than the actual truth would.” *Id.* Still,
5 here, there are zero inaccuracies, zero instances of flexibility,
6 and zero instances of literary license: the report is a full and
7 complete video and audio recording. It is an absolutely true
8 report of Petitioner’s deposition.

9 Supporting this rule: in *Kilgore v. Younger*, plaintiff
10 Kilgore argued that information posted in two newspapers was not
11 privileged, because it left out certain information, thereby—
12 allegedly—making the information neither fair nor true. The
13 Supreme Court disagreed and instead affirmed the trial court’s
14 ruling that the information reported was “a fair and true report
15 of a public meeting.” See *J-M Manufacturing Co., Inc.* (2016) 247
16 Cal. App. 4th 87, 99. Information does not have to be a full and
17 complete representation to be considered “fair and true.”

18 And in *Sipple v. Foundation for National Progress*, the
19 appellant requested that the privilege be applied narrowly and
20 “not shield the entire article but only the statements that are
21 part of the proceedings,” but the court denied this request. See
22 *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal. App. 4th
23 226, 241.

24 In this case, the information is absolutely privileged; not
25 only is it a fair and true report of a public proceeding, but it
26 is a complete record that has not been altered in any way. It is
27 a full, complete, and true record of a judicial proceeding. No
28 parts of the proceeding have been clipped or edited out, except

1 during breaks in the deposition. The video footage is a fair
2 and true report of Petitioner's deposition, and the web page
3 with Respondent's counsel's annotations and commentary is also
4 privileged as his opinion.

5 At this time, video footage of Petitioner's deposition has
6 not been shared anywhere. Respondent's counsel intends to share
7 the video footage on his website. His website contains a blog,
8 which is a public journal in that it is publicly accessible on
9 the Internet for free, just like a free newspaper.

10 "In determining the scope of the term 'judicial proceeding'
11 within the purview of the rule, the courts of this state seem
12 to take a comparatively broad view of the question." *Hayward v.*
13 *Watsonville Register-Pajaronian & Sun* (1968) 265 Cal. App. 2d
14 255, 260.

15 In fact, some "courts have extended Civil Code section 47,
16 subdivision (d) protection to confidential proceedings." *See*
17 *Braun v. Chronicle Publishing Co.* (1997) 52 Cal. App. 4th 1036,
18 1051.

19 A deposition is a public proceeding: any public person
20 may attend a deposition unless the court issues a protective
21 order preventing [a] designated person[s] from attending the
22 deposition. *See* Code Civ. Proc. § 2025.420(b)(12). And per
23 *Braun*, even if Petitioner's deposition had been a confidential
24 proceeding, the Court still has the authority to extend Civil
25 Code section 47 protection to recordings of the deposition, for
26 purposes of publication or broadcast.

27 Finally, it is noteworthy that the identity of the person
28 publicizing or broadcasting the information is irrelevant. A

1 party or his attorney may share case information and material,
2 period. *In Argentiere v. Zuckerberg*, for example, we see that
3 when material may be shared, it is perfectly fine for an attorney
4 to share the material on behalf of his client. The heart of
5 the issue is not who has authority to share the information,
6 but whether the information itself is privileged speech: “The
7 legislative history of section 47 subdivision (d) makes it clear
8 that our Legislature fully intended to protect as privileged an
9 attorney’s communication of a complaint to a newspaper on behalf
10 of his client.” *Argentiери v. Zuckerberg* (2017) 8 Cal. App. 5th
11 768, 793. In fact, even an attorney’s statement summarizing a
12 complaint, rather than providing the complaint itself, holds the
13 same privilege. See *Id.* As long as the material being publicized
14 or broadcast is privileged, it may be shared by a party or his
15 attorney.

16 The fair and true reporting privilege makes the video
17 footage of Petitioner’s deposition privileged publications,
18 separate and apart from the free speech issue discussed above.

19 III.

20 VIDEO FOOTAGE OF MS. ACOSTA’S DEPOSITION IS PROTECTED SPEECH FOR
21 PURPOSES OF PUBLICATION OR BROADCAST, BECAUSE IT IS A FAIR AND
22 TRUE REPORT OF A PUBLIC MEETING.

23 Publications or broadcasts of information are also
24 considered privileged and protected speech when they are “a fair
25 and true report of (1) the proceedings of a public meeting, if
26 the meeting was lawfully convened for a lawful purpose and open
27 to the public.” Cal. Civ. Code § 47(e).

28 In this case, Ms. Acosta asked the trial court for a

1 protective order over video footage that Plaintiff properly took
2 of Ms. Acosta's deposition. A protective order should not have
3 been issued, though, because the publication or broadcast of the
4 video would also satisfy the requirements of Civil Code section
5 47(e).

6 First, we consider whether the proceedings covered were a
7 public meeting. A deposition is indeed a form of public meeting:
8 any public person may attend a deposition unless the court issues
9 a protective order preventing designated persons from attending
10 the deposition. See Code Civ. Proc. § 2025.420(b)(12). Here, the
11 video footage covers Ms. Acosta's deposition, which was a public
12 meeting.

13 In that same sense, the proceedings in question were also
14 open to the public; until Ms. Acosta filed her motions for a
15 protective order, there were no requests that record of the
16 deposition be withheld from any specific people. Anybody could
17 have attended the deposition.

18 Next, we consider whether the deposition was lawfully
19 convened for a lawful purpose, and it was. All notices and
20 communications regarding the deposition were properly and timely
21 served. Moreover, conducting a deposition is not only lawful but
22 extremely common.

23 Ms. Acosta asked the state court to keep confidential a
24 fair and true report of the proceedings of a public meeting. Her
25 request was improper in that it was a direct attempt to thwart
26 California Civil Code section 47(e). That very section keeps the
27 video recording of the deposition privileged for publication or
28 broadcast.

1 IV.

2 RULE 5-120 OF THE RULES OF PROFESSIONAL CONDUCT DOES NOT APPLY
3 BECAUSE THIS IS NOT A CRIMINAL CASE, NOR IS THE WEB PAGE LIKELY
4 TO OR INTENDED TO AFFECT THE ADJUDICATION OF THIS CAUSE

5 An exception in 47(d) states that it does not apply to
6 statements that violate Rule 5-120. Rule 5-120 prohibits
7 extrajudicial statements that are intended to or likely to
8 affect the adjudication of the cause. In other words, the Rule
9 is intended to ensure a fair trial, principally in criminal
10 cases as the official comments indicate. Here, this is not a
11 criminal case, and in any event, Ms. Acosta is the claimant,
12 not Mr. Acosta. The video of Ms. Acosta's deposition and Mr.
13 Acosta's counsel's commentary on it are not intended to, nor
14 are they likely to, affect the trial of this matter. Rule 5-120
15 does not apply, and in any event would be an unlawful burden
16 on Mr. Acosta's and his counsel's freedom of speech if applied
17 here. Further, to the extent minor children are involved,
18 "protecting" them from knowledge is not protection at all. The
19 minor's information can be made confidential; public information
20 cannot be withheld from the minor, and Petitioner can point to no
21 authority to the contrary.

22 V.

23 CONCLUSION

24 Various mechanisms are in place that protect Mr. Acosta and
25 his counsel's ability to publicize or broadcast video footage
26 of Petitioner's deposition. Both the fair and true reporting
27 privilege, and the fair and true reporting of a public meeting
28 privilege, provide that sharing video footage of Petitioner's

1 deposition and commentary thereon are protected speech. It would
2 be wholly improper to allow the enforcement of any order stating
3 otherwise. There was absolutely no basis on which to restrict
4 Plaintiff's freedom of speech by prohibiting the distribution
5 of the deposition video online. If anything, Plaintiff and his
6 counsel were too tolerant of the missteps by Ms. Acosta and
7 her counsel, including the substantial delay beyond the agreed
8 deadline for filing the ex parte, which violated the parties'
9 stipulation.

10 The balancing of hardships here is in extreme disparity in
11 favor of Plaintiff. Plaintiff, having been silenced by Defendant
12 using the ultimate power of a court order, is without a remedy at
13 law and his injury is only redressable in this Court. This Court
14 is the court of last resort for an ordinary citizen to rectify
15 a violation of his freedom of speech, and Plaintiff prays for
16 justice in this case: a Temporary Restraining Order prohibiting
17 Defendant from enforcing its unlawful order, and an Order to
18 Show Cause regarding a Preliminary Injunction enjoining the
19 enforcement of same pending the trial of this matter.

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21 Date: July 21, 2021

Andrew G. Watters

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