

1
2
3
4
5
6
7
8
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10
11
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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA
HAYWARD HALL OF JUSTICE

PEOPLE FOR THE ETHICAL TREATMENT
OF ANIMALS, INC., a corporation,

Plaintiff

v.

HEIDI MEIZNER, *et al.*,

Defendants

PEOPLE FOR THE ETHICAL TREATMENT
OF ANIMALS, INC., a corporation,

Petitioner,

v.

NATHAN WINOGRAD and
NO KILL ADVOCACY CENTER,

Respondents.

Alameda County Case No. RG18907174
Fairfax County, Virginia
Case No. Civil 2018-01234

**NATHAN WINOGRAD and
NO KILL ADVOCACY CENTER'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
PETA'S MOTION TO COMPEL**

Date: January 10, 2019
Time: 9:00 am
Dept: 511
Judge: Hon Jeffrey Brand
Reservation 2030498

Filed herewith:
*DECLARATION OF NATHAN WINOGRAD
DECLARATION OF JOSHUA KOLTUN
REQUEST FOR JUDICIAL NOTICE*

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Introduction..... 1

Factual and Procedural Background 1

A. PETA is an organization that has adopted the investigative tools of journalism – including guaranteeing confidentiality to its whistleblower sources – in order to expose what it contends is the unethical treatment of animals 1

B. Winograd is a journalist and activist who has adopted the same investigative tools as PETA; one of the subjects of his own investigations has been PETA’s practice of killing animals, which Winograd contends is unethical 2

C. Winograd’s reporting on the incident at the heart of this lawsuit – PETA’s killing of the dog Maya – was based on on-the-record sources, videotape, an analysis of public records, and PETA’s own statements; the confidential whistleblowers merely corroborated what he had reported about PETA’s general practices 3

D. Although the Virginia lawsuit nominally seeks millions from two indigent pro se defendants, the only apparent purpose of the lawsuit is to label Winograd and other PETA critics as “co-conspirators,” without naming them as defendants – thus subjecting them to harassing and intrusive discovery while denying them any ability to defend themselves through discovery or dispositive motions 5

Argument 6

I. Winograd has shown that he falls within the protection of the absolute California Reporter’s Shield and that he is entitled to invoke the qualified Reporter’s Privilege..... 6

A. The First Amendment and the California Constitution support a right not to reveal the confidential source of information reported to the public 6

B. Winograd has met his burden of showing that he gathered information from his confidential sources for the purpose of reporting information to the public 7

C. Winograd’s advocacy of “no kill” animal shelters does not negate his right to maintain the confidentiality of his sources 9

II. PETA cannot overcome Winograd’s constitutional interest in protecting the confidentiality of his sources..... 12

A. Since the Reporter’s Shield applies to Winograd, that ends the matter, for it provides an absolute protection..... 12

B. Even if only the qualified Privilege applied, PETA has not shown that its interest in learning Winograd’s confidential sources overcomes the constitutional interest in protecting the sources’ anonymity 12

Conclusion 15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Cases

Anti-Defamation League of B’nai Brith v. Superior Court, 67 Cal.App. 4th 1072, 1092-94..... 10

Beaver Cty. Emplrs. Ret. Fund v. Tile Shop Holdings, Inc., No. 16-mc-80062-JSC, 2016 U.S. Dist. LEXIS 74205 12

Branzburg v Hayes, 408 U.S. 665, 690-91 (1972).....6, 7, 13

Britt v. Superior Court, *Id.* 20 Cal. 3d 844, 852-54 (1978). 11, 13

Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 667 (1989)..... 12, 15

Mitchell v. Superior Court, 37 Cal. 3d 268, 279-83 (1984).....7, 12, 13

New York Times v. Superior Court, 51 Cal. 3d 453, 461 (1990).....7, 12, 15

O’Grady v. Superior Court, 139 Cal. App. 4th 1423, 1432, 1457-63 (2006).8, 9, 15

People v. Von Villas, 10 Cal. App. 4th 201, 232 (1992).....8

PETA, Inc. v. Stein, 737 F. App'x 122, 130 (4th Cir. 2018)2

Rancho Publications v. Superior Court, 68 Cal. App. 4th 1538, 15497, 11, 13

Shoen v. Shoen, 5 F.3d 1289, 1294 (9th Cir. 1993).9, 11

Stange v. Cox Enters., 440 S.E.2d 503, 507 (Ga. App. 1994)4

Von Bulow v. Von Bulow, 811 F.2d 136 (2d Cir. 1987).9, 11

Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981) 13

Constitution of California

Article I, section 2(b)passim

Statutes

Ev Code § 1070.....7

CCP §1987.2(a); 15

CCP ¶2025.480(j). 15

CCP § 2029.650 (a)..... 15

CCP § 2029.500 12

Other Authorities

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
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24
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28

Ballot Pamphlet, Primary Election 1980.7

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3
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Introduction

Winograd was asked in his deposition to identify confidential whistleblowers who had informed him and provided evidence of PETA’s general practices regarding killing animals. He declined, believing that the Reporter’s Shield and the Reporter’s Privilege protected his right to refuse. The premise of this motion to compel is that “journalism” and “advocacy” are *mutually exclusive* categories. PETA contends that Winograd had no right to invoke the Shield and Privilege (which PETA conflates) because they only protect reporters who maintain neutrality concerning the ethical/political implications of the matters on which they report, and who abstain from political or other constitutionally-protected activities regarding those matters.

Winograd’s refusal was based on the firm belief that his journalism and his advocacy are *intertwined and mutually supportive*. The law supports Winograd. The very authorities relied upon by PETA show that Winograd was entitled to protect his sources. The determinative legal question is whether Winograd, at the time he gathered information from the confidential sources, was doing so with the intention of *reporting* information to the public. The record shows beyond doubt that he was doing so. The law imposes no wall of separation between “journalism” and “advocacy.” The law does not permit this Court to deny a reporter the protection of the Shield and Privilege on the grounds that his reporting is somehow not “legitimate journalism.”

Factual and Procedural Background

A. PETA is an organization that has adopted the investigative tools of journalism – including guaranteeing confidentiality to its whistleblower sources – in order to expose what it contends is the unethical treatment of animals

PETA is an advocacy organization dedicated to stopping what it contends is the unethical treatment of animals. Among the ways in which it advances this cause is by investigating organizations that are (by its standards) abusing animals. To this end it has adopted techniques commonly used by traditional journalists, including whistleblowers, employees of the abusive organizations who surreptitiously and anonymously transmit information and evidence to PETA. According to PETA, its “[w]histleblowers have been instrumental in revealing horrific abuse at scores of laboratories that has resulted in shocking exposés, federal fines, citations, corporate and government policy changes, and the complete end of some cruel experiments on animals.” Koltun

1 Decl., Exh. A. To encourage whistleblowers at laboratories and other facilities to come forward,
2 PETA maintains a form on its website to enable whistleblowers to upload information and evidence.
3 *Id.* PETA states that “[w]e **guarantee confidentiality**, whether you choose to provide contact
4 information or not.” *Id.* (emphasis added). If “violations of local, state, or federal laws and guidelines
5 or corporate policies are reported to PETA, we will file complaints with the appropriate agencies.”
6 *Id.*; also Exh B (testimonial). PETA also offers financial rewards to whistleblowers. *Id.*, Exh. C.

7 In several agriculture-friendly states, so called “Ag-Gag” laws have been passed that would
8 make it more difficult, if not illegal, for PETA to continue these investigative techniques. PETA has
9 challenged these Ag-Gag laws on First Amendment grounds. Twenty-six media organizations
10 supported PETA as *amici* in one such lawsuit, arguing that by chilling the willingness of
11 whistleblower sources to come forward, the statute would interfere with the First Amendment rights
12 of the whistleblowers, journalists, and PETA to expose wrongdoing. Koltun Decl., Exh. D; *cf PETA,*
13 *Inc. v. Stein*, 737 F. App’x 122, 130 (4th Cir. 2018) (holding that PETA has First Amendment standing
14 to challenge statute because of chilling effect on whistleblowers).

15 ***B. Winograd is a journalist and activist who has adopted the same investigative tools as***
16 ***PETA; one of the subjects of his own investigations has been PETA’s practice of***
17 ***killing animals, which Winograd contends is unethical***

18 Nathan Winograd studied journalism in college. Winograd Decl., ¶1. While in college he
19 worked for the Financial News Network. *Id.* Later, he volunteered for PETA in Virginia. *Id.*, ¶ 2.
20 He quit, however, after learning of PETA’s practices concerning the killing of animals, which he
21 regards as unethical. *Id.* He was employed by animal shelters in legal, advocacy, and administrative
22 capacities from 1998 to 2004. After 2004 he intermittently took paid consulting work from animal
23 shelters but has not done so since 2009. The No Kill Advocacy Center, which he founded and runs, is
24 not and never has been an animal shelter. *Id.*

25 Since 2007 he has been blogging continually, several times a week, reporting about animal
26 rights issues and developments, advocating that animal shelters adopt a “no-kill” policy, and
27 advocating legal and regulatory reforms that would advance that policy. *Id.*, ¶3. Around the time he
28 began his blog, a widely publicized trial was taking place in North Carolina of PETA employees, who
had killed healthy animals in the back of a PETA van, disposing of them in supermarket dumpsters,

1 and Winograd reported on the trial testimony. *Id.* Winograd frequently discusses PETA and his
2 opposition to its policies and practices, but his blogging is not exclusively about PETA. *Id.*, ¶5.

3 In addition to his blog, Winograd has published articles online in the Huffington Post. *Id.*,
4 Exh. B. He also often reworks material he had published on his blog into book form. The material
5 concerning the North Carolina trial reappeared in his 2012 book, *Friendly Fire*, and regarding the
6 killing of Maya (the Zarate's pet that is at the heart of this lawsuit), in his 2017 book, *Why PETA kills*.
7 *Id.* He has also written and produced a documentary. His journalism has received multiple awards.

8 In 2008, PETA demanded that Winograd retract certain statements that PETA contended were
9 false and defamatory. *Id.*, Exh.D. Winograd declined to retract any of his statements because he did
10 not believe that they were false. PETA never sent any such notice or demand to Winograd concerning
11 his published statements about PETA's killing of Maya. *Id.*

12 **C. *Winograd's reporting on the incident at the heart of this lawsuit – PETA's killing of***
13 ***the dog Maya – was based on on-the-record sources, videotape, an analysis of public***
14 ***records, and PETA's own statements; the confidential whistleblowers merely***
15 ***corroborated what he had reported about PETA's general practices***

16 Thus as early as 2007, long before PETA killed the Zarates' pet dog Maya, Winograd had been
17 reporting and commenting on PETA's animal-killing practices, and had advocated that these practices
18 be stopped. Winograd Decl., ¶ 5. When Winograd learned that PETA had killed Maya, he
19 interviewed (defendant) Edward Armstrong, the Zarates' spokesman, *on the record*. *Id.*, ¶ 7
20 Armstrong corroborated his account of the incident by supplying a videotape. *Id.* His account was
21 consistent with everything Winograd had previously reported on concerning PETA's practices. *Id.*
22 Shortly after Winograd began reporting about PETA's killing of Maya, Heather Harper-Troje, a
23 former PETA employee, published on her own blog an account of her time as an employee that
24 corroborated Winograd's account of PETA's practices. *Id.*, Exh. E, F. She later submitted her account
25 as a sworn affidavit in the lawsuit the Zarates' brought against PETA. *Id.*, Exh H. Winograd called
26 upon additional PETA employees to come forward, on the record, if possible. *Id.*, Exh. G.

27 In reporting on PETA's killing of Maya, Winograd relied on numerous *on-the-record* sources,
28 including Armstrong and Harper-Troje, the previous sworn testimony in the North Carolina trial of
PETA employees, public statements by PETA founder Ingrid Newkirk and others concerning PETA's

1 mission, philosophy, and practices, and an analysis of public records, many of which he obtained
2 through Public Records Act requests. *Id.*, ¶8. For example, a government inspection showed that
3 PETA’s supposed “animal shelter” was not an animal shelter at all, and that 90% of the animals taken
4 by the “shelter” were killed within 24 hours. *Id.*, Exh. B. Winograd ferreted out discrepancies
5 between PETA’s own reports, in which they claimed to have turned over animals to other shelters, and
6 the reports of those other shelters, which indicated that they did not receive such animals. *Id.*, Exh. L.
7 Winograd would frequently provide hyperlinks to these government reports and other documents, so
8 that his readers could check his analysis and decide for themselves. *Id.*, Exhs. J, K, M.

9 While Winograd was reporting on PETA’s killing of Maya, Winograd was contacted by
10 several informants who had worked at PETA and who corroborated what he had reported about
11 PETA’s general practices regarding killing animals. *Id.*, ¶9. These whistleblowers did not have any
12 direct information concerning PETA’s killing of Maya, and Winograd never reported that they did.
13 *Id.* These whistleblowers reasonably feared retribution from PETA if their identities were revealed.
14 After Heather Harper-Troje went on the record about her experiences as a PETA employee, PETA
15 sought unsuccessfully to have her husband fired from the United States Foreign Service for
16 purportedly conspiring with her to harm PETA. *Id.*, Exh.N. This motion seeks to compel the
17 disclosure of the anonymous whistleblower’s identities.

18 As a journalism student and a fledgling journalist, it was impressed upon Winograd that a
19 journalist’s promise of confidentiality is sacred. To betray that promise would forever compromise
20 his reputation as a journalist and make it impossible to work in the future – indeed would damage the
21 ability of journalists everywhere to obtain vital information of public importance from whistleblowers.
22 *Id.* He was taught by his professor and mentor that to protect confidential material he should destroy
23 his notes after incorporating them into his articles, and he has always done so. *Id.* Many professional
24 journalists follow this practice, and some media organizations require this as company policy. *Id.* &
25 Exh. O; see *Stange v. Cox Enters.*, 440 S.E.2d 503, 507 (Ga. App. 1994) (noting routine practice).

26 At the same time, Winograd is cautious about publishing information learned from
27 confidential sources. Following journalistic best practices, he publishes such information only where
28 he can corroborate that information from nonconfidential sources and evidence (including documents,

1 photographs and videotape). Such was the case here. *Id.*, ¶ 10, Exh. F. When he does publish
 2 confidential information, he tries to give his readers some information concerning the source, without
 3 providing enough to identify the source. Here, he did so by describing the confidential informants as
 4 people who had worked at PETA. *Id.* He has never identified them to anyone. *Id.*

5 As a result of his reporting, Winograd and No Kill Advocacy Center have publicly advocated
 6 that PETA’s practices of killing animals be stopped. He has publicly called upon various government
 7 officials and agencies to investigate and halt PETA’s practices, and called for the passage of
 8 legislation that would have halted PETA’s killing practices. *Id.*, ¶¶ 5, 11, Exh. C, P, R. Winograd’s
 9 calls for official action were done both through formal petitions and letters to officials, and
 10 simultaneous public calls for such action on his blog. *Id.* The legislation ultimately passed, despite
 11 PETA’s lobbying against it. He publicly criticized regulations enacted to enforce that legislation,
 12 which he argued allowed PETA’s killing to continue. *Id.*, Exh. S.

13 Once the Zarates filed their lawsuit against PETA, Winograd reported on and commented on
 14 that proceeding. *Id.*, Exh T. He predicted, accurately, that PETA would settle the case before it could
 15 be forced to produce evidence in discovery that might corroborate his reporting. *Id.*. PETA settled,
 16 paying the Zarates \$49,000 in exchange for a conciliatory statement. Complaint, ¶ 118.

17 ***D. Although the Virginia lawsuit nominally seeks millions from two indigent pro se***
 18 ***defendants, the only apparent purpose of the lawsuit is to label Winograd and other***
 19 ***PETA critics as “co-conspirators,” without naming them as defendants – thus***
 20 ***subjecting them to harassing and intrusive discovery while denying them any ability***
 21 ***to defend themselves through discovery or dispositive motions***

22 In 2018, PETA filed the instant Virginia lawsuit, if “lawsuit” is the proper term for this
 23 peculiar proceeding. Hirschkop Decl., Exh. A (“Complaint”). PETA is seeking millions of dollars in
 24 damages from two indigent *pro se* defendants, the Armstrongs, who lived in the trailer park with
 25 Zarate. *Id.*, ¶ 9-12.¹ According to the Complaint, Edward Armstrong and the Zarates intentionally
 26 “conspired” to “edit” the security video. *Id.* By “edit,” PETA means they failed to include earlier
 27 footage of Maya running loose, which for some reason PETA believes exonerates its killing of Maya.
 28 *Id.*, ¶ 29. Armstrong and Zarate “edited” the video to “purposely provide false information” to the

¹PETA originally included two other defendants in the lawsuit, but while their motion to
 compel discovery of PETA was pending, PETA nonsuited them. Koltun Decl., ¶3, Exhs. E & F.

1 Sheriff in order to induce a “wrongful” prosecution of PETA employees. *Id.*, ¶ 33. They also took
 2 their purportedly “false” story and “edited” video to numerous others, who became part of a vast
 3 “conspiracy” to harm PETA, involving numerous people, including Winograd. These people are all
 4 **labeled** “co-conspirators,” but are **NOT** named as **defendants**. *Id.*, ¶¶ 13-21. These “co-conspirators”
 5 include Zarate and his attorneys (who presumably were subject to a general release), and numerous
 6 critics and opponents of PETA’s policies concerning the killing of animals. *Id.* PETA’s critics are
 7 shady characters who do not have the proper qualifications to criticize PETA’s practices; they
 8 promote their wrongheaded “no kill” philosophy, “hate” PETA and seek to “harm” PETA’s
 9 “business” by encouraging legislation, regulations, and administrative actions that would halt its
 10 practices. *Id.*, ¶¶ 21-119. Since the “co-conspirators” are not defendants, they cannot seek discovery
 11 as to the truth of their statements about PETA, or file dispositive motions arguing that their purported
 12 “conspiratorial” acts are protected by the Constitution, not to mention the statute of limitations.

Argument

14 I. ***Winograd has shown that he falls within the protection of the absolute California Reporter’s
 15 Shield and that he is entitled to invoke the qualified Reporter’s Privilege.***

16 A. ***The First Amendment and the California Constitution support a right not to reveal
 17 the confidential source of information reported to the public***

18 The Reporter’s Shield of the California Constitution provides reporters with an **absolute**
 19 immunity from being held in contempt for declining to testify concerning confidential sources or
 20 unpublished information. *Id.* Art I, Sec. 2(b). There is also a **qualified** Reporter’s Privilege, arising
 21 under both the First Amendment and the California constitution’s protections of freedom of speech.

22 In *Branzburg v Hayes*, the United States Supreme Court balanced the First Amendment burden
 23 on news gathering that would result from compelling reporters to testify before grand juries against
 24 the “public interest in law enforcement and ensuring effective grand jury proceedings.” *Id.*, 408 U.S.
 25 665, 690-91 (1972). On the record before it, the Court held that the reporter’s First Amendment
 26 interest in declining to appear was outweighed. *Id.*; *compare id* at 709 , concurring opinion of Powell,
 27 J. (where reporter appears before grand jury but refuses to disclose confidential sources, court must
 28 balance competing interests in determining whether to compel disclosure). The Court noted that state
 legislatures were entitled to enact stronger reporter’s privileges, and state courts entitled to fashion

1 reporter's privileges arising from the state's constitution. *Id.* at 706.

2 At the time *Branzburg* was decided, California had a so-called "reporters' shield" enshrined in
3 Evidence Code section 1070. That statutory shield was elevated by referendum to constitutional status
4 in 1980, in direct response to *Branzburg* and to the perceived unwillingness of the courts to apply the
5 protections of the shield. RJN Exh A (Ballot Pamphlet). Article I, section 2(b) provides that a

6 publisher, editor, reporter, or other person connected with or employed upon a
7 newspaper, magazine, or other periodical publication ... or any person who has been so
8 connected or employed, shall not be adjudged in contempt by a judicial ... body, ... for
9 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.

10 In a civil case in which the reporter is called as a third-party witness, since contempt is the
11 only applicable sanction, the Shield operates as an **absolute** protection. *New York Times v. Superior*
12 *Court*, 51 Cal. 3d 453, 461 (1990). Where the reporter is a party, however – for example when he is
13 sued for defamation – there are other potential sanctions for refusing to testify. In this situation the
14 First Amendment creates a **qualified** Reporter's Privilege which requires a balancing of interests to
15 determine whether and to what extent the reporter may be penalized for declining to testify concerning
16 the identity of confidential sources or other unpublished information. *Mitchell v. Superior Court*, 37
17 Cal. 3d 268, 279-83 (1984).

18 This First Amendment balancing test also comes into play in the event that a third-party
19 witness cannot invoke the shield, for example in federal court, or where his reporting falls outside the
20 terms of the Shield. *Rancho Publications v. Superior Court*, 68 Cal. App. 4th 1538, 1549 (1999).
21 This balancing test is rooted in the First Amendment and in California Constitution's protections of
22 free speech and privacy. *Id.* at 1547-49 (citing authorities). This qualified Privilege also protects **the**
23 **sources'** rights "to promulgate their information and ideas in a public forum while keeping their
24 identities secret." *Id.* at 1547. The Privilege also protects against using discovery to investigate those
25 who have organized in political opposition to the party seeking the discovery. *Id.* at 1547.

26 **B. Winograd has met his burden of showing that he gathered information from his**
27 **confidential sources for the purpose of reporting information to the public**

28 The California Reporter's Shield is absolute, but because of its specific textual terms, is

1 narrower in its coverage than the qualified Reporter’s Privilege. But these terms have been broadly
2 construed. Winograd easily falls within their protection.

3 Contrary to PETA, the Shield is not limited to the traditional or institutional media. MPA at 2,
4 7. Although the Shield refers to a “reporter, or other person *connected with* or employed upon a
5 newspaper, magazine, *or other periodical publication*,” it is a sufficient connection that a freelance
6 writer is gathering the information in the hopes of “pitching” his future piece to (say) a magazine.
7 *People v. Von Villas*, 10 Cal. App. 4th 201, 232 (1992). The Shield also applies to those who self-
8 publish, including those who self-publish via the internet. *O’Grady v. Superior Court*, 139 Cal. App.
9 4th 1423, 1432, 1457-63 (2006). The Shield requires a “periodical” publication, but that means only
10 that publication be “recurring,” not that it occur at regular intervals. *Id.* at 1463-66.

11 Relying on *O’Grady*, PETA argues that this Court should deny the protections of the Shield to
12 Winograd because (PETA contends) he is not *really* a journalist by virtue of his “refusal to disclose
13 [the identities of his confidential sources], and his destruction of any and all supporting documentation
14 that might be used to test the veracity of his claims.” MPA at 7, 10-11. But the court in *O’Grady*
15 specifically rejected the proposition that it should “embroil” itself in determining what is “legitimate
16 journalis[m].” *Id.*, 139 Cal. App. 4th at 1457. Any such inquiry “would imperil a fundamental
17 purpose of the First Amendment, which is to identify the best, most important, and most valuable
18 ideas not by any sociological or economic formula, rule of law, or process of government, but through
19 the rough and tumble competition of the memetic marketplace.” *Id.*,

20 PETA argues that in order to qualify as journalist covered by the Shield, one must *provide the*
21 *public* with the identity of one’s sources and all supporting evidence and documentation to the public,
22 so that they may judge it for themselves. MPA at 10. On that interpretation, the Shield is a
23 nonsensical nullity. The protection of the Shield is the absolute right to “*refus[e] to disclose* the source
24 of any information ...or ... any unpublished information... include[ing] but ... not limited to, all
25 notes, outtakes, photographs, tapes or other data of whatever sort.” Art I, Sec. 2(b) (emphasis added).

26 To be sure, the Shield, with its absolute protection, is limited to “periodical publications.” If
27 Winograd had never blogged or sought to have articles published in online newspapers such as the
28 Huffington Post, but had only written books, then the Shield would not apply. But Winograd’s books

1 simply collect in a new format material that he originally gathered and published on his blog.
 2 Winograd Decl., ¶ 4. Winograd has been continually blogging about PETA and its policies of killing
 3 animals from 2007 until now. *Id.*, ¶3-13. There can be no serious contention that at the time
 4 Winograd gathered the information he lacked the intention to publish it in a “periodical publication.”

5 Moreover, even if Winograd were solely a book author – as PETA falsely states² – and the
 6 *Shield* did not apply, the *Privilege* applies. “The critical question for deciding whether a person may
 7 invoke the journalist's privilege is ... whether the person seeking to invoke the privilege had the intent
 8 to use material - sought, gathered or received - to disseminate information to the public and [whether]
 9 such intent existed at the inception of the newsgathering process.” *Shoen v. Shoen*, 5 F.3d 1289, 1294
 10 (9th Cir. 1993). “Indeed, it would be unthinkable to have a rule that an investigative journalist, such as
 11 Bob Woodward, would be protected by the privilege in his capacity as a newspaper reporter writing
 12 about Watergate, but not as the author of a book on the same topic.” *Id.*; accord *O’Grady*, 139 Cal.
 13 App. 4th at 1467.

14 **C. Winograd’s advocacy of “no kill” animal shelters does not negate his right to**
 15 **maintain the confidentiality of his sources**

16 PETA argues that Winograd’s “slanted focus,” his “selective” reporting and criticism, and his
 17 advocacy of a position (in favor of “no kill” shelters and in opposition to PETA’s killing practices)
 18 disqualify him from the protection of the Shield and Privilege. But the First Amendment specifically
 19 forbids this Court from “embroiling” itself in the determination PETA is asking it to make: that
 20 Winograd is not a legitimate journalist. *O’Grady*, 139 Cal. App. 4th at 1457.

21 PETA contends that even if it were proper for a journalist to act as an advocate, Winograd

22 ² PETA misstates the facts of this case in an attempt to force an analogy to *Von Bulow v. Von*
 23 *Bulow*, MPA 4, 6 (citing *id.* 811 F.2d 136 (2d Cir. 1987)). *Von Bulow* involved the girlfriend of a
 24 suspected murderer who sought to avoid disclosing her notes on the ground that she hoped to use them
 25 to write a book. Neither the fact that she was von Bulow’s girlfriend nor that she had never published
 26 anything disqualified her from seeking the privilege. *Id.* at 139, 144-45. What disqualified her was
 27 the court’s determination that she had initially taken the notes for personal reasons and with no
 28 intention to publish, and only later decided to write a book based on those notes. *Id.* at 141-42; 145-
 46. **PETA knows** that Winograd was reporting to the public on his blog about PETA at least by 2008,
 when it sent a retraction demand to him. Winograd Decl., Exh D. **The very information PETA is**
seeking on this motion is the answer to a question asked at his deposition to identify the confidential
 informants whose information are contained in Winograd’s **February 9, 2015 blog post**. Compare
 Koltun Decl., Exh.G (Tr. 188:17-191:8), Exh H (Depo Exhibit 11) with Winograd Decl., ¶7, Exh. F.

1 “cannot ... wear both hats at once.” MPA at 4. For example, counsel questioned Winograd about a
2 letter that Winograd had sent the Virginia State Veterinarian seeking to stop PETA’s killing, citing the
3 killing of Maya and previous killings on which Winograd had reported. Koltun Decl., Exh. G, at
4 84:19-21. In response to the question, “You did that as an advocate, not as a reporter,” Winograd
5 refused to give a simple yes or no answer, but insisted on explaining that his letter was advocacy
6 “based on an investigation that I gathered as part [counsel interrupts and tries to stop him] based on
7 information I gathered as part of my journalistic work.” In fact, he *had been* wearing “both hats at the
8 same time.” Based on the investigation he had conducted, he simultaneously drafted the petition and
9 published an article about the incident which summarized the petition and linking to it, as well as to
10 the security video; this was the first of many articles he wrote publicizing the killing of Maya and
11 calling publicly for an official response. Winograd Decl., ¶ 11, Exhs. P, Q. But when Winograd
12 declined to accept the premise of the question by giving a simple “yes” or “no,” counsel threatened to
13 “certify the question to the judge” and seek “sanctions.” Koltun Decl., Exh. G, 82:1-85:4.

14 Well, here we are. PETA relies on *Anti-Defamation League of B’nai Brith v. Superior Court*,
15 describing it as holding that a “nonprofit advocacy group” could not “invoke[] the protections of the
16 First Amendment in an attempt to withhold *non-public* information it shared with foreign government
17 officials in furtherance of its charitable mission.” MPA at 4 (*citing id.* 67 Cal.App. 4th 1072, 1092-94
18 (emphasis added)). PETA suggests that the court in *Anti-Defamation League* disqualified the ADL
19 from First Amendment protection precisely because its “mission” was “advocacy.” But the court’s
20 ruling in that case was the exact opposite. The court held that the ADL conducted activities that
21 constituted “journalism,” such as publishing its magazines and other publications, and that the
22 information it had gathered qualified as journalism if the intention was to publish it. *Id.* at 1093 This
23 was true even if the ADL never published the information, because it was the intent at the time of
24 gathering the information that was significant. *Id.* The snippet quoted by PETA simply indicated that
25 *if* the ADL *had not* gathered the information in question in order to *publish* it, but rather to share it
26 *privately* with a foreign government, then that activity would not be protected. *Id.* at 1093-94.³

27 _____
28 ³ PETA contends that Winograd, as in *Anti-Defamation League*, “gathered and shared *the*
information at issue with his co-conspirators, and he used the information to lobby various authorities

1 PETA notes that Winograd took out an advertisement in a local paper that mirrored the
2 allegations in his blog that “PETA may be in your neighborhood rounding up animals to kill,” arguing
3 that this “self-promotional content” was like the “advertorial” that was denied the protection of the
4 Shield in *Rancho Publications*. MPA at 5-6. In *Rancho Publications*, the newspaper published an
5 advertorial purchased by anonymous persons. The court ruled that the newspaper was not entitled to
6 invoke the *Shield* to hide the identity of the advertisers, because the newspaper had not acted as a
7 journalist in accepting the advertorial, but rather was “indifferent to the informational content of these
8 advertisements and would have accepted them whether they sold used cars, promoted the painless
9 removal of unwanted hair, or communicated absolutely nothing.” *Id.*, 68 Cal.App.4th at 1546. Here,
10 PETA is not contending that Winograd was indifferent to the content of the ad. On the contrary,
11 PETA states that he “kept strict control over the content.” MPA at 6.

12 Moreover, the newspaper in *Rancho Publications* **successfully protected the identity of the**
13 **advertisers under the qualified Privilege** because the advertisers themselves were entitled to speak
14 anonymously and galvanize political opposition to the plaintiff (a hospital), which the Court
15 characterized as “core political speech.” *Id.* at 1550.⁴ Similarly, in *Britt v. Superior Court*, on which
16 the court in *Rancho Publications* relied, the California Supreme Court barred discovery into the
17 activists in organizations who were protesting operations at a local airport and attempting “through
18 traditional political efforts to influence the future conduct of such operations,” which political efforts
19 were protected by the U.S. and California constitutions. *Id.* 20 Cal. 3d 844, 852-54 (1978). The
20 Privilege protects “investigative reporting.” *Shoen* 5 F.3d at 1293. That includes

21 muckraking authors such as Lincoln Steffens and Upton Sinclair [, who] exposed
22 widespread corruption and abuse in American life. More recently, social critics such as
Rachel Carson, Ralph Nader, Jessica Mitford, and others have written books that have

23 in an attempt to shut down PETA’s sheltering activities.” MPA at 4. But there is no contention that
24 Winograd gathered the information to **privately** share it with the “co-conspirators.” On the contrary,
25 there is no evidence that Winograd has ever used **any** material information in his advocacy work that
he hasn’t simultaneously publicized through his blog and other media.

26 ⁴ *Accord Von Bulow*, 811 F.2d 136, 144-45 (“the informative function asserted by
27 representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists,
28 academic researchers, and dramatists. . . liberty of the press is the right of the lonely pamphleteer who
uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes
the latest photocomposition methods.”) (internal citation omitted).

1 made significant contributions to the public discourse on major issues confronting the
American people.

2 *Id.* Every crusading journalist in that pantheon of heroes cited by the court would have flunked
3 PETA’s putative “journalism” test, for their journalism was inseparable from their advocacy. Indeed,
4 Sinclair and Nader took their advocacy onto the campaign trail and sought public office. Winograd
5 and NKAC’s intertwined investigative and advocacy work are no different from that done by Nader
6 and his nonprofit Public Citizen. Koltun Decl., Exhs. D at 6-7 (discussing advocacy journalism), I.⁵

7 **II. *PETA cannot overcome Winograd’s constitutional interest in protecting the confidentiality***
8 ***of his sources***

9 **A. *Since the Reporter’s Shield applies to Winograd, that ends the matter, for it provides***
10 ***an absolute protection***

11 Since Winograd is protected by the Shield, that ends the matter, for in a civil case that
protection is absolute. *New York Times*, 51 Cal.3d. at 461.

12 **B. *Even if only the qualified Privilege applied, PETA has not shown that its interest in***
13 ***learning Winograd’s confidential sources overcomes the constitutional interest in***
14 ***protecting the sources’ anonymity***

15 Even if Winograd were protected only by the qualified Privilege, PETA has failed to show a
sufficient need for the identity of the confidential informants. In evaluating PETA’s purported need,
16 this Court must carefully examine five “interrelated factors.” *Mitchell*, 37 Cal.3d at 279.⁶

17 ***First***, the Court must consider “***the nature of the litigation and whether the reporter is a***

18 ⁵ That Winograd’s uses the vehicle of his nonprofit No-Kill Advocacy Center does not
19 disqualify him from the protections of the Shield or Privilege any more than a traditional for-profit
20 newspaper, which may see a surge in circulation if it publishes a newsworthy story. *Cf. Harte-Hanks*
21 *Commc’ns v. Connaughton*, 491 U.S. 657, 667 (1989) (“If a profit motive could somehow strip
22 communications of the otherwise available constitutional protection, our cases ... would be little more
than empty vessels.”). Moreover, the contention that Winograd is motivated by a desire to profit from
the “business model” of “no-kill” animal shelters is factually incorrect. He has not operated any
animal shelter, or even done any paid consulting work with animal shelters since 2009. Winograd
23 Decl., ¶2. *Beaver Cty. Empls. Ret. Fund v. Tile Shop Holdings, Inc.*, even if it were correctly decided,
is thus inapplicable. See MPA at 5, citing *id.*, No. 16-mc-80062-JSC, 2016 U.S. Dist. LEXIS 74205
24 (N.D. Cal. June 7, 2016).

25 ⁶ The *Mitchell* factors require this Court to carefully scrutinize the underlying case, even
though that case is in another jurisdiction. Even if the Court were not required to do so as a
26 constitutional matter, it is ***required to do so by California law***. CCP § 2029.500. When a litigant in a
foreign state seeks discovery of a nonparty witness in California, the California court has a duty to
27 treat the matter as “if the case had originally been filed in” California, because California has a
“significant interest in [such] cases in protecting its residents ... from any unreasonable or unduly
28 burdensome discovery request.” *Id.* (Law Revision Commission Comments).

1 **party.”** *Id.* Where the case is a libel action with a public-figure plaintiff (who must show “actual
 2 malice”) and the reporter is the defendant, the reporter’s “successful assertion of the privilege” might
 3 unfairly shield him from liability and disclosure might be appropriate. *Id.* at 279-80 (citing
 4 *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981)). On the other hand, where the reporter is only a
 5 witness, “the civil litigant’s interest in disclosure should yield to the journalist’s privilege in all but the
 6 most exceptional cases,” for otherwise “its value will be substantially diminished,” since “potential
 7 sources” must have confidence that “compelled disclosure is unlikely.” *Zerilli*, 656 F.2d 712.

8 As PETA concedes, Winograd is a witness, not a party. MPA at 8. PETA seeks to evade this
 9 by inventing a new concept: the nonparty party. *Id.* PETA has **labeled** Winograd as a “co-
 10 conspirator” and therefore, PETA contends, Winograd is the moral equivalent of a party. But the
 11 *Mitchell* standard does not permit PETA to have its cake and eat it too. If PETA had ever had the
 12 courage to sue Winograd for defamation, he would indeed have been a party, and that would have
 13 factored in PETA’s favor because of the possible inequity of allowing him to use the Privilege to
 14 shield himself from liability. But in such a case Winograd would **also** have had the right to defend
 15 himself against liability by filing motions to contest the legal bases of the action. He could have taken
 16 discovery of PETA that might have shown the truth of any allegedly false statements. But PETA has
 17 ensured that the only parties to the case are two indigent *pro se* defendants, precisely so that it cannot
 18 be subjected to discovery itself. PETA complains that the Zarate lawsuit against PETA was brought
 19 “not for the purpose of advancing a legal claim on behalf of the Zarates, but rather to use as a vehicle
 20 to obtain broad based discovery as to PETA’s operations ... for use in harming PETA.” Complaint, ¶
 21 103. That is what PETA is doing here: hijacking the Court’s discovery processes to harass and
 22 investigate its critics and opponents. (By contrast, in the Zarate case PETA was a defendant who
 23 could defend itself) The “nature of this case” then – intruding on core political speech and
 24 association of PETA’s critics in the public arena – is precisely the sort that requires heightened
 25 protection under the qualified Privilege. *Rancho Publications*, 68 Cal. App. 4th at 1550-51; *Britt*, 20
 26 Cal.3d at 852-855, 857; *cf. Branzburg*, 408 U.S. at 707-08 (court must protect reporters from
 27 harassment intended to disrupt relationship with sources).

28 **Second**, the identity of the confidential informants must not merely be relevant to PETA’s

1 lawsuit; it must “*go to the heart of plaintiff’s claim.*” *Mitchell*, 37 Cal. 3d at 280 (emphasis added).
 2 ***The only two defendants in the lawsuit are the Armstrongs.*** Winograd interviewed Edward
 3 Armstrong as ***on the record*** and published the videotape Armstrong provided to him and others
 4 (including the Sheriff). PETA claims that Armstrong was a “fraudster” who “doctored” that
 5 videotape. But if that were so, then one of the people he defrauded was Winograd. Armstrong
 6 supplied information to Winograd, not vice versa. Winograd answered any questions at his deposition
 7 that PETA asked about his interactions with Armstrong. PETA has failed to meet its burden of
 8 showing that whistleblowers to whom Winograd spoke about PETA’s general killing practices (not
 9 about Maya) are at the ***heart*** of PETA’s lawsuit, which is against ***Armstrong***, not the putative “co-
 10 conspirators.”⁷

11 ***Third***, the Court must consider whether PETA has exhausted all “alternative sources of
 12 information,” meaning that the information sought is ***not merely cumulative*** of other information
 13 available to PETA. *Mitchell*, 37 Cal.3d at 282. Here, Winograd relied upon publicly available
 14 information, including the testimony and documentation provided by known witnesses such as
 15 Armstrong and Harper-Troje and those who testified in the North Carolina proceeding, as well as
 16 public documents. The information sought concerning the confidential whistleblowers is cumulative
 17 of that which PETA has within its power to produce at trial.

18 ***Fourth***, the court should consider “***the importance of protecting confidentiality in the case at***
 19 ***hand.***” *Mitchell*, 37 Cal.3d at 283. “The investigation and revelation of hidden criminal or unethical
 20 conduct is one of the most important roles of the press in a free society – a role that may depend upon
 21 the ability of the press and the courts to protect sources who may justifiably fear exposure and
 22 possible retaliation.” *Id.* Here the confidential whistleblowers have corroborated Winograd’s
 23 exposure of PETA’s practices, which he and many others consider unethical. These whistleblowers
 24 reasonably fear retribution from PETA. Winograd Decl., ¶9, Exh. N.


25 _____
 26 ⁷ To constitute a ***conspiracy*** to spread false information about PETA, the participants would
 27 have to ***know*** it was false. The snippet of evidence PETA introduces to show that Winograd was a
 28 member of a “conspiracy” shows that all parties to that communication believed at the time that, since
 PETA had deliberately killed Maya, by petitioning “administrative” and “legislative” channels for
 reform, they would be able to save “pets” from being killed by PETA. Hirschkop Decl., Exh. B.

1 *Fifth*, the Court must consider whether the requesting party has presented *prima face evidence*
 2 *of falsity*. *Mitchell*, 37 Cal.3d at 282-83, *O’Grady*, 139 Cal.App.4th at 1479 (*prima facie* case on the
 3 merits). PETA has submitted *no evidence whatsoever* of falsity. The record contains only the
 4 *allegations* of the Complaint⁸ and various assurances of counsel. Certainly there is no evidence that
 5 Winograd “admitted” the falsity of anything he published, let alone that he knew that any statements
 6 were false at the time he published them.⁹

7 **Conclusion**

8 Because PETA has misstated the facts and law in order to compel Winograd to betray
 9 confidential sources who blew the whistle on its own practices, and because the discovery herein was
 10 designed to harass one of PETA’s most outspoken critics and intimidate future whistleblowers,
 11 Winograd respectfully asks that the motion be denied and for an award of attorney fees in an amount
 12 to be determined on separate motion. CCP §§ 1987.2(a); 2025.480(j). If the Court grants this motion
 13 to compel, Winograd respectfully contends that the arguments herein are, at a minimum, “colorable,”
 14 and requests that the Court stay any contempt proceeding for 60 days so that he can seek appellate
 15 review on the important issues implicated by such a denial.¹⁰

16 Dated January 2, 2019

17 
 18 Joshua Koltun
 19 Attorney for Respondents

22 ⁸ Much of what the Complaint characterizes as “false” are simply opinions and philosophical
 23 positions. PETA argues that the opinions are outrageous and wrongheaded, but even if that were so,
 they would still be protected by the First Amendment.

24 ⁹ Moreover, for a public figure such as PETA, the defamer must show “actual malice.” Actual
 25 malice in the constitutional sense is not the “hatred” that PETA alleges of the Complaint. Actual
 26 malice means “that the defendant actually had a ‘high degree of awareness ... of probable falsity.’”
Harte-Hanks, 491 U.S. at 688.

27 ¹⁰ *New York Times*, 51 Cal. 3d at 460 (trial court should stay adjudication of contempt pending
 28 appellate review if there is a colorable argument against disclosing confidential source); CCP §
 2029.650 (a) (superior court order granting relief concerning interstate deposition may petition for
 extraordinary writ).

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Joshua Koltun, Attorney, 1 Sansome Street, Suite 3500/No. 500, San Francisco CA 94104.

On **January 2, 2019**, I served the following documents:

**WINOGRAD OPPOSITION TO MOTION TO COMPEL
DECLARATION OF NATHAN WINOGRAD
DECLARATION OF JOSHUA KOLTUN
REQUEST FOR JUDICIAL NOTICE**

X By placing a true copy of the document(s) listed above in a separate and sealed envelope, and causing it to be hand-delivered to the person(s) at the address(es) listed below:

__ By placing a true copy of the document(s) listed above in a separate and sealed envelope, postage paid, to be delivered by regular US Mail to the person(s) at the address(es) listed below:

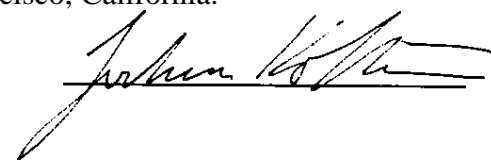
__ By placing a true copy of the document(s) listed above in a separate and sealed envelope to be delivered by overnight delivery service to the person(s) at the address(es) listed below:

X By emailing a true copy of the document(s) listed above to the person(s) at the electronic service addresses listed below:

Edward P. Sangster
K&L Gates LLP
Four Embarcadero Center
Suite 1200
San Francisco CA 94111
edward.sangster@klgates.com

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Executed on **January 2, 2019**, at San Francisco, California.


Joshua Koltun

Joshua Koltun ATTORNEY

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