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ATTORNEY FOR DEFENDANT MELISSANNE VELYVIS

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. MELISSANNE VELYVIS, Defendant	Case No.: CR211376A **RESPONSE TO THE PEOPLE'S SECOND AND THIRD SURREPLIES OPPOSING DEMURRER; DELARATION OF COUNSEL** Date: June 22, 2020 Time: 9:00 a.m. Courtroom: M

Introduction

Melissanne Velyvis was first ordered that she must not post online or speak to third parties about her own survivor story to the extent it referenced her ex-husband. Now she is being prosecuted for allegedly doing so. The cases cited by the parties, particularly *Candiotti* and *Evilsizor*, make the same critical distinction:

It may be lawful for the government to enjoin a party from disclosing sensitive information acquired from another party, if that order is precisely tailored.

But it is always in excess of jurisdiction, under both Constitutional principles and the DVPA (per Curcio), to muzzle a person from speaking about information independently acquired, especially their own life experiences.

Ms. Velyvis's speech about Dr. Velyvis to willing third parties was entirely independently-acquired. Such speech cannot be enjoined. The demurrer should be sustained.

Background: The May 2, 2018 Hearing[1]

The hearing began with Ms. Velyvis seeking a continuance because she had secured legal representation but the attorney was unavailable that day. Ms. Velyvis offered that the attorney was available on several other dates that same month. (May 2, 2018 Reporter's Transcript ("5/2/18 RT") in Case No. FL1603174, 43:3-18.) The court denied Ms. Velyvis' continuance request and insisted she proceed alone. (*Id*. 43:24-28.)

Testimony from Ms. Velyvis

West Virginia Child Custody Case. After questioning Ms. Velyvis about a bankruptcy filing, Mr. Jackson turned to another matter not noticed in the DVRO application: a West Virginia child custody proceeding involving Dr. Velyvis and his new girlfriend, Kaitlyn Dickens. (*Id*. 70:17-81:21.) Ms. Velyvis testified that Kaitlyn's ex-husband, Mitchell Dickens, had contacted Ms. Velyvis and pleaded for help because Kaitlyn and Dr. Velyvis were seeking full custody of his six- and seven-year old children. Mitchell said that his attorney, through investigation[2], had learned of allegations of

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[1] In its second surreply, the prosecution based its defense of its filing decision on their claim that the May 2, 2018, hearing evidenced Ms. Velyvis' "pattern and practice of harassing her ex-husband and disturbing his peace." Most of this "pattern" was not actually evidenced by that hearing and all of it is overstated. (Supp. Briefing in Opposition, at 5-6.) To respond, therefore, it is required to review the evidence brought forth at that hearing.

[2] Through his questioning, Mr. Jackson tried to insinuate that Mitchell's attorney had learned about such allegations against Dr. Velyvis through Ms. Velyvis' blog. (5/2/18 RT 72:13-26.) There is no evidence of that. An attorney's investigator would be capable of running

violence against Dr. Velyvis. (*Id*. 72:5-72:19.) Ms. Velyvis testified that she provided Mitchell with her victim copies of two police reports, a recording (the contents of which are never disclosed in the hearing), a declaration she wrote regarding allegations of Dr. Velyvis' domestic abuse, two deposition transcripts of testimony by her former neighbors when she lived with Dr. Velyvis, a minute order confirming her divorce from Dr. Velyvis, and a publicly-filed request for order. (*Id*. 71:22-72:2, 75:25-78:18.)

Email to Attorney Jackson. Mr. Jackson then turned to questions about an email he received on April 26, 2018, from Ms. Velyvis, which email attached a recording entitled "John Admitting Abuse." (*Id*. 81:25-82:27.) Ms. Velyvis testified that a handyman named Nelson was present during the recorded conversation, which was not an argument; and that Dr. Velyvis also recorded the conversation though he did not expressly consent to being recorded by her.[3] (*Id*. 83:19-84:23.) The evidence presented at the hearing (mostly the unsworn "testimony" of Mr. Jackson) does not establish that this is the same recording Ms. Velyvis provided to Mitchell. (5/2/18 RT 88:13-89:8.) Nor does the court make a factual finding addressing this issue.

Facebook Harassment Allegation. Mr. Jackson then turned to Dr. Velyvis' allegation that Ms. Velyvis was harassing him with Facebook friend requests from unknown third parties. After questioning, no evidence emerged that this was remotely true. (*Id*. 89:23-91:16.)

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a background check on a person, learning that the person was arrested, and then seeking relevant police records through a subpoena or public records request.

[3] Given that the handyman was present, the conversation was therefore not confidential and there was no violation of Penal Code 632 by either Ms. Velyvis or Dr. Velyvis, both of whom apparently recorded the conversation in front of each other.

Blog Post. Ms. Velyvis then testified that on March 13, 2018, she posted a Wordpress blog post entitled "Nonfatal Strangulation Administered by Husband, Dr. John. H. Velyvis." (*Id*. 92:5-28.) Subsequently, Mr. Jackson stipulated that Dr. Velyvis was no longer alleging that she also posted the blog on Facebook. (*Id*. 115:13-18.)

Emails to Family Members. Mr. Jackson then turned to Dr. Velyvis' allegation that since December 22, 2017, Ms. Velyvis has harassed his family members over email. This allegation also does not gain any evidentiary support. Ms. Velyvis testified that she had not contacted his mother, brother, sister, or any blood relatives. Ms. Velyvis had only contacted his brother's wife, Christine Velyvis. Mr. Velyvis also testified that her last contact of Christine was January 31, 2018. (*Id*. 96:20-100:27.)

Court Indicates Time Restriction. After completing his questioning, Mr. Jackson announced Dr. Velyvis had to leave at noon. Ms. Velyvis offered she could come back later to finish the hearing. The court responded: "That's all right. I am making sure that each of you have equal time to address the issues raised." (*Id*. 103:1-8.)

Questioning of Dr. Velyvis by Ms. Velyvis:

Ms. Velyvis' questioning of Dr. Velyvis went as well as one could expect for a lay person forced to examine her ex-husband in an emotionally-charged hearing.

Notably, when Ms. Velyvis attempted to introduce photographic evidence supporting her strangulation allegation, the court rejected it, stating: "This is not a civil defamation action." (*Id*. 124:10-125:18.)

Ms. Velyvis also stated to Dr. Velyvis that she and Christine Velyvis have been "friends for years on Facebook and that we have been talking all along and that they wanted to know what was going on because they don't talk to you." Dr. Velyvis

responded that Ms. Velyvis' communications with his sister-in-law "have been nothing but harassing and ruining a relationship with my brother and sister-in-law, including my mother and my sister. . . . you are friends and she blocked you." (*Id*. 129:23-130:18.)

The court cut off Ms. Velyvis' questioning at five minutes to noon. When Ms. Velyvis objected that she still had questions to ask Dr. Velyvis to defend herself, the court stated that both sides were given "equal time." (*Id*. 130:19-26.)

The Court's Ruling

The court then told each side they "have two minutes to argue." (*Id*. 131:1.) Following these brief arguments, the court made the following statement:

> So I look at the pattern of behavior that has taken place and I see that there is a pattern indeed, Ms. Velyvis, and I do think that you have crossed a line.
>
> You did interject yourself with the custody evaluation in the Norton-Velyvis matter, and I actually presided over that case as well. I understand the damage that your interjection into that custody evaluation did and that was in the form of unsolicited contact with the custody evaluator. You have inserted yourself into the Norton-Velyvis matter. You filed a request for joinder in a case seeking custody and visitation and/or parenting time with John's biological children. Again, a bizarre and completely unwarranted application.[4]

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[4] As can be seen from the review of the transcript, contrary to the prosecutor's claim in their June 3, 2020, filing (at 2), there was never any evidence presented at the May 2, 2018, hearing of Ms. Velyvis' conduct with regard to the Norton-Velyvis matter, Dr. Velyvis' other pending divorce. The court apparently made this statement about that case based on its own personal belief and opinion from having also presided over that case. The court appears to be referring to the fact that **in 2014**, when she was married to Dr. Velyvis, Ms. Velyvis contacted Dr. Pickar, the custody evaluator in the Norton-Valyvis divorce, to respond to Dr. Norton's attacks against her as an unfit step-mother needing evaluation. (*See* Exhibit C to attached Declaration.) Subsequently, in March 2017, Dr. Norton's attorney asked the court to terminate Dr. Pickar as the custody evaluator for fear that this previous contact with Ms. Velyvis may have biased him. The court denied this request. (*See* Exhibit D to attached Declaration [March 15, 2017 Reporter's Transcript in Case No. FL1602416, 10:10-15:25].)

> You have contacted his family to the extent that they have blocked your contact, and maybe you have a friendship with his sister-in-law. I don't know, but the evidence is what the evidence is.
>
> You have certainly injected yourself in connection with his current partner and that is in terms of providing with a significant degree of enthusiasm, I might add, information regarding John Velyvis to the husband or ex-husband of his current partner.
>
> And finally I hear today you are pursuing an action with the Medical Board. You are pursuing a civil action, all of which -- I am not saying you can't do; but taken together, it reveals a pattern and practice of an intent to harass Dr. Velyvis.[5]

(*Id*. 140:21-141:19.)

After stating this summary, the court issued a standard "no harassment" and "no contact" order under Family Code section 6320:

> So I am going to issue an order that you not harass, strike, threaten, assault, hit, follow, molest, destroy the personal property, disturb the peace, keep under surveillance, impersonate, or block the movement of Dr. Velyvis. I am going to issue a no-contact order and that you stay 100 yards away from him . . ..

(*Id*. 142:28-143:6.)

The court then made a separate "no speech" order against Ms. Velyvis:

> Now I think that one of things you don't seem to appreciate is the incredible and irretrievable damages that result from posting things on the Internet. Once you post something, it's

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[5] There was also no evidence presented at the May 2, 2018, hearing that Ms. Velyvis was pursuing any action against Dr. Velyvis. During her closing argument, Ms. Velyvis referenced a Medical Board investigation against Dr. Velyvis. This investigation would have likely been triggered by his domestic violence arrests or case referrals to the DA's office. Indeed, Ms. Velyvis never said that she initiated that investigation (nor would she, a private citizen, have the power to do so). She only said that the board investigators had sought her medical records from Dr. Velyvis, who also acted as her treating physician. (*Id*. 137:18-20; 139:16-19.)

> no longer within you control and you have shown that you do post things which are highly inflammatory. And when I told you to take them off, you did skirt it. I have to say that I was pretty clear with what I was trying to accomplish, and I don't appreciate how you responded. So I am going to be -- I am making an order that you remove any postings on social media on Internet regarding Dr. John Velyvis and that you not post anything on social media regarding Dr. Velyvis or his children directly or indirectly.

(*Id*. 143:7-19.) The court subsequently issued its written orders. The court issued a "Restraining Order After Hearing (Order of Protection)" using the DV-130 form. Under sections 6 and 7 of that form, the court checked the appropriate boxes to make a "no harassment" order and "stay away" order against Ms. Velyvis as to Dr. Velyvis. The court also checked section 23 of the form for "other orders" and referred to Attachment 23, stating, in pertinent part: "Melissanne Velyvis shall not post anything on social media, blogs, and internet regarding Petitioner [Dr. Velyvis] . . ."

It is this "no speech" order that Ms. Velyvis is charged with violating.

Legal Argument

I. THE PROSECUTION CAN CITE NO CASELAW TO SUPPORT THAT BLANKET CENSORSHIP OF A PERSON'S SPEECH IS CONSTITUTIONALLY ALLOWED TO PREVENT HARASSMENT.

In its numerous oppositions to the Demurrer, the prosecution never attempts to distinguish the Federal and California cases that support the inescapable conclusion that the sweeping order prohibiting Ms. Velyvis from speaking about Dr. Velyvis is an unlawful encroachment on her free speech under both the United States and California Constitutions.

In favor of its view that the family law court acted within its jurisdiction, the prosecution cites five cases in total. None support the prosecution's view.

A. ***Nadkarni* and *Evilsizor* Have No Application Here Because Ms. Velyvis Never Hacked Nor Threatened to Publish Dr. Velyvis' Personal Electronic Information.**

In re Marriage of Nadkarni (2009) 173 Cal.App.4th 1483, 1497, is cited by the prosecution for the proposition that "disturbing the peace of the other party" as used by Family Code section 6320 "may be properly understood as conduct that destroys the mental or emotional calm of the other party." (Supp. Briefing in Opposition, at 3.) From this, the prosecution suggests that *Nadkarni* authorizes a sweeping order prohibiting Ms. Velyvis' speech about Dr. Velyvis, notwithstanding the Federal and State constitutions, because such speech might disrupt his inner calm.

Nadkarni stands for no such proposition. The actual holding of that case is: "the plain meaning of the phrase 'disturbing the peace' in section 6320 may include, as abuse within the meaning of the DVPA, a former husband's alleged conduct in destroying the mental or emotional calm of his former wife ***by accessing, reading and publicly disclosing her confidential emails.*"** (*Id*. at 1498 [emphasis added].)

In other words, *Nadkarni* does not say that one can destroy another's personal calm merely by speaking about that person to third parties. Rather, *Nadkarni's* holding is that, to rise to the level of "disturbing the peace," one party must, without authorization, access, read, and publicly disclose the other party's personal emails.

Similarly, *In re Marriage of Evilsizor & Sweeney* (2015) 237 Cal. App. 4th 1416, the primary case relied on by the prosecution (Supp. Briefing in Opposition, at 4-5), involves facts regarding the taking and disclosure of private electronic information. Sweeney downloaded thousands of his ex-wife's text messages and her e-diary and hacked into her email and Facebook accounts, changing passwords and rerouting

messages to himself. The restraining order prohibiting Sweeney from disclosing any information taken from his wife's phone or accounts was upheld. (*Id*. at 1423.)

Notably, *Evilsizor* distinguished information acquired by Sweeney from his ex-wife versus information acquired by him through independent sources. (*Id*. at 1429 ["Sweeney's comparison of this case to situations where parties obtain information from independent sources also misses the mark"].) The *Evilsizor* court acknowledged that:

> An order issued in the area of First Amendment rights must be couched in the *narrowest terms* that will accomplish the *pin-pointed objective* permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." In other words, ***the order must be tailored as precisely as possible to the exact needs of the case***."

(*Id*. at 1430-1431, quoting *Carroll v. Princess Anne* (1968) 393 U.S. 175, 183-184 [emphasis added].) The *Evilsizor* court then made clear that to meet this mandate the order must be read to be limited to the disclosure of information stolen from Sweeney:

> *As we construe the order, it is directed at Evilsizor's data that Sweeney surreptitiously downloaded*. Sweeney contends the order could be interpreted as prohibiting him from using text messages that he himself exchanged with Evilsizor, but we disagree. If a text message appears on Sweeney's own phone, nothing in the order prevents him from disclosing it (assuming it appears on his phone because he received it, and not because he later downloaded it from Evilsizor's phone). We acknowledge that a prohibition on "disclosing" the "content" of Evilsizor's text messages could arguably cover information that Sweeney knew independently of the review of Evilsizor's information. ***But given that the order is directed only at the data Sweeney "downloaded," we believe the order was sufficiently tailored to the harm it was meant to prevent—namely, disclosing or threatening to disclose the information.*** Under these circumstances, the court's protective order does not violate Sweeney's right to free speech.

(*Id*. at 1431 [emphasis added].)[6]

In other words, following *Nadkarni*'s narrow holding*, Evilsizor* provides that an order is only legally authorized to prevent the disclosure of private information taken from another person. The implication of this ruling is clear: prohibiting Sweeney's speech based on independently-acquired information would have been overbroad and an infringement on his free speech rights.

This distinction between information acquired from the opposing party and information acquired from independent sources was also highlighted in *Candiotti*. That case distinguished between "information . . .acquired during formal discovery and that independently obtained" and held that an order restricting free speech regarding independently-obtained information was unconstitutional. (*In re Marriage of Candiotti* (1995) 34 Cal.App. 4th 718, 722, 725-726; *see also Hurvitz v. Hoefflin* (2000) 84 Cal. App. 4th 1232, 1244 [striking down gag order and citing "*Candiotti* [which] demonstrates a prior restraint on speech may not be constitutionally imposed to prevent the dissemination of information obtained outside the discovery process, even if it is libelous and even if it invades a person's privacy."])

There was never any finding, nor even an allegation, that Ms. Velyvis' took and published Dr. Velyvis' private information from his cell phone, email, or any other source. Anything Ms. Velyvis ever said referencing Dr. Velyvis was from her own

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[6] The court also noted as significant that "Sweeney has not identified any public concern in Evilsizor's text messages and other information that he surreptitiously took from her phones." (*Evilsizor*, *supra*, 237 Cal. App. 4th at 1428.) Here, Ms. Velyvis' speech is of value to the public, particularly survivors of domestic violence and their advocates, and potential patients of Dr. Velyvis, who would undoubtedly want to know all such information about their surgeon.

experience. As the May 2, 2018, hearing evidence shows, the order muzzling Ms. Velyvis' speech about Dr. Velyvis was based on 1) her blog post, 2) her communicating with Christine Velyvis[7], and 3) her communicating with and providing her own independently-acquired materials to Mitchell Dickens. All of this speech was based on her own life and information she acquired ***independently***. Unlike *Evilsizor*, no private information or data was taken from Dr. Velyvis.

The prosecutor states in the June 12, 2020 surreply (at 2), that at the May 2, 2018, hearing, "evidence was produced that defendant did distribute to third parties private information in the form of disclosing police reports." Ms. Velyvis, the stated victim in these two police reports, independently obtained them from the Novato Police Department. (*See* attached Declaration.) The prosecutor also incorrectly states (providing no citation or support) that at the May 2 hearing "there was evidence of similar distribution of private information to a child custody evaluator" in the Norton-Velyvis case. In fact, everything Ms. Velyvis wrote Dr. Pickar was information independently acquired by Ms. Velyvis. (*See* Exhibits C and D to attached Declaration.)

Further, even if there had been a legitimate basis for the "no speech" order against Ms. Velyvis, by its plain terms, that order was not limited at all, much less to any specific personal information acquired from Dr. Velyvis. In *Evans*, the court struck down as "vague, overbroad, and not narrowly tailored" an order enjoining one

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[7] The evidence from the May 2, 2018, hearing indicates that Ms. Velyvis had an ongoing friendship with Christine, at least until (according to Dr. Velyvis' hearsay) Christine blocked Ms. Velyvis for unknown reasons (perhaps to keep the peace with her husband, or Dr. Velyvis, or other family members.) There was no evidence that Ms. Velyvis continued to contact Christine after January 2018, or harassed her in any way after she cut off contact.

spouse from publishing "confidential personal information" about the other on the internet. (*Evans v. Evans* (2008) 162 Cal.App.4th 1157, 1169-1171.) The court stated that the phrase "confidential personal information" was unclear and did not provide any guidance regarding the required balancing of "the competing privacy and free speech constitutional rights" for any given specific information. (*Id*.)

The prosecution is wrong that *Evilsizor* and *Nadkarni* support the view that, to preserve Dr. Velyvis' personal tranquility, a court may absolutely muzzle Ms. Velyvis in speaking about her life experiences, including her past marriage, her ex-husband, her survival of his abuse. To the contrary, these cases are in line with the weight of authority that such an order was unlawful. (*See* May 27, 2020, Reply in support of Demurrer, at 7-8.)

***B. Balboa Island* and *Aguilar* Are Not on Point Because There Was No Finding that Ms. Velyvis Said Anything Defamatory.**

The prosecution cites *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1153, for the proposition that "[a]n injunctive order prohibiting the repetition of expression that has been judicially determined to be unlawful does not constitute a prohibited prior restraint on speech." (Supp. Briefing in Opposition, at 3.)

The prosecution is again attempting to contort the caselaw to fit this situation. The holding of *Balboa Island* was limited to post-trial findings of defamation:

> we hold that, ***following a trial at which it is determined that the defendant defamed the plaintiff***, the court may issue an injunction prohibiting the defendant from repeating the statements determined to be defamatory. . . . Such an injunction, issued only following a determination at trial that the enjoined statements are defamatory, does not constitute a prohibited prior restraint of expression.

(*Id*. at 1155-1156 [emphasis added].)

There was no adjudicated determination that Ms. Velyvis ever defamed Dr. Velyvis when she made her blog post, or spoke to Christine, or proved materials to Mitchell. In fact, the family court judge made clear that: "This is not a civil defamation action." (5/2/18 RT 125:11-18.) Indeed, given the documented history of domestic discord, including 32 police calls for service (*Id*. 127:26-28), Dr. Velyvis has never elected to bring a defamatory action against Ms. Velyvis.

Tellingly, the prosecution neglects to state that *Balboa Island* also provides that in the event there is a post-trial finding in a defamation action that specific statements are defamatory, the resulting injunction must be limited to those specific statements. In *Balboa Island*, the court held that "[t]he injunction in the present case is broader than necessary to provide relief to plaintiff while minimizing the restriction of expression." (*Id*. at 1160.) In addition to stating that the injunction must be limited to the specific statements found to be defamatory, the court also found that the injunction was overbroad because it applied to defendant's agents, it prohibited contact by defendant with the plaintiff's employees, and it prohibited defendant was making grievances to government officials. (*Id*. at 1160-1161.) It's hard to imagine a more overbroad order than the one here, forbidding Ms. Velyvis from posting "anything" about Dr. Velyvis, or from "publishing any information" about him.

The other case cited by the prosecution, *Aguilar v. Avis Rent A Car Sys., Inc.* (1999) 21 Cal. 4th 121, 126 (Supp. Briefing in Opposition, at 3-4), also does not help this deeply-flawed criminal filing. In contrast to the prosecution's characterization of *Aguilar*, the actual holding of that case was limited to upholding FEHA protections:

> we hold that a remedial injunction prohibiting the continued use of racial epithets in the workplace does not violate the right to freedom of speech *if there has been a judicial determination that the use of such epithets will contribute to the continuation of a hostile or abusive work environment and therefore will constitute employment discrimination.*

(*Id*.) Like *Balboa Island*, *Aguilar* involved a factual finding, after trial, that the use of racist epithets by a manager in defendant's workplace violated FEHA, and the enjoining of the repetition of those epithets against other employees by that manager as long as he was employed by defendant. (*Id*. at 128.) Further, like *Balboa Island*, *Aguilar* supports that such a post-trial injunction must be narrowly tailored, and noted that the appellate court had limited the injunction to speech within defendant's workplace. (*Id*. at 150; see also *Id*. at 140-141 [stating that the injunction to be lawful must be "clear and sweep[] no more broadly than necessary."])

Given their holdings that any post-trial speech restrictions to prevent further defamation or protect employees under FEHA must be precisely written and narrowly tailored, *Balboa Island* and *Aguilar*, like all the other cases cited by the parties, support Ms. Velyvis' Demurrer. One need only to look at the text of the underlying restraining order to see that it is drastically overbroad and could not possibly be confined to any specific lawful purpose (i.e., preventing the repetition of statements adjudicated to be defamatory, or maintaining FEHA protections for a workplace), had one ever existed here. The order here therefore violates *Balboa Island* and *Aguilar* as those cases have interpreted the constitutional limits on speech-related injunctions.

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C. **The Prosecution is Wrong That So Long As There Was a Hearing, Any Resulting Order is Entitled to the Benefit of the Doubt.**

The prosecution also suggests that the constitutional protections set forth in the many cases supporting the Demurrer would only apply to a preliminary injunction or temporary restraining order, not an order issued after a contested hearing.[8] Citing *DVD Copy Control Asn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 891-892, the prosecution states that: "Courts have distinguished also between preliminary and permanent injunctions." (Supp. Briefing in Opposition, at 3.)

DVD Copy involved a narrowly tailored injunction of computer code to preserve trade secrets, a content neutral objective. It has no application here to the blanket censorship of Ms. Velyvis' speech about her own life that makes any mention of her ex-husband, an extreme and blunt prior restraint of content-based speech.

Suffice it to say that none of the numerous controlling cases recognize any dispositive distinction between temporary and permanent injunctions. In fact, the two controlling cases, *Candiotti*, *supra*, and *Molinaro v. Molinaro* (2019) 33 Cal. App. 5th 824, both involved a three-year "no speech" restraining order issued under the Family Code after a full hearing, just like the "no speech" order at issue here. So did *Curcio v. Pels*, discussed below. These cases confirm the obvious point that an unlawful order may result after a contested hearing.

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[8] The prosecution's repeated claim that Ms. Velyvis received the benefit of a "full and fair hearing" is overstated to say the least. Ms. Velyvis was not allowed a brief continuance so she could have an attorney represent her, despite the complex legal and factual issues. Her questioning was cut off in the middle so that Dr. Velyvis could make his lunch date. She was given two minutes to argue on behalf of her most fundamental constitutional right.

II. THE NO SPEECH ORDER IS NOT LAWFUL UNDER THE DVPA.

A recently-issued case presents an even more fundamental problem for the "no speech" order issued in FL1603174: it was in excess of, not just free speech protections, but the DVPA under which it was purportedly issued.

In *Curcio v. Pels* (2020) 47 Cal.App.5th 1, 13, the Second District found that a single private Facebook post by a woman about her ex-girlfriend "was a far cry from the conduct described" by *Evilsizor* and *Nadkarni*. The court explained that this conduct could not support a DVPA restraining order:

> We do not interpret Nadkarni and its progeny to hold a restraining order may issue based on any act that upsets the petitioning party. The DVPA was not enacted to address all disputes between former couples, or to create an alternative forum for resolution of every dispute between such individuals. If Pels's Facebook post is libelous, for example, Curcio may seek recourse through a defamation suit.
>
> Curcio understandably was upset by the social media post and it may have made her fear for her career, but we conclude it cannot be said to rise to the level of destruction of Curcio's mental and emotional calm, sufficient to support the issuance of a domestic violence restraining order.

(*Id*.) Finding no abuse under the DVPA, the court then stated "we need not address Pels's contention the order is a prior restraint on her speech." (*Id*.)

Curcio demonstrates that the conduct Ms. Velyvis was accused of engaging in does not even rise to the level of recrimination under the DVPA. The "no speech" order against Ms. Velyvis was based on her blog post, and her consensual communications with two third parties, about Dr. Velyvis. The evidence showed that the blog post, like the Facebook post in *Curcio*, was private given its content was not accessible. (*See* Exhibit A to March 2, 2020, Declaration of Will Morehead submitted in

support of Demurrer; 5/2/18 RT 115:28-116:1 (["[t]he blog consists solely of [a] headline and no further content."])

Further, that Ms. Velyvis additionally spoke to Christine Velyvis and submitted materials to Mitchell Dickens does not bring this case to the level of *Nadkarni* and *Evilsizor* because, as stated above, Ms. Velyvis' speech was entirely based on independently-acquired information from her own life. As in *Curcio*, there was no evidence that Ms. Velyvis "published or distributed to third parties [Dr. Velyvis'] private information or messages, as was the case in both *Nadkarni* and . . . *Evilsizor*." (*Curcio, supra,* 47 Cal.App.5th at 13). Again, the line between taken information and independently-acquired information is key. The same facts that distinguish *Curcio* from *Nadkarni* and *Evilsizor* also apply to this case as well.

As *Curcio* shows, the "no speech" order issued here was in excess of the DVPA's authority. Speaking to, and providing information independently acquired, to third parties about someone is not harassment or disturbing the peace under the DVPA. As in *Curcio*, this Court need not reach the constitutional issues.

Conclusion

For all of the foregoing reasons, the Court should sustain this Demurrer and dismiss the Complaint without leave to amend.

Dated this 19th day of June, 2020.

Respectfully submitted,

Will Morehead
Attorney for Melissanne Velyvis

DECLARATION OF COUNSEL

I, WILL MOREHEAD, declares as follows:

I am an attorney duly admitted and licensed to practice before all of the courts of the State of California, and the attorney retained to represent defendant Melissanne Velyvis in the above-captioned action.

I have prepared the foregoing motion and know the contents thereof. The same is true of my knowledge, based upon a review of court documents, including the Complaint and related police reports in this case and in the numerous District Attorney referrals by the Novato Police Department regarding Dr. Velyvis. I have also reviewed the relevant filings and hearing transcripts in Marin Superior Court Case Numbers FL1603174 and FL1602416.

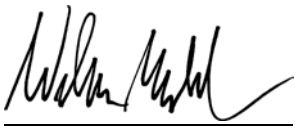
I have reviewed the police reports (dated December 30, 2016, and July 1, 2013) which Ms. Velyvis provided to Mitchel Dickens. Ms. Velyvis is the stated victim in these two police reports and given her position as victim, the Novato Police Department provided her with these reports. The reports contain no private information of Dr. Velyvis.

I am informed and believe that attached hereto as Exhibit C is a true and correct copy of Ms. Velyvis' September 10, 2014, letter to Dr. Pickar.

Attached hereto as Exhibit D is a true and correct copy of the relevant portions (pages 10-16) of the March 15, 2017 Reporter's Transcript in Case No. FL1602416.

I declare under penalty of perjury that the foregoing is true and correct of my own personal knowledge, except as to those matters stated on information and belief, and as to such matters, I believe them to be true.

Executed this 19th day of June, 2020, at San Francisco, California.



Will Morehead
Attorney for Melissanne Velyvis

PROOF OF SERVICE

I am over the age of 18 and not a party to this action.

I am a resident of or employed in the county where the service occurred; my business address is: 407 San Anselmo Avenue, San Anselmo, CA 94960.

On June 19, 2020, I served the foregoing document(s) described as:

RESPONSE TO THE PEOPLE'S SECOND SURREPLY OPPOSING DEMURRER; DELARATION OF COUNSEL

to the following parties:

Deputy District Attorney Roopa Krishna
Marin County District Attorney's Office
3501 Civic Center Drive, Suite 130
San Rafael, CA 94930
Facsimile: 415-473-3719

[ ] (By U.S. Mail) I deposited such envelope in the mail at _____, California with postage thereon fully prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

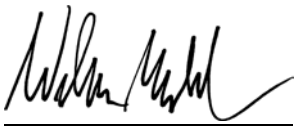
[X] (By Personal Service) I caused such envelope to be delivered by hand via messenger service to the address above;

[ ] (By Facsimile) I served a true and correct copy by facsimile during regular business hours to the number(s) listed above. Said transmission was reported complete and without error.

[X] (By Email) I served a true and correct copy by email to rkrishna@marincounty.org, Ms. Krishna's professional email address, with which I have recently corresponded with her.

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

DATED: June 19, 2020



Will Morehead
Attorney for Melissanne Velyvis