SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PROJECT VERITAS, Plaintiff, *- against -* THE NEW YORK TIMES COMPANY, MAGGIE ASTOR, TIFFANY HSU, AND JOHN DOES 1-5, Defendants.	Index No. 63921/2020

SUR-REPLY MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR AN ORDER TO SHOW CAUSE SEEKING TO ENJOIN THE NEW YORK TIMES FROM GATHERING AND PUBLISHING INFORMATION ABOUT PROJECT VERITAS OUTSIDE OF THE LITIGATION CONTEXT

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Defendant The New York Times Company ("The Times") respectfully submits this sur-reply memorandum of law in opposition to Plaintiff's motion for an Order to Show Cause seeking to impose a prior restraint on The Times and destroy certain newsworthy materials and reporting.

PRELIMINARY STATEMENT

This is not, as Project Veritas suggests, a run-of-the-mill discovery dispute. The information published by The Times was obtained outside discovery by reporters doing their jobs. Project Veritas simply seeks to use this litigation to suppress unfavorable news coverage of its activities. That it cannot do.

Project Veritas's proposed remedy is, under well-settled law, an unconstitutional prior restraint on journalism. Project Veritas argues only that a statute, CPLR 3103(c), permits that prior restraint no matter what the Constitution says. That, of course, is not how the law works. Prior restraints on journalism bear a "heavy presumption of constitutional invalidity," *National Broadcasting Co.* v. *Cooperman*, 116 A.D.2d 287, 290 (2d Dep't 1986), and are "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 559 (1976). Not surprisingly, the only cases to address the clash between the First Amendment's near-total ban on prior restraints and the attorney-client privilege unequivocally hold that prior restraints are not permitted, even when the material at issue is protected by the attorney-client privilege. *See, e.g.*, *Nicholson* v. *Keyspan Corp.*, 836 N.Y.S.2d 501 (Table), 2007 WL 641414, at *6 (Sup. Ct. of Suffolk Cnty. Feb. 28, 2007). And the Supreme Court has addressed the limits of discovery orders in libel cases, such as this, involving a newspaper publisher. In *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 34 (1984), the Court upheld a protective order limiting the newspaper's right to publish information turned over in discovery — but made clear that information gathered by reporters outside of discovery, even if it that information was identical to the discovery material, could not be restrained by a protective order.

Here, the case for rejecting a prior restraint on a publisher is even clearer, because there has been no discovery exchanged. Project Veritas is free to ask the Court to impose limits on the use of information in discovery and this litigation; it is not free to use a discovery ruling to stop publication by the press.

ARGUMENT

I. PROJECT VERITAS'S REQUESTED RELIEF IS AN UNCONSTITUTIONAL PRIOR RESTRAINT, AND THIS IS NOT A RUN-OF-THE-MILL DISCOVERY DISPUTE

At its heart, Project Veritas's Reply [Dkt. 192] minimizes the extraordinary nature of the relief it seeks and argues that, because The Times is a litigant in the underlying defamation action, the protections of the First Amendment do not apply, and the Court is empowered by the CPLR to restrain The Times's protected speech. But this is not a simple, run-of-the-mill discovery dispute. Project Veritas seeks to enjoin news reporting by journalists that is independent of and unrelated to this litigation and therefore not subject to the ordinary powers of the Court to regulate discovery. Project Veritas's attempt to escape the heavy burden that applies to requests for prior restraints fails for at least four reasons.

First, the memoranda at issue were not obtained in discovery, and The Times will not use them in this action. In such circumstances, CPLR 3103(c) does not apply. *See* Opposition to Plaintiff's Motion for an Order to Show Cause (Nov. 22, 2021) [Dkt. 185] ("Opp.") 10-12 (demonstrating that CPLR 3103(c) is limited to improperly or irregularly obtained *disclosure*). Notably, Project Veritas fails to address the substantial case law cited by The Times (Opp. 10-11 n.8) that acknowledges that procedural rules distinguish between material obtained as part of discovery and material obtained outside of the litigation process.[1] Project Veritas simply ignores

[1] Project Veritas mischaracterizes the lone authority it cites in response. In *Stevens* v. *St. Tamminy Parish Government*, 212 So.3d 568, 579-81 (La. Ct. App. 2017), the court of appeal held that, as part of the trial

these rulings, incorrectly stating that "The Times cites ***no case*** where a court held that it lacked authority to restrict a party from obtaining and disseminating the opposition's attorney-client privileged material during ongoing litigation." Reply 7. *Kirshner* v. *Uniden Corp. of America*, 842 F.2d 1074, 1081 (9th Cir. 1988), held exactly that. In *Kirshner*, the Ninth Circuit held that the district court lacked the power to compel the plaintiff to return the defendant's privileged materials that the plaintiff obtained in a separate action. *Id.* at 1080 ("[T]he district court's power to control discovery in the case before it did not extend to documents obtained in a separate action between the parties[.]").

Second, even if CPLR 3103(c) were read to give courts general authority in this area, restraints regarding the publication of materials obtained independently of disclosure and used only outside of litigation are unconstitutional prior restraints. *See e.g.*, *Seattle Times*, 467 U.S. at 34 (holding that a protective order prohibiting the dissemination of discovery material was not a prior restraint where a party could "disseminate the identical information covered by the protective order as long as the information [was] gained through means independent of the court's processes"). Project Veritas's assertion that *Seattle Times* is inapplicable because the Court did not have the occasion to consider whether a protective order would be appropriate under different circumstances — an empty objection that could be addressed to every case ever decided on a given

court's inherent power to control trial proceedings, it could issue a protective order prohibiting the use of information in litigation in violation of court orders. But the court also noted that the Louisiana and Federal Rules of Civil Procedure did not authorize courts to limit the use of information obtained outside of discovery. *See id.* at 579-80 ("[F]ederal courts . . . have consistently held that Rule 26(c) . . . does not provide a trial court with a basis for limiting the use of evidence obtained outside of discovery or provide blanket authorization to prohibit disclosure of information whenever it may deem advisable."). Here, in contrast, The Times has not violated any discovery orders and is not attempting to use the at-issue memoranda in the litigation, and thus the Court's inherent authority to manage this action is inapplicable. *See, e.g.*, *Schlaifer Nance & Co.* v. *Estate of Warhol*, 742 F. Supp. 165, 166 (S.D.N.Y. 1990) ("Neither the Federal Rules of Civil Procedure nor courts' inherent powers support an order prohibiting use of information innocently obtained from third parties without use of judicial process.").

set of facts — is a blatant misreading of the case and ignores the plethora of cases that have since interpreted *Seattle Times.* Such cases uniformly preclude the issuance of protective orders barring the distribution of materials obtained independent of discovery, absent circumstances not present here. *E.g.*, *Procter & Gamble Co.* v. *Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) (holding that an injunction precluding a magazine from publishing sealed documents obtained outside the litigation process was an unconstitutional prior restraint); *see also* Opp. 9-10, n.7. Project Veritas fails to address any of these cases.

Third, the cases cited by Project Veritas are easily distinguishable. The Times is not aware of any cases — and Project Veritas cites none — that hold that a discovery order prohibiting the disclosure of materials is appropriate absent one of the following: (1) acquisition of the materials through discovery; (2) use of the materials in the underlying litigation; (3) blatant misconduct, such as a bribe inducing someone to release a privileged medical report; and/or (4) a preexisting duty to keep the materials confidential, such as an extant confidentiality order. Each of Plaintiffs' cited cases (Mot. 6-8; Reply 3, 5, 8, 15, 17) is distinguishable on one or more of these bases. *See supra* n.1; Opp. 11-12, n. 9.

Finally, Project Veritas's assertion that the at-issue memoranda relate to the underlying defamation claim is both untrue[2] and legally irrelevant. Nothing about the legality of information-gathering tactics used by Project Veritas operatives (the principal subject of the memoranda) speaks to whether the content of a specific video was deceptive (the principal subject of this action). And even if the materials did relate to the underlying claims or defenses, this does not

[2] The fact that the issues discussed in the memoranda are unrelated to any of the claims or defenses in this action is also an independent ground to deny the motion. Opp. 19-20.

change the fact that The Times did not obtain them through discovery and is not seeking to use them in the litigation.

II. PROJECT VERITAS HAS NOT MET THE EXTRAORDINARY SHOWING REQUIRED FOR A PRIOR RESTRAINT TO ISSUE

A. Prior Restraints Are Presumptively Invalid and Permitted Only Upon a Showing of Immediate and Irreparable Harm to a Public Interest

Project Veritas cannot and does not dispute that prior restraints are among the most disfavored and extreme remedies in American jurisprudence. Such restraints are "particularly anathematic to the First Amendment," *Nebraska Press*, 427 U.S. 539, 598 (1976) (Brennan, J., concurring), and the damage they cause "can be particularly great when the prior restraint falls upon the communication of news and commentary on current events." *Nebraska Press*, 427 U.S. at 559. "It is well settled that if a newspaper lawfully obtains truthful information of great public concern, even when stolen from a third party, the Courts will uphold the right of the press to publish such information, and restraint of such may be deemed unconstitutional." *Trump* v. *Trump*, 128 N.Y.S.3d 801, 812 (N.Y. Sup. Ct. of Dutchess Cnty. 2020) (citing *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001)).[3] Only the most extreme circumstances, such as to suppress "the specific details of troop movements during wartime," might justify imposing a prior restraint. *Nebraska Press*, 427 U.S. at 605 (Brennan, J., concurring). The bar against prior restraints has thus been described as not only high, but "virtually insurmountable." *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring).

[3] Here Project Veritas has not provided any factual basis even to allege that The Times acted unlawfully. It merely speculates. Project Veritas also cites the NYRPC, but these rules govern the conduct of attorneys, and there is nothing in the record to suggest that any attorney was involved in gathering information for the November 11 Article. Furthermore, and even if an attorney were involved, the rules that Project Veritas cites do not apply. Opp. 16-18. Finally, a violation of the NYRPC is not an unlawful act sufficient to remove First Amendment protections under *Bartnicki*.

Even when a news organization's disclosures may lead to criminal or civil sanctions after publication, prior restraints on publication have been rejected. In the Pentagon Papers case, Justice White noted that the publishers could face criminal prosecution if they published classified information, but even the possibility of a criminal violation did not justify a prior restraint. *New York Times Co.* v. *United States*, 403 U.S. 713, 733 (1971) (White, J., concurring). In *CBS, Inc.* v. *Davis*, a business claimed that a broadcast was about to reveal trade secrets and sought to enjoin it. Justice Blackmun found that, because of the First Amendment, the appropriate remedy was a civil action after publication, not a prior restraint. *CBS, Inc.* v. *Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers). The burden of overcoming the heavy presumption that a prior restraint is unconstitutional falls squarely with the party seeking to suppress the news. *Cooperman*, 116 A.D.2d at 290; *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971). That party must make a "showing on the record," not just of the possibility of private injury, but "that such expression will *immediately* and *irreparably* create *public injury*." *People ex rel. Arcara* v. *Cloud Books*, 68 N.Y.2d 553, 558 (1986) (emphasis added). *See also Porco* v. *Lifetime Entertainment Services, LLC*, 116 A.D.3d 1264, 1266 (3d Dep't 2014) (order enjoining the broadcast of a movie was an unconstitutional prior restraint).

Contrary to Project Veritas's assertions, the arguably privileged nature of the materials at issue and The Times's status as a party to this litigation do not lessen the demanding showing required to impose a prior restraint. *See Nicholson*, 2007 WL 641414, at *6; *Republic of Kazakhstan* v. *Does 1-100*, 2015 WL 6473016, at *1 (S.D.N.Y. 2015); *Rodgers* v. *United States Steel Corp.*, 536 F.2d 1001, 1006-08 (3d Cir. 1976) (holding that an order enjoining plaintiff's counsel from sharing allegedly privileged materials "obtained otherwise than through the court's processes" was an unconstitutional prior restraint).

Significantly, Project Veritas cites no cases directly addressing the conflict presented here between the First Amendment prohibition on prior restraints and the attorney-client privilege. The Times now cites three — all of which hold that the First Amendment prohibits court orders prohibiting publication of attorney-client privileged information obtained outside of litigation processes. Project Veritas is unable to persuasively distinguish those cases.

In *Nicholson*, the court held that the "broad constitutional prohibition on restraints on the press does not exempt from its operation comment on items covered by attorney client privilege if the document covered by attorney client privilege comes into conflict with the right of the press to publish and comment on matters of public concern as long as the press did not improperly conspire to obtain the material that was covered by the privilege." 2007 WL 641414, at *6 (citations omitted).

Similarly, in *Republic of Kazakhstan*, a New York federal court rejected the argument made by Project Veritas here that the privileged nature of materials permits an order suppressing publication notwithstanding the protections offered by the First Amendment. 2015 WL 6473016, at *1. In that case, the court found that an injunction preventing a media organization from disseminating privileged documents stolen by hackers and posted on the Internet would be an unconstitutional prior restraint. *Id.* Its holding tracks that in *Nicholson* that, as important as the attorney-client privilege is, it does not trump the First Amendment's protection against prior restraints.

Project Veritas strains to distinguish this holding in *Nicholson*, arguing that the court in that case would have come out differently had the newspaper in question been a party to the litigation. But nothing in *Nicholson* (or *Republic of Kazakhstan*) suggests First Amendment interests are lessened when the media is a litigant instead of intervener. The broad language of the

court's holding that the "broad constitutional prohibition on restraints on the press does not exempt from its operation comment on items covered by attorney client privilege if the document covered by attorney client privilege comes into conflict with the right of the press to publish and comment on matters of public concern as long as the press did not improperly conspire to obtain the material that was covered by the privilege" is wholly inconsistent with Project Veritas's position. 2007 WL 641414, at *6. Moreover, the newspaper in *Nicholson* intervened in the case, making it a party to the litigation and subject to the court's jurisdiction, just like any other party.

In any event, *Rodgers* v. *United States Steel Corp.* precisely rejects Project Veritas's distinction between injunctions directed at parties to the litigation and those directed at non-parties. The case unequivocally held that, even where a speaker is a party to the action, a court may not enjoin that party's use of privileged materials belonging to its adversary if such materials were obtained independent of court processes. At issue in *Rodgers* was a document obtained by petitioner's counsel wholly outside the court's processes that respondents claimed implicated, not only their attorney-client privilege, but the attorney work-product doctrine, the common law negotiation privilege, and a statutory privilege under Title VII of the Civil Rights Act of 1964. 536 F.2d at 1004-07. The court held that neither party status nor the privileged nature of the information at issue was sufficient to justify a prior restraint. As the court explained, "[there is] no doubt that neither the parties nor their counsel implicitly waive their First Amendment rights to disclose or disseminate information or matters obtained independent of the court's processes" and "even if we were to agree that this information was privileged . . . that fact alone would not justify a prior restraint on speech here." *Id.* at 1006-08.

B. Project Veritas Has Not Satisfied the Heavy Burden for a Prior Restraint to Issue

Project Veritas argues that the relief it seeks "is exceedingly narrow," Reply 15, but nothing could be further from the truth. The relief sought, quite tellingly, is not designed to protect Project Veritas's rights in this litigation, but rather seeks modification of The Times's existing press coverage of Project Veritas and prohibitions designed to prevent certain future coverage. Project Veritas asks this Court for an order directing The Times to (1) "remove from its website Project Veritas' attorney-client privileged material"; (2) "delete or return to Project Veritas all copies of [Project Veritas's attorney-client privileged material] in The Times' possession"; (3) "sequester and refrain from publishing any Project Veritas attorney-client privileged materials in The Times' possession"; and (4) "cease any further efforts to improperly obtain Project Veritas' privileged materials." Mot. 16.

That relief, which seeks nothing short of an order removing or editing an existing story on The Times's website, requiring the destruction or return of newsworthy information gathered by The Times's reporters, and prohibiting publication or gathering of certain information about Project Veritas in the future, is a classic prior restraint. *See, e.g.*, *Alexander* v. *United States*, 509 U.S. 544, 550 (1993) ("Temporary restraining orders and permanent injunctions — i.e., court orders that actually forbid speech activities — are classic examples of prior restraints."); *Porco*, 116 A.D.3d at 1265-66 ("A prior restraint on speech is a law, regulation, or judicial order that suppresses speech . . . on the basis of the speech's content and in advance of its actual expression." (internal quotes omitted)).

There is simply no basis in law for this extreme remedy. Prior restraints "may be imposed only in the most exceptional cases," and can only be issued "upon a showing on the record that such expression will immediately and irreparably create public injury." *Id.* at 1266. Here, there

has been no showing of a public injury of any kind. Opp. 7-8. And because the requested relief seeks to enjoin unknown and perhaps unwritten future coverage, it is impossible for Project Veritas to demonstrate that any future public injury would be "immediate" or "irreparable." *East Meadow Association* v. *Board of Education of Union Free School District No. 3, County of Nassau*, 18 N.Y.2d 129, 134 (1966) (prior restraint requires "danger of immediate and irreparable injury to the public weal").[4] Project Veritas's mere speculation that future publications or newsgathering might harm them is insufficient.

Even as to any alleged private injury, Project Veritas has failed to demonstrate "irreparable" harm or that the requested relief would prevent any alleged harm, given that information about the memoranda has already been published. Once information has been published — even if it was improper to have done so, which is not the case here — courts have been hesitant to enjoin future publication. *See, e.g.*, *United States* v. *Bolton*, 468 F. Supp. 3d 1, 6-7 (D.D.C. 2020) (although the government demonstrated that former National Security Advisor John Bolton likely jeopardized national security by disclosing classified information in his book, an injunction against publication still would not issue because the government failed to establish that it would prevent irreparable harm). Project Veritas's memoranda are already out in the world, and there is no putting the proverbial horse back in the barn. *Id.* at 6 ("[G]iven the widespread dissemination of the books, the 'horse is already out of the barn.'").

[4] Even if this were not a case in which Project Veritas were seeking an all-but-impossible remedy of a prior restraint, an injunction could not issue. Project Veritas fails even to articulate the three required elements that must be satisfied for preliminary injunctive relief like that sought by Project Veritas to issue: "(1) likelihood of success on the merits, (2) irreparable injury absent granting of a preliminary injunction, (3) and a balancing of the equities in the movant's favor." *Trump*, 128 N.Y.S.3d at 812. Project Veritas cannot meet this standard because its underlying defamation claims do not relate in any way to the relief it seeks in this motion, and it has not articulated any allegedly tortious conduct in connection with The Times's publication of the November 11 Article.

Project Veritas is not without a remedy if it believes its rights have been violated. It could seek to demonstrate that The Times had committed some sort of tort in supposedly improperly obtaining or publishing attorney-client material. *See, e.g.*, *Davis*, 510 U.S. at 1318 (Blackmun, J., in Chambers) (refusing to enjoin broadcast that would reveal trade secrets because the proper remedy was "a damages proceeding rather than . . . suppression of protected speech"). Or, under *Seattle Times*, it could seek an order limiting the use of the material in this litigation. But, under the First Amendment, it cannot obtain an injunction against The Times's reporters that prohibits them from gathering information or publishing certain newsworthy stories about Project Veritas.

Were it otherwise, The Times alone among all the publishers in the world could not publish the material at issue while other news outlets could. Were it otherwise, any individual or organization wanting to limit unfavorable news coverage could simply file a libel suit over an earlier story and then use discovery orders to censor or prevent future reporting. That result would be contrary both to the First Amendment and the letter and spirit of New York's discovery rules.

C. The Times is not seeking privileged status as a newspaper. It merely seeks to be treated like all speakers in analogous circumstances

Contrary to Project Veritas's assertions, The Times is not seeking special treatment or exemption from laws of general applicability. Reply 6-7, 16 (citing *Cohen* v. *Cowles Media Co*., 501 U.S. 663, 669 (1991); *Boehner* v. *McDermott*, 484 F.3d 573, 580-81 (D.C. Cir. 2007); *United States* v. *Aguilar*, 515 U.S. 593, 605-606 (1995); *Baumann* v. *D.C.*, 987 F. Supp. 2d 68, 78-81 (D.D.C. 2013), *aff'd*, 795 F.3d 209 (D.C. Cir. 2015)). Rather, The Times asks that the Court follow the firmly-established First Amendment principles that permit the publication of information on a matter of public concern where that information was obtained outside the litigation process with no intention to use the information in the litigation and without fault or a preexisting duty to maintain the confidentiality of the information.

The cases cited by Project Veritas hold only that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen*, 501 U.S. at 669. But, as the case law makes clear, imposing a prior restraint on a major newspaper is about as far from imposing an "incidental effect" on newsgathering as one can get under the law. None of the cases cited by Project Veritas on this point involves a prior restraint and none supports the imposition of one on similar facts. They are inapplicable here, where the threat of a prior restraint is considered "the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press*, 427 U.S. at 559, as opposed to an "incidental effect" on reporting the news.

III. THE COURT SHOULD DENY PROJECT VERITAS'S ALTERNATIVE REQUEST FOR DISCOVERY

A. The Stay on *All* Discovery in this Matter, Ordered by the Appellate Division of the Second Department, is Unambiguous

On October 27, 2021, the Appellate Division of the Second Judicial Department ordered that "*all* discovery in the above-entitled matter is stayed, pending hearing and determination of the appeal." Decision and Order on Motion, 2021-02719 (emphasis added). This unambiguous order precludes the Court from ordering any discovery, and on this basis alone the Court must deny Project Veritas's request for discovery (Reply 19-20).

B. Discovery Relating to the Receipt and Publication of the Memoranda is Not Warranted Because Plaintiffs Have Failed to Make a Threshold Showing that a Prior Restraint is Justified

Project Veritas's request for discovery should also be denied as futile, as it has not made a showing of any kind that a prior restraint is justified. Project Veritas has not made the requisite "showing on the record that [the] expression [at issue] will immediately and irreparably create public injury," *Porco*, 116 A.D.3d at 1266 (internal quotation marks omitted), for a prior restraint

to issue. *See also* Opp. 7. Nowhere in Project Veritas's Reply has it explained why the publication of the memoranda at issue will cause irreparable injury to the public at large. Given that Project Veritas has not even attempted to satisfy this requirement, this Court should not permit Project Veritas to go on futile fishing expedition by allowing it discovery. Project Veritas does not even have an adequate basis to allege in a signed pleading that The Times did anything improper or wrong here. To allow discovery before any such basis exists would be wholly improper.

CONCLUSION

Defendant respectfully requests that the Court deny Plaintiff's Motion in its entirety.

Dated: New York, New York
December 3, 2021

Respectfully submitted,

By: /s/ Joel Kurtzberg

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Dated: New York, New York
December 3, 2021

/s/ Joel Kurtzberg
Joel Kurtzberg