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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES

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11 BARBRA STREISAND, an individual,,) Case No. SC077257
12 Plaintiff,)
13 vs.) **ADELMAN'S OPPOSITION TO MOTION**
14 KENNETH ADELMAN, an individual;) **FOR PRELIMINARY INJUNCTION**
15 PICTOPIA.COM, a California corporation;) Date: July 14, 2003
LAYER42.NET, a California corporation; and) Time: 1:30 p.m.
16 DOE 1 through DOE 20, inclusive.,) Dept.: H (Hon. Allan J. Goodman)
17 Defendants.) Complaint filed: May 20, 2003

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1 **INTRODUCTION**

2 Plaintiff Barbra Streisand requests an injunction requiring defendant Kenneth Adelman to
3 remove from his website a photograph showing the portion of the coastline containing Streisand's
4 bluff-top estate ("Image 3850") and the photograph's caption, "Streisand Estate, Malibu." Motion
5 at 15:13-15. As an initial matter, this motion should be denied because Adelman's anti-SLAPP
6 motion to strike Streisand's complaint, set for hearing at the same time as this motion, should be
7 granted. If the complaint is stricken as an improper lawsuit brought to chill the valid exercise of
8 free speech, then this motion is moot.

9 This motion must also be denied because an injunction would be contrary to both federal
10 and California law prohibiting such prior restraint of speech. Both the United States and
11 California Supreme Courts have held that prior restraints are prohibited by the United States and
12 California Constitutions except where the speech would result in an extremely serious and
13 imminent substantive evil. Not even the threat of a breach to national security satisfies this
14 exceedingly stringent standard. Streisand's concern about people seeing "the positioning of the
15 deck chairs and parasols around her pool" falls far short of the type of imminent serious harm that
16 could justify a prior restraint of speech. She cites no California case that has ever authorized a
17 prior restraint of speech to prevent an alleged invasion of privacy, and there is none. What
18 Streisand asks this Court to do is unprecedented and unconstitutional.

19 Streisand's motion must be denied for the independent reason that she cannot satisfy the
20 requirements for the issuance of a preliminary injunction. First, she has failed to show a
21 likelihood of success on the merits of her right of privacy causes of action. There is simply no
22 legal authority that photographing the outside of a house and identifying its owner violates any
23 right of privacy, especially where, as here, that information is already public and the owner is an
24 outspoken celebrity and self-proclaimed environmentalist involved in litigation over proposed
25 improvements to her property that would allegedly destabilize the coastal bluff. Her claims based
26 on the caption are also barred by the federal Communications Decency Act, 47 U.S.C. § 230,
27 because a third-party user provided the information in the caption and the Act immunizes a
28 website owner from state claims based on information provided by such third-party "information

1 content providers." Similarly, her other claims will fail because the Anti-Paparazzi Act does not
2 apply to houses, and under section 3344 of the California Civil Code, it is perfectly appropriate to
3 use Streisand's name in connection with a matter of public affairs, such as identifying who is using
4 and potentially harming an environmentally sensitive area.

5 Furthermore, Streisand has failed to show the possibility of irreparable harm if the
6 injunction is not granted. As a matter of law, when information is already available to the public,
7 the supposed harm caused by the publicity cannot be undone by an injunction attempting to
8 squeeze the toothpaste back into the tube. Because the alleged harm here occurred long ago when
9 fan websites posted Streisand's home address and *People* magazine published an aerial photograph
10 of her estate similar to Image 3850, and because that information is still publicly available,
11 prohibiting Adelman from posting Image 3850 and its caption on his website will not prevent the
12 alleged harm.

13 Finally, Streisand cannot demonstrate that a greater injury will result to her if the
14 injunction is denied than will result to Adelman if the injunction is granted. As a matter of law,
15 the deprivation of a person's First Amendment right to free speech constitutes irreparable harm.
16 Here the proposed injunction would not only require the removal of the photograph and caption
17 from the website, it would also prevent Adelman from linking to news articles about this case or
18 posting copies of his own publicly-available court documents on his website if these documents
19 contain copies of the photograph. In contrast, Streisand has submitted no evidence that anyone is
20 viewing Image 3850, let alone that there is any real danger that someone will use the photograph
21 to harm her. Streisand's overblown rhetoric that there are "future millions of people" who will see
22 the photograph is not supported by the facts. Indeed, during the three and one-half months before
23 this lawsuit was filed, the download interface was used just six times (twice by Streisand's own
24 attorneys).¹ In the entire lifetime of the website prior to the lawsuit, only three reprints of Image
25 3850 were purchased (two by Streisand and one by her neighbors).

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¹ The download interface was first added to the website on February 14, 2003.

1 **BACKGROUND FACTS**

2 Rather than acknowledge the public service performed by Adelman at his own expense in
3 creating a free and publicly-available photographic record of the California coastline on a website
4 that is used and praised by conservationists, the Coast Guard, governmental agencies, and private
5 citizens, Streisand accuses Adelman of "voyeurism" and calls him "a multi-millionaire with the
6 penchant for flying his own helicopter and snapping pictures of people's private homes." Motion
7 at 1. Streisand's mean-spirited efforts to mischaracterize the nature and scope of
8 *californiacoastline.org* and its public-spirited sponsor are out of place in a legal brief – they sound
9 more like efforts to "spin" the media. In any event, the simple and uncontroverted fact is that
10 Adelman's website is a non-profit effort to speak out on matters of public concern and to create a
11 resource for environmental activists and all those who love the coastline. Contrary to Streisand's
12 false and unsupported accusations, Adelman used normal camera lenses at normal resolution to
13 take long-distance aerial photographs depicting the coastline and coastal neighborhoods. He is
14 neither a voyeur nor a paparazzo.

15 In his anti-SLAPP motion to strike the complaint, Adelman describes in detail the history
16 and purpose of his website, the equipment he used to take the photographs, how he took Image
17 3850, and the procedure for third-party users to provide captions for the photographs. That
18 discussion will not be repeated here.² Instead, Adelman will specifically address just a few of the
19 misrepresentations in Streisand's motion that are particularly relevant here:

- 20 • Streisand claims that Adelman took his photographs "through sophisticated optical
21 aids." Motion at 1:12. In fact, Adelman used a standard digital camera and lens – a
22 Nikon D1x with a 28-70 mm f/2.8 ED-IF AF-S Zoom-Nikkor lens. Complaint, ¶ 23.
23 The camera and lens produce photographs of lower resolution than a standard 35 mm
24 camera, and the lens does not extend past 70 mm and thus cannot function as a
25 telephoto lens. Adelman Decl., ¶¶ 2-3.³

26 ² Adelman incorporates by reference herein his Background Facts from his anti-SLAPP
27 motion to strike, set for hearing concurrently with this motion.

28 ³ The declarations and exhibits referenced here were originally filed in support of
Adelman's anti-SLAPP motion to strike. Rather than burden the Court with another set of the
declarations and exhibits, Adelman incorporates by reference herein the Declarations of Laura A.

- 1 • Streisand claims that Image 3850 shows "the interior of Streisand's home." Motion at
2 2:9-10. This is not true. Nothing is visible through the windows shown in the
3 photograph. Exs. A, E. Even when the photograph is hugely enlarged, nothing is
4 visible through the windows because the photograph lacks the necessary resolution.
5 Ex. I.
- 6 • Streisand claims that the photograph of the outside of her house, her pool, and her
7 garden shows "this most private of spheres of her life." Motion at 7:11. Yet, in 1998,
8 Streisand apparently cooperated with *People* magazine in its publication of a cover
9 story entitled "Barbra & Brolin, Talking with Hollywood's most surprising – and
10 smitten – couple" that featured a color photograph of her house shot from the same
11 angle as Adelman's photograph showing her house, pool, and garden plants. Ex. K.
- 12 • Streisand claims that Adelman "identified such property and location as belonging to
13 Streisand by captioning the appropriate pictures with the title 'Streisand's estate'."
14 Motion at 2:16-17. Streisand again is wrong. Captions are provided by third-party
15 users, not Adelman. Any user may provide a caption to a photograph by using the
16 "Suggest Caption" function. Ex. G. More than 5,100 of the photographs have received
17 captions in this manner. Adelman Decl., ¶ 5.
- 18 • Streisand claims that the website "publishes the location of Streisand's home address"
19 and includes a map "enhanced to show the street location of Streisand's residence as if
20 one were looking at a Thomas Guide." Motion at 4:22-23, 8:24. This is not true.
21 Streisand's address is *not* on the website, and the map does not include street names,
22 addresses, or other identifying features found on a Thomas Guide map. Exs. E, F.

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28 Seigle, Kenneth Adelman, and Mark Liebman and attached declarations filed in support of his anti-SLAPP motion to strike.

1 **ARGUMENT**

2 **I. The First Amendment And California Constitution Prohibit The Court From**
3 **Enjoining Adelman's Publication Of Matters Of Serious Public Interest**

4 Streisand completely ignores an insurmountable legal hurdle facing her motion for a
5 preliminary injunction – the universal condemnation of prior restraint on the freedom of speech.
6 "The right to free speech is, of course, one of the cornerstones of our society," and is protected
7 both by the First Amendment and the "even broader" California Constitution. *Hurvitz v. Hoefflin*,
8 84 Cal. App. 4th 1232, 1241 (2000). "Orders which restrict or preclude a citizen from speaking in
9 advance are known as 'prior restraints,' and are disfavored and presumptively invalid."⁴ *Id.*; see
10 also *Wilson v. Superior Court*, 13 Cal. 3d 652, 657 (1975) ("it has been consistently held that any
11 prior restraint on expression bears a heavy presumption against its constitutional validity"). In the
12 face of such strong disapproval, courts allow prior restraint only when the speech will result in
13 imminent and serious "substantive evil." *Wilson*, 13 Cal. 3d. at 660 ("The cases establish that the
14 substantive evil must be extremely serious and the degree of imminence extremely high before
15 utterances can be punished.") (quotations omitted). Neither the publication of the Pentagon Papers
16 that the government claimed would "result in a serious breach of national security," nor the
17 distribution of allegedly misleading campaign material that supposedly would have "interfered[]
18 with the democratic voting process," satisfied this extremely stringent standard. *Id.* at 657, 660;
19 *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

20 Given this precedent, no California court has ever sustained on appeal a preliminary
21 injunction prohibiting speech solely to protect a plaintiff's purported right to privacy because
22 "sparing citizens from embarrassment, shame, or even intrusions into their privacy has never been
23 held to outweigh the guarantees of free speech in our federal and state Constitutions." *Hurvitz*, 84
24 Cal. App. 4th at 1244. For example, in *Gilbert v. National Enquirer, Inc.*, 43 Cal. App. 4th 1135
25 (1996), the actress Melissa Gilbert successfully obtained from the trial court a preliminary

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27 ⁴ Prior restraints are not limited to injunctions that prohibit speech before its initial
28 publication. A preliminary injunction that seeks to restrain further speech after the initial
publication is still considered a prior restraint. See *Wilson v. Superior Court*, 13 Cal. 3d 652, 655,
662 (1975) (holding that "injunction to restrain petitioner from *further* publication of the
Newsletter" was an unconstitutional prior restraint) (emphasis added).

1 injunction preventing her ex-husband and the National Enquirer from expressing and publishing
2 information about her purported sexual relationships and substance abuse on the ground that this
3 "threatened disclosure of private information" outweighed her ex-husband's free speech rights. *Id.*
4 at 1142. The appellate court vacated the injunction, holding that "the preliminary injunction [was]
5 an invalid prior restraint that must be reversed." *Id.* at 1148. The court held "as a matter of law,
6 that Gilbert's right to privacy [did] not outweigh [her ex-husband's] right to express his uncensored
7 opinion about her use of drugs and alcohol and her sexual relationships, or the Enquirer's right to
8 publish that information, subject, of course, to possible civil liability for the abuse of those rights."
9 *Id.*

10 Here, Adelman enjoys a constitutional right to publish his photographic record of the
11 California coastline in order to encourage and facilitate the preservation of the coastline, the
12 tracking of illegal activities that endanger the coastline, and the enforcement of environmental
13 regulations.⁵ Ex. C. Streisand does not even attempt to satisfy the extremely heavy burden of
14 showing that this publication will result in an imminent and serious substantive evil. She does not
15 cite a single case in which a court granted a preliminary injunction restraining speech merely to
16 protect the plaintiff's right to privacy.⁶ There is simply no authority for restraining Adelman's
17 right to free speech based on Streisand's concern that the website reveals the location of her house

18 ⁵ That Adelman's website and photographs are constitutionally protected speech on a
19 matter of public concern cannot be disputed. The California Legislature has declared that the
20 coastline is a "distinct and valuable natural resource of vital and enduring interest to all the
21 people" and whose protection is "a paramount concern to present and future residents of the state
22 and nation." Pub. Res. Code § 30001.

23 ⁶ Streisand cites *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978), but that case is
24 wholly in apposite. The court in *Ali* restrained the distribution of a magazine containing a nude
25 drawing of and a "plainly fictional and allegedly libelous" rhyme about Muhammad Ali based his
26 claim that the magazine had exploited his likeness for commercial purposes. *Id.* at 727. The case
27 did not involve a claim for right of privacy based on publication of private facts because no private
28 facts were at issue. The court explained that "the offensive illustration and rhyme are essentially
fictional." *Id.* at 728 n.9. Because the offending material did "not embody those factual 'matters
of public interest'" that are constitutionally protected, there were no prior restraint or constitutional
issues for the court to consider. *Id.* Similarly, *Michaels v. Internet Entertainment Group, Inc.*, 5
F. Supp. 2d 823 (C.D. Cal. 1998), a case not cited by Streisand, is inapplicable. In that case the
court issued an injunction because the plaintiffs had shown a likelihood of success on their claims
for copyright infringement and right to publicity, as well as right of privacy, based on the
distribution of a videotape showing them engaging in sexual relations. *Id.* at 843. The First
Amendment does not protect copyright infringement, but Streisand asserts no copyright in the
exterior of her home.

1 (although not its address), her landscaping, or the configuration of her deck chairs around her
2 swimming pool.

3 **II. Streisand's Contention That The Injunction "Will Not Affect His Operations" Does**
4 **Not Make The Injunction Constitutional**

5 Streisand apparently contends that the requested injunction somehow is exempt from the
6 prohibition against prior restraint because, as she claims in her motion, the injunction "will not
7 affect [Adelman's] operations in any significant way." Motion at 15:15-16. She argues in her
8 motion that she is asking for very little, simply that Adelman "remove and is prevented from
9 selling a few photographs out of tens of thousands of pictures published on his Website" and
10 remove the caption identifying Image 3850 as depicting Streisand's estate. *Id.* at 15:13-14.
11 Streisand apparently contends that the injunction does not really restrain Adelman's right to free
12 speech because he will remain free to publish the rest of his photographs and because the caption
13 on Image 3850 is not necessary to his mission. *See id.* at 1-2, 10:19-22 (arguing that Adelman
14 does not "explain why or how identifying Streisand's property as hers serves" his purpose of
15 documenting the coastline).

16 Neither Streisand nor any court is empowered to decide what speech is necessary or
17 appropriate on Adelman's website. The California Supreme Court has repeatedly rejected the
18 argument that the courts should act as editors or censors of speech and determine what is really
19 "necessary" to achieve the speaker's purpose. For example, in *Shulman v. Group W Productions,*
20 *Inc.*, 18 Cal. 4th 200 (1998), the plaintiffs, like Streisand, brought claims for intrusion into
21 seclusion and publication of private facts, alleging that defendants had violated an accident
22 victim's right to privacy by taping and broadcasting video showing her "intimate private, medical
23 facts and her suffering." *Id.* at 229. They argued that even if the broadcast of the accident was
24 newsworthy and therefore constitutionally protected, showing "intimate private, medical facts and
25 [the victim's] suffering was not *necessary* to enable the public to understand the significance of the
26 accident or the rescue as a public event." *Id.* (emphasis in original). The California Supreme
27 Court rejected this argument, explaining that "[t]he standard, however, is not necessity." *Id.* That
28 the broadcast could have been edited to exclude certain words and images was "not determinative"

1 because "[t]he courts do not, and constitutionally could not, sit as superior editors of the press."
2 *Id.*

3 The California Supreme Court also rejected this role of editor or censor in *Wilson*. In that
4 case, the trial court had issued an injunction requiring a political candidate to follow certain court-
5 prescribed rules in writing campaign material, such as including certain information in the material
6 and using a certain font size, all in the interest of achieving "a balanced presentation of the facts."
7 13 Cal. 3d at 656. The California Supreme Court sharply criticized the injunction, stating that the
8 trial court had "devised for itself an intolerable role" as "governmental censor" by undertaking to
9 determine whether the campaign material was "fair." *Id.* at 661.

10 The Court here, too, must reject Streisand's argument that it can act as editor and censor,
11 deciding what parts of Adelman's website are really "necessary" and proscribing other supposedly
12 "unnecessary" photographs and captions. There is no authority, and Streisand cites none,
13 permitting a court to undertake such a role.

14 **III. Streisand Fails To Satisfy Her Burden For Obtaining A Preliminary Injunction**

15 Separate and apart from the insurmountable hurdle presented by the prohibition against
16 prior restraints, this motion must fail because Streisand cannot satisfy the standard for the issuance
17 of a preliminary injunction.

18 **A. She Cannot Show The Likelihood Of Success On The Merits Because No**
19 **Court Has Sustained Privacy Claims Based On A Photograph Of A House**

20 Streisand spends the bulk of her argument contending that she is likely to prevail on the
21 merits of her two common law privacy claims for publication of private facts and intrusion into
22 seclusion, relegating her other three causes of action to a footnote. Motion at 13 n.1. None of
23 these causes of action finds any support in the case law, as evidenced by the fact that Streisand
24 cites only inapposite cases in her motion. Because no California court has ever sustained any right
25 of privacy cause of action based on a photograph showing only the outside of a house and a yard,
26 Streisand's causes of action have no chance of prevailing.⁷

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28 ⁷ Adelman's already-filed anti-SLAPP motion, also set for hearing on July 14, 2003,
discusses in much greater length the futility of each of Streisand's causes of action.

1 **1. The claim for publication of private facts fails because the website does**
2 **not reveal Streisand's address, which is already public and newsworthy**

3 Streisand bases the purported likely success of her claim for publication of private facts on
4 the contention that "Adelman's Website publishes the location of Streisand's home address." *Id.* at
5 8:24. She then cites several cases that supposedly find a privacy interest in "the location of a
6 particular individual's address and telephone number." *Id.* at 9:2. All of this is beside the point
7 because Adelman's website does *not* mention Streisand's address, identify the name of her street,
8 or list her telephone number. Ex. E. Moreover, not one of her cases holds that a private citizen's
9 publication of a person's home address, let alone the mere identification of the location of a
10 person's home without mentioning the address, violates the California right of privacy.⁸

11 In any event, this cause of action also fails because the location of her home, including her
12 address, was public knowledge long before the advent of the website. The law in California is
13 clear – "there can be no privacy with respect to a matter which is already public" and therefore
14 "there is no liability when the defendant merely gives further publicity to information about the
15 plaintiff that is already public." *Sipple v. Chronicle Publishing Co.*, 154 Cal. App. 3d 1040, 1047
16 (1984). Thus, Streisand is simply wrong as matter of law in asserting that "just because the same
17 private information can be, or has been, disseminated before, is no defense to a publication cause

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20 ⁸ Streisand cites the following inapposite cases. In *Lorig v. Medical Board*, 78 Cal. App.
21 4th 462, 468 (2000), the court held that under the California Public Records Act, the state medical
22 board's disclosure of doctors' home addresses was permissible. In *Denari v. Superior Court*, 215
23 Cal. App. 3d 1488, 1502 (1989), the court held that *in a discovery dispute* concerning the
24 production of individuals' addresses, the California constitutional right to privacy was not
25 preempted by federal law. The appellant did not raise and the court did not address whether under
26 state discovery statutes the addresses should have been produced. *Id.* at 1502 n.3. In *Paul P. v.*
27 *Verniero*, 170 F.3d 396, 406 (3rd Cir. 1999), the federal court held that the federal law requiring
28 the disclosure of the home addresses of prior sex offenders did *not* violate their right to privacy.
In *Hill v. Colorado*, 530 U.S. 703, 716, 735 (2000), the court addressed the right to avoid
unwanted communications and held that a Colorado statute regulating speech proximate to
abortion clinics was constitutional. In *Department of Defense v. FLRA*, 510 U.S. 487, 497 (1994),
the court held that federal employers' disclosure of their employees' home addresses to a union
representative violated the employees' personal privacy under the Freedom of Information Act
because it did not fulfill the Act's purpose of furthering citizens' right to be informed about their
government. In *Planned Parenthood Golden Gate v. Superior Court*, 83 Cal. App. 4th 347, 360-
61 (2000), the court held that home addresses of Planned Parenthood employees should not be
produced *in discovery* because of evidence that the Nuremberg Files website was collecting and
publishing such addresses in order to promote violence against abortion providers.

1 of action."⁹ Motion at 9:19-21. Under *Sipple*, it absolutely *is* a defense. Here, Streisand's street
2 address is publicly available on fan websites and star maps, and the latitudinal and longitudinal
3 coordinates of her house are also freely available. Ex. M. There are also numerous news articles
4 that, unlike the website, reveal the name of her street. *See, e.g.*, Exs. H, N.

5 The cause of action will also fail because Streisand will not be able to prove that the
6 publication of the photograph identified as her estate would be offensive to a reasonable person.
7 Although Streisand argues that "[t]he revelation of the location of one's home is similarly
8 offensive" as the revelation of a person's "prior life as a prostitute," no reasonable person would
9 accept that analogy. Motion at 10:7-14. Not surprisingly, Streisand cites no case making this
10 comparison. Streisand's analogy is particularly inapt because the photograph reveals nothing of a
11 personal nature, not even her address, and because Adelman's undisputed objective – to create a
12 historical record of the coastline to enable efforts of environmental preservation – rebuts
13 Streisand's claim of offensiveness. *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 26
14 (1994) (offensiveness depends on "the degree of intrusion, the context, conduct and circumstances
15 surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he
16 intrudes, and the expectations of those whose privacy is invaded").

17 In addition, despite Streisand's newly-acquired preference (beginning sometime after the
18 publication of the *People* cover story) that her home not be photographed, her Malibu bluff-top
19 estate *is* newsworthy. Information is newsworthy if it is (1) "of significant public interest" and (2)
20 there is "[s]ome reasonable proportion . . . maintained between the events or activity that makes
21 the individual a public figure and the private facts to which publicity is given." *Shulman*, 18 Cal.
22 4th at 222. Entertainment celebrities in particular "have to some extent lost the right of privacy,"
23 making their "accomplishments and way of life" legitimate topics of public discussion. *Carlisle v.*

24 _____
25 ⁹ The cases cited by Streisand to support this assertion do not mention the California
26 common law tort of publication of private facts. The court in *Ali* held that under New York right
27 of publicity law, Ali had established a probability of success on the merits of his claim that
28 *Playgirl* magazine had commercially exploited his likeness by publishing a nude drawing of Ali.
447 F.Supp. at 727-28. The case did not involve the publication of a private fact; to the contrary,
the court called the offending material "essentially fictional." *Id.* at 728 n.9. In *City of San Jose v.*
Superior Court, 74 Cal. App. 4th 1008, 1011 (1999), the court analyzed governmental disclosure
requirements under the California Public Record Act.

1 *Fawcett Publications, Inc.*, 201 Cal. App. 2d 733, 746-47 (1962); *Carafano v. Metrosplash.com,*
2 *Inc.*, 207 F. Supp. 2d 1055, 1069 (C.D. Cal. 2002) (granting defendants' summary judgment on
3 actress' invasion of privacy claim because Internet publication of actress' home address and
4 telephone number was newsworthy). The identification of Streisand as the owner of a huge estate
5 on the edge of a bluff overlooking the ocean is newsworthy, particularly because she has chosen to
6 entertain the United States President at a well-publicized event there and because of a public
7 controversy over whether Streisand's continuing development of her property is threatening the
8 stability of the bluff. Exs. P, H. Streisand's public pronouncements on the importance of
9 environmental conservation and her personal involvement in public environmental issues make
10 her own actions affecting the environment newsworthy. Ex. Q. Finally, Streisand argues that if
11 her address is newsworthy, than so are the addresses of "elected officials, police chiefs, prominent
12 CEO's" and that "[t]his is clearly not the case." Motion at 11:9-12. Again, she is wrong because it
13 clearly is the case that information about such people's residences can be newsworthy. Countless
14 photographs circulated in the news in the last year identifying the huge, multi-million dollar
15 homes of prominent executives of Enron and other failed corporations.

16 A final reason that this cause of action will fail is the protection afforded by section 230 of
17 the Communications Decency Act, which states that "[n]o provider or user of an interactive
18 computer service shall be treated as the publisher or speaker of any information provided by
19 another information content provider." 47 U.S.C. § 230(c)(1). Section 230 preempts inconsistent
20 state law claims. *Id.* at § 230(e)(3). Thus, when a third party provides information that is posted
21 on a website, the owner of the website cannot be liable under state law for causes of action based
22 on the provided information.¹⁰ Under section 230, Adelman cannot be liable for any state law
23 claim based on harm supposedly caused by the caption of Image 3850 because the website

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25 ¹⁰ See, e.g., *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 828-32 (2002) (provider of
26 auction website not liable for fraudulent item descriptions and seller ratings posted on site by
27 users). The holding in *Carafano* is not to the contrary. In that case, the court concluded that
28 Matchmaker.com was itself an information content provider because users created their profiles
that were posted on the Matchmaker website by answering specific multiple choice and essay
questions written by Matchmaker; the court found that these questions themselves contributed to
the content of the third-party user's profile. 203 F. Supp. 2d. at 1066-67. Adelman's website
makes no such contribution to the caption. Ex. G.

1 captions are provided by third-party users through the "Suggest Caption" function. Ex. G;
2 Adelman Decl., ¶ 5. Therefore, Streisand's claim that Adelman improperly disclosed private facts
3 by identifying her home "via the caption 'Streisand Estate, Malibu" will fail. Motion at 8:25.

4 **2. The claim for intrusion into seclusion fails because there is no case law**
5 **holding that taking a photograph of a house is intrusive**

6 Streisand contends that she will prevail on her intrusion into seclusion cause of action
7 because "Adelman's photographs reveal the private access routes within the property, the plant
8 arrangements in the gardens, the layout of the pool, the positioning of the room and balconies of
9 the house, views inside the doors and windows of the home." Motion at 12:21-24. She cites not
10 one case holding that taking pictures of a person's landscaping, pool layout and balcony
11 positioning violates that person's right to privacy, because there is none.

12 No California court has ever held that taking aerial photographs that happen to include
13 people's homes, *but not the people themselves*, constitutes an act of intrusion into those people's
14 seclusion. Indeed, even the cases cited by Streisand reveal that only allegations of *physical*
15 intrusion into homes or places of medical treatment, or allegations of the recording of
16 conversations, satisfy the elements of this tort. *See Schulman*, 18 Cal. 4th at 232-33 (intrusion into
17 air ambulance carrying injured patient to hospital and recording of patient's conversation with
18 paramedics); *Sanders v. American Broadcasting Co., Inc.*, 20 Cal. 4th 907, 911 (1999) (secret
19 recordings of conversations); *Miller v. National Broad. Co.*, 187 Cal. App. 3d 1463, 1484 (1986)
20 (intrusion by camera crew into plaintiff's bedroom while he was being treated for heart attack).
21 *See also Sanchez-Scott v. Alza Pharmaceuticals*, 86 Cal. App. 4th 365, 379 (2001) (intrusion into
22 medical examination room during examination of plaintiff); *Dietemann v. Time, Inc.*, 449 F.2d
23 245, 248 (9th Cir. 1971) ("clandestine photography of the plaintiff in his den").

24 Moreover, Streisand bases her argument on "facts" that she knows are not true. It is not
25 true that "[t]he enlarged pictures allow one to peer into Streisand's home through windows and
26 doors." Motion at 12:17. In actuality, when the photograph is enlarged, it lacks sufficient
27 resolution to see much of anything. Ex. I. She is also wrong in asserting that "Adelman relies on
28 enhanced optical aids to produce the images published on his website." Motion at 12:25. The

1 photograph was not taken with a telescopic lens. Adelman Decl., ¶ 2. Finally, Streisand claims
2 that she "is not engaging in any activity that would violate any [environmental] laws." Motion at
3 13:7. That is not so clear. She is apparently engaged in a long-running public dispute over her
4 expansion of one of her three houses that could damage the bluff. Ex. H. Whatever the outcome
5 of that dispute, there is obviously more than one point of view on the matter.

6 **3. The other three causes of action are equally defective**

7 By devoting just one footnote to her remaining three causes of action, Streisand accords
8 them as much space as they are worth. Motion at 13 n.1. In brief, Streisand claims that she will
9 prevail on her constitutional privacy cause of action for the same reasons as her two other privacy
10 claims. On the contrary, the constitutional claim will fail for the same reasons as the other claims.
11 Next, her misappropriation cause of action is meritless because "use of a name . . . in connection
12 with any news [or] public affairs," such as Adelman's website, is exempted. Civ. Code § 3344(d);
13 *Dora v. Frontline Video, Inc.* 15 Cal. App. 4th 536 (1993) (name and likeness of famous surfer as
14 part of documentary about early Malibu surfing culture exempt under section 3344(d)). In
15 addition, Adelman's web site is a non-profit venture; Adelman is not using Streisand's name for
16 commercial gain, and section 3344 is inapplicable on that ground as well. Civ. Code § 3344(a).
17 To succeed on her last cause of action under the Anti-Paparazzi Act (Civ. Code § 1708.8),
18 Streisand would have to establish that Adelman attempted to capture in a manner that is offensive
19 to a reasonable person a visual image of her engaging in a personal or familial activity under
20 circumstances in which she had a reasonable expectation of privacy through use of a visual
21 enhancing device without which the image could not have been achieved without a trespass. Civ.
22 Code § 1708.8. Image 3850 shows no attempt to capture any image of Streisand whatsoever and
23 was not made with a visual enhancing device, and so this claim fails as well. Ex. A; Adelman
24 Decl., ¶ 2.

25 **B. There Is No Possibility Of Irreparable Harm Because The Facts Revealed On**
26 **The Website Are Already Public**

27 The request for an injunction must also be denied because, as a matter of law, Streisand
28 cannot prove any possibility of irreparable harm if the injunction is not granted. As Streisand

1 herself acknowledges, "when a private fact gets disclosed, it cannot be undisclosed." Motion at
2 14:6. Similarly, the law recognizes that "once the information is released, unlike a physical object,
3 it cannot be recaptured and sealed." *Hurvitz*, 84 Cal. App. 4th at 1245. The court in *Hurvitz*,
4 which held as unconstitutional an injunction prohibiting the dissemination of information about a
5 doctor's celebrity patients, explained that "because the information is already public, the harm to
6 the patients' privacy has already occurred and cannot be prevented by the order. . . . neither the
7 state nor the federal Constitution permits the court to lock the barn door after the horse is gone."
8 *Id.*

9 Because information about the location and appearance of Streisand's house is already
10 public on the Internet and in *People* magazine, an injunction is useless to prevent the purported
11 possibility of future harm. Even if Adelman removed Image 3850 and the caption, anyone with
12 access to the Internet could easily find fan websites with her exact address.

13 Moreover, Streisand's bald assertion of prospective irreparable harm fails as a factual
14 matter. Although she claims that "there are millions of people around the world" who have not yet
15 become "acquainted with Streisand's private information," she has not submitted evidence that
16 these people have any desire to look at a picture of Streisand's pool layout and plant arrangements,
17 let alone travel from some far corner of the world to harm her. Indeed, the only evidence is to the
18 contrary. In the three months before the lawsuit was filed, only three copies of Image 3850 were
19 purchased (one to Streisand's neighbor and two to Streisand herself), and the download interface
20 was used for Image 3850 only six times (twice by Streisand's attorneys).¹¹ Adelman Decl., ¶ 6.

21 C. **Given Adelman's Free Speech Interests, The Balance Of Equities Does Not**
22 **Favor Streisand**

23 Finally, in arguing that the balance of equities favors herself, Streisand completely ignores
24 the harm to Adelman's free speech rights if an injunction is granted. In performing this balancing,

25 ¹¹ Streisand bases her "inadequate legal remedy" argument on the same assertion that
26 there are "future millions of people" who will not be able "to unlearn" the information about her
27 house and address. Motion at 14:20. Besides the lack of evidence supporting this assertion, the
28 one case Streisand cites does not hold that "no legal remedy can restore the privacy shattered by an
improper disclosure," as she claims. Motion at 14:16-17. In *Blair v. Pitchess*, 5 Cal. 3d 258, 283-
84 (1971), the court held that an illegal search and seizure of property caused irreparable harm
with no adequate legal remedy.

1 a court must determine if "a greater injury will result to the moving party if the injunction is
2 denied than will result to the opposing party if the injunction is granted." *Paradise Hills*
3 *Associates v. Procel*, 235 Cal. App. 3d 1528, 1538 (1991). As a matter of law, "the deprivation of
4 first amendment rights for even minimal periods constitutes irreparable harm in the context of an
5 action for injunctive relief." *Id.* at 1539 (quotations omitted).

6 The harm that would occur to Adelman if the injunction were granted is much greater than
7 Streisand's motion suggests. Not only would Adelman be required to remove Image 3850 and the
8 caption from his website (Motion at 15:13-15), it also appears that under Streisand's requested
9 injunction he would not be allowed to link to or reprint on his website any news articles about this
10 case that contain a copy of the photograph. Further, he would not be allowed to post copies of his
11 own publicly-available court documents on his website if these documents contain copies of the
12 photograph. Thus, Adelman would be restricted in his speech about this very lawsuit. While any
13 newspaper or Internet site would be free to report on this case and publish copies of Image 3850,
14 the very defendant in this case would not be able to discuss this case freely on his own website.

15 **CONCLUSION**

16 For all of these reasons, Streisand's motion for a preliminary injunction must be denied.

17 Dated: July 3, 2003

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18 By: _____
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TABLE OF CONTENTS

	<u>Page</u>
1 INTRODUCTION.....	1
2	
3 BACKGROUND FACTS	3
4	
5 ARGUMENT	5
6 I. The First Amendment And California Constitution Prohibit The	
7 Court From Enjoining Adelman's Publication Of Matters Of Serious	
Public Interest.....	5
8 II. Streisand's Contention That The Injunction "Will Not Affect His	
9 Operations" Does Not Make The Injunction Constitutional	7
10 III. Streisand Fails To Satisfy Her Burden For Obtaining A Preliminary	
Injunction	8
11 A. She Cannot Show The Likelihood Of Success On The Merits	
12 Because No Court Has Sustained Privacy Claims Based On	
A Photograph Of A House	8
13 1. The claim for publication of private facts fails	
14 because the website does not reveal Streisand's	
address, which is already public and newsworthy	9
15 2. The claim for intrusion into seclusion fails because	
16 there is no case law holding that taking a photograph	
of a house is intrusive.....	12
17 3. The other three causes of action are equally defective.....	13
18 B. There Is No Possibility Of Irreparable Harm Because The	
19 Facts Revealed On The Website Are Already Public	13
20 C. Given Adelman's Free Speech Interests, The Balance Of	
Equities Does Not Favor Streisand	14
21 CONCLUSION	15
22	
23	
24	
25	
26	
27	
28	

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
4 <i>Ali v. Playgirl, Inc.</i> , 447 F. Supp. 723 (S.D.N.Y. 1978).....	6, 10
5 <i>Carafano v. Metrosplash.com, Inc.</i> , 207 F. Supp. 2d 1055 (C.D. Cal. 2002).....	11
6 <i>Carlisle v. Fawcett Publications, Inc.</i> , 201 Cal. App. 2d 733 (1962).....	10
7 <i>City of San Jose v. Superior Court</i> , 74 Cal. App. 4th 1008 (1999).....	10
8 <i>Denari v. Superior Court</i> , 215 Cal. App. 3d 1488 (1989).....	9
9 <i>Department of Defense v. FLRA</i> , 510 U.S. 487 (1994).....	9
10 <i>Dietemann v. Time, Inc.</i> , 449 F.2d 245 (9th Cir. 1971).....	12
11 <i>Dora v. Frontline Video, Inc.</i> 15 Cal. App. 4th 536 (1993).....	13
12 <i>Gentry v. eBay, Inc.</i> , 99 Cal. App. 4th 816 (2002).....	11
13 <i>Gilbert v. National Enquirer, Inc.</i> , 43 Cal. App. 4th 1135 (1996).....	5, 6
14 <i>Hill v. Colorado</i> , 530 U.S. 703 (2000).....	9
15 <i>Hill v. National Collegiate Athletic Assn.</i> , 7 Cal. 4th 1 (1994).....	10
16 <i>Hurvitz v. Hoefflin</i> , 84 Cal. App. 4th 1232 (2000).....	5, 14
17 <i>Lorig v. Medical Board</i> , 78 Cal. App. 4th 462 (2000).....	9
18 <i>Michaels v. Internet Entertainment Group, Inc.</i> , 5 F. Supp. 2d 823 (C.D. Cal. 1998).....	6
19 <i>Miller v. National Broad. Co.</i> , 187 Cal. App. 3d 1463 (1986).....	12
20 <i>New York Times Co. v. United States</i> , 403 U.S. 713 (1971).....	5

	<u>Page(s)</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
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17	
18	
19	
20	
21	
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24	
25	
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27	
28	