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11
 12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA
 14 SAN FRANCISCO DIVISION

15 hiQ Labs, Inc.,
 16 Plaintiff,
 17 vs.
 18 LinkedIn Corporation,
 19 Defendant.

Case No. 17-cv-03301-EMC

**LINKEDIN CORPORATION'S
 SUPPLEMENTAL BRIEF IN SUPPORT
 OF MOTION TO DISSOLVE
 PRELIMINARY INJUNCTION**

Date: July 7, 2022
 Time: 1:30 p.m.
 Courtroom: 5 (Remote via Zoom)
 Judge: Hon. Edward M. Chen

21 LinkedIn Corporation
 22 Counterclaimant,
 23 vs.
 24 hiQ Labs, Inc.
 25 Counterdefendant.

Complaint Filed: June 7, 2017
 Trial Date: February 27, 2023

INTRODUCTION

1
2 Plaintiff hiQ Labs, Inc. is not an operational business and has not been for quite some
3 time. In a word used by its CEO, Mark Weidick, when hiQ shut down its Amazon Web Services
4 (“AWS”) servers, data storage, and the database used to operate its products in early 2020, those
5 products “decisively” were no longer available. hiQ has no present prospects of pursuing any
6 legitimate “commercial opportunity,” to use the suggestion offered by Mr. Weidick in his
7 declaration. [REDACTED]

8 [REDACTED]
9 [REDACTED] hiQ has thus misused the offices of this Court by taking the protection afforded it by a
10 preliminary injunction awarded on a theory of unfair competition, and instead of pursuing that
11 purported competition has engaged in the kind of conduct this Court and the Ninth Circuit said
12 LinkedIn had a legitimate interest in trying to prevent. [REDACTED]

13 [REDACTED]
14 hiQ is steps away from insolvency [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED] It would be worse than
19 speculation to claim hiQ could sell its products at this point, it is simply untrue. Part I.A., *infra*.

20 hiQ is defunct despite the fact that LinkedIn fully complied with this Court’s order, giving
21 hiQ nearly unfettered access to publicly viewable member profile data. This outcome belies any
22 causal link between LinkedIn’s assertion of rights and hiQ’s failure. [REDACTED]

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED] LinkedIn’s assertion
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1 of rights in a cease and desist letter had nothing to do with any of that. Because there is no causal
 2 relationship between the alleged threat of harm and LinkedIn’s alleged wrongful conduct, hiQ
 3 cannot maintain the preliminary injunction. Part I.B., *infra*.

4 Finally, hiQ’s conduct [REDACTED]

5 [REDACTED] threatens significant harm to LinkedIn and to the public.

6 While hiQ has no cognizable threat of ongoing irreparable harm, LinkedIn and its members face
 7 meaningful threats from hiQ’s ability to remove data from the platform without any meaningful
 8 oversight. The balance of hardships tips decisively against continuing an injunction. Part II,
 9 *infra*.

10 ARGUMENT

11 **I. DISCOVERY HAS CONFIRMED THAT THERE IS NO ONGOING THREAT OF** 12 **LIKELY IRREPARABLE HARM TO HIQ.**

13 It is undisputed that a likelihood of irreparable harm is required to maintain an injunction.
 14 *Compare* Mot. (ECF 216-3) at 13 (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
 15 1135 (9th Cir. 2011)) *with* Opp. (ECF 219) at 12–13 (citing *All. for the Wild Rockies*, 632 F.3d at
 16 1131 and not disputing that irreparable harm is required). The other *Winter* factors need not even
 17 be considered when the irreparable harm standard is unmet. *See Turo Inc. v. City of Los Angeles*,
 18 847 F. App’x 442, 444 (9th Cir. 2021) (“Having determined that the City has not made an
 19 adequate showing of the likelihood of irreparable harm on this record, we need not address the
 20 parties’ arguments regarding the remaining elements of the preliminary injunction test.”);
 21 *ConocoPhillips Co. v. Gonzalez*, No. 5:12-cv-00576-LHK, 2012 WL 538266, at *3 (N.D. Cal.
 22 Feb. 17, 2012).

23 Circumstances have changed significantly since the Court entered its preliminary
 24 injunction, and hiQ is no longer (assuming *arguendo* it ever was) at risk of threatened irreparable
 25 harm from LinkedIn. Even though it had the protection of the injunction, hiQ admitted in the first
 26 round of briefing of this Motion that it is out of business. It has “no funds, employees, or
 27 customers[,] . . . could not afford to keep the lights on, and was forced to shut down the majority
 28

1 of its systems and archive its core IP.” Opp. at 13. hiQ can “no longer solicit new clients or
2 renew client contracts.” *Id.* at 5. [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

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11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

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1 Even before AWS shut hiQ down, hiQ had decommissioned and destroyed the MongoDB
2 database necessary to support the operations of its two Products, Keeper and Skill Mapper,
3 archiving only a portion of that database and none of the parsed data necessary to run its products.
4 See [REDACTED] Ex. 4 (Kim Depo)
5 at 165:25-167:10 (Mr. Kim testifying about contents of MongoDB and AWS shut down); Ex. 6
6 (Miller May 26 Depo) at 310:16-311:4 (Mr. Miller testifying that systems decommissions led to a
7 time when hiQ's products were not operational) [REDACTED]

8 [REDACTED]
9 hiQ's Salesforce Customer Relationship Management system was also destroyed, as its
10 Salesforce subscription was discontinued and hiQ did not archive the contents. [REDACTED]
11 [REDACTED] hiQ knew that it had an obligation to
12 preserve Salesforce. [REDACTED]
13 [REDACTED] Ex. 10 (Weidick May 23 Depo) at 178:12-14, 180:14-
14 181:11, 184:20-185:3 (Weidick admits an obligation to preserve Salesforce data); 185:4-186:4
15 (Weidick admits receiving email from Salesforce warning of suspension); [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 hiQ also archived its source code ticketing and management system JIRA, and that
19 archive cannot be restored to use. Supp. Hurst Decl. ¶¶ 47-48. [REDACTED]

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 Not only did hiQ shut down its operations, it also purged a substantial quantity of
24 evidence regarding its scraping operations in the process. [REDACTED]

25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

1 [REDACTED] Ex. 6 (Miller May 26 Depo) at 314:2-
2 315:25 (CTO Miller testifying that logs related to the operation of the MiFi server would have
3 been lost with the deletion of the server), 357:1-17 (Miller testifying that he did not save the
4 Splunk Indexer), 372:5-9 (Miller testifying that he was unable to recover Splunk data).

5 hiQ’s decommissioning and destruction of its systems and data demonstrates decisively
6 that hiQ is no longer an operational company.¹ As such, there is no longer any ongoing threat of
7 likely irreparable harm to hiQ.

8 **A. The Court Should Not Credit Any Prospect Of Future Commercial**
9 **Relationships In Ruling On The Motion.**

10 Lacking any business to operate, hiQ rests its assertion of ongoing likely irreparable harm
11 on the remote possibility it might lose unspecified “future commercial relationships that could
12 leverage [hiQ’s] expertise, experience, and access to LinkedIn’s servers.” Opp. at 14 (claiming
13 further irreparable harm without citing evidence); see ECF No. 219-2 (Weidick Decl.) ¶ 14
14 (identifying future “commercial inquiry” as a possible harm). The Court should not credit such
15 an assertion in measuring any ongoing likelihood of irreparable harm, because hiQ itself has
16 either misused or rejected such opportunities.

17 *Misuse.* As hiQ is currently not capable of providing its original products without
18 completely starting over, the Court should view with skepticism any claim that it is just one

19 _____
20 ¹ hiQ claims that it ran out of money and could not pay for the maintenance of its systems and
21 data. And, hiQ surely has insolvency problems that would plainly prevent it from resuming
22 operations. [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
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[REDACTED]

[REDACTED] Such inquiries may well involve misuse of the Court's power for a purpose never contemplated at the time it granted the preliminary injunction.

That is all the more likely when one considers, as hiQ has conceded, that it is in no position to generate legitimate business opportunities for its products. [REDACTED]

[REDACTED]

[REDACTED] Ex. 10 (Weidick May 23 Depo) at 178:12-14, 180:14-181:11, 184:20-185:3 (Mr. Weidick testifying that if he had received notice of Salesforce would be suspended and deleted, he would have paid the invoice); 185:4-186:4 (Mr. Weidick acknowledging that he received an email from Salesforce, warning of suspension). Nor has hiQ otherwise tracked information regarding its potential customers. The list hiQ provided in discovery of purported prospective customers for its products that it allegedly lost out on consists of a spreadsheet whose provenance cannot be identified. Ex. 10 (Weidick May 23 Depo) at 135:18-143:16 (Weidick cannot explain where spreadsheet of prospective customers came from).

[REDACTED]

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[REDACTED]

“Establishing a threat of irreparable harm in the indefinite future is not enough.” *Amylin
Pharms., Inc. v. Eli Lilly & Co.*, 456 Fed. App’x 676, 679 (9th Cir. 2011). [REDACTED]

[REDACTED] hiQ doesn’t have the funds to re-
commence operations. Speculative injury does not warrant a preliminary injunction. *Caribbean
Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

**B. There Was No Causal Relationship Between hiQ’s Inability To Conduct Its
Operations and LinkedIn’s C&D Letter.**

As discussed in LinkedIn’s Motion, the fact that hiQ failed despite the presence of the
preliminary injunction belies any notion that LinkedIn was the *cause* of any threatened irreparable
harm. Mot. at 13-17. The law requires a causal relationship between the threatened irreparable
harm and the conduct sought to be enjoined. *Id.* at 15; *see, e.g., Smithfield Packaged Meat Sales
Corp. v. Dietz & Watson, Inc.* No. 1:20-cv-00005-RGE-CFG, 2021 WL 2627454, at *2 (S.D.
Iowa April 23, 2021) (dissolving preliminary injunction prohibiting solicitation of customers
because those specific customers stopped doing business with plaintiff and therefore the
purported irreparable harm on which the injunction was based no longer existed).

[REDACTED]

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[REDACTED]

[REDACTED] As this Court and the Ninth Circuit have previously acknowledged in this case (let alone other cases like *Facebook*

1 v. *Power Ventures*), LinkedIn was and is entitled to maintain such technical defenses. See *hiQ*
2 *Labs, Inc. v. LinkedIn Corp.* (“*hiQ Labs II*”), 31 F.4th 1180, 1202 (9th Cir. 2022) (“Internet
3 companies and the public do have a substantial interest in thwarting denial-of-service attacks and
4 blocking abusive users, identity thieves, and other ill-intentioned actors.”); *hiQ Labs, Inc. v.*
5 *LinkedIn Corp.* (“*hiQ Labs I*”), 273 F. Supp. 3d 1099, 1113 (N.D. Cal. 2017) (“This is not to say
6 that a website like LinkedIn cannot employ, e.g., anti-bot measures to prevent, e.g., harmful
7 intrusions or attacks on its server. Finding the CFAA inapplicable to hiQ’s actions does not
8 remove all arrows from LinkedIn’s legal quiver against malicious attacks.”).

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
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27 [REDACTED]

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1 **II. THE BALANCE OF HARDSHIPS FAVORS LINKEDIN.**

2 The law post-*Winter* is clear that an injunction may not be maintained in the absence of
3 likely, imminent irreparable harm, and the Court need go no further in its analysis. *E.g.*,
4 *ConocoPhillips Co.*, 2012 WL 538266 at *3; *Fox Broad. Co.*, 905 F. Supp. 2d at 1111. Should
5 the Court nonetheless wish to consider the balance of harms and public interest, these factors also
6 favor dissolving the preliminary injunction. *See* Mot. at 17-19.

7 As to the balance of equities, the Court must balance the harm caused by the injunction
8 against the harm that would result if it were dissolved. *Univ. of Hawai'i Prof'l Assembly v.*
9 *Cayetano*, 183 F.3d 1096, 1108 (9th Cir. 1999). As discussed above, the only ongoing hardship
10 hiQ identifies is speculative at best and a misuse of the injunction at worst. The lack of any
11 cognizable harm to hiQ tips the balance of the equities "firmly" in LinkedIn's favor. *Nevada v.*
12 *United States*, 364 F. Supp. 3d 1146, 1157 (D. Nev. 2019).

13 Moreover, the harms LinkedIn faces if the injunction continues are significant. hiQ has
14 misused the injunction by scraping and selling profile data instead of its products. As this Court
15 and the Ninth Circuit have recognized, LinkedIn has a legitimate interest in enforcing its User
16 Agreement to protect the trust of its members and the safety of its platform from scraping and
17 members' concomitant loss of control over their data. *See hiQ Labs II*, 31 F.4th at 1189 ("As the
18 district court observed, 'the fact that a user has set his profile to public does not imply that he
19 wants any third parties to collect and use that data for all purposes.'"); *hiQ Labs I*, 273 F. Supp.
20 3d at 1106 ("LinkedIn argues that both it and its users therefore face substantial harm absent an
21 injunction; if hiQ is able to continue its data collection unabated, LinkedIn members' privacy may
22 be compromised, and the company will suffer a corresponding loss of consumer trust and
23 confidence. These considerations are not without merit.").

24 hiQ has also failed to maintain operational security of the IP addresses. [REDACTED]

25 [REDACTED]

26 [REDACTED] Ex. 6

27 (Miller May 26 Depo) at 337:13-338:3 (Miller testifying that hiQ ran a proxy manager out of

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1 computer in a closet); [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]

8 As to the public interest, the fact that hiQ scraped and sold profile data outside the context
9 of its products confirms a significant threat to the public interest. LinkedIn members share data
10 subject to the User Agreement and LinkedIn Privacy Policy. Those Agreements entitle members
11 to delete their profiles if they want to, or to change them and have the earlier versions be
12 removed. When hiQ takes data off of the site and passes it to third parties, members are no longer
13 able to exercise control over that data. The threats from unauthorized collection of user
14 information have grown much more substantial with widespread availability of machine-learning
15 tools that can be used to create personalized phishing attacks, rogue facial recognition systems,
16 and other malicious activity. hiQ has sold raw profile data to third parties, exposing LinkedIn
17 members to those risks. *See* Mot. at 18–19 (citing evidence); *see also hiQ Labs II*, 31 F. 4th at
18 1202 (recognizing “significant public interests” identified by LinkedIn). On the record presently
19 before the Court, the public interests identified by LinkedIn weigh in favor of dissolving the
20 preliminary injunction.
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