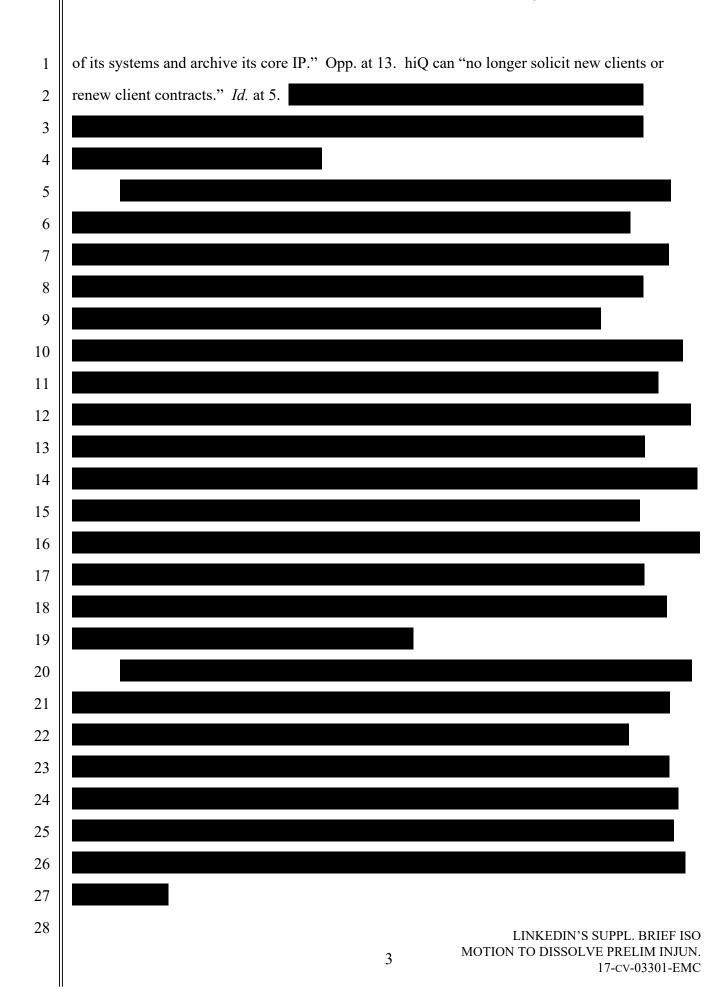
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| 12 | UNITED STATES DISTRICT COURT | | |
| 13 | NORTHERN DIS | STRICT OF CALIFOR | NIA |
| 14 | SAN FRAI | NCISCO DIVISION | |
| 15 | hiQ Labs, Inc., | Case No. 17-c | v-03301-EMC |
| 16 | Plaintiff, | | CORPORATION'S |
| 17 | VS. | SUPPLEMEN | TAL BRIEF IN SUPPORT TO DISSOLVE |
| 18 | LinkedIn Corporation, | | RY INJUNCTION |
| 19 | Defendant. | Date: Time: | July 7, 2022 1:30 p.m. |
| 20 | | Courtroom: Judge: | 5 (Remote via Zoom) Hon. Edward M. Chen |
| 21 | LinkedIn Corporation | Complaint File | ed: June 7, 2017 |
| 22 | Counterclaimant, vs. | Trial Date: | February 27, 2023 |
| 23 | hiQ Labs, Inc. | | |
| 24 | Counterdefendant. | | |
| 25 | | | |
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| | | MOTIO | LINKEDIN'S SUPPL. BRIEF ISO IN TO DISSOLVE PRELIM INJUN. |

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| | |
| 1 | INTRODUCTION |
| 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. |
| 8 | |
| 9 | 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. |
| 13 | |
| 14 | hiQ is steps away from insolvency |
| 15 | |
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| 17 | |
| 18 | It would be worse than |
| 19 | speculation to claim hiQ could sell its products at this point, it is simply untrue. Part I.A., <i>infra</i> . |
| 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. |
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| 24 | |
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| 27 | LinkedIn's assertion |
| 28 | LINKEDIN'S SUPPL. BRIEF ISO MOTION TO DISSOLVE PRELIM INJUN. 17-cv-03301-EMC |

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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 |
| 5 | 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 | <u>ARGUMENT</u> |
| 11 | I. <u>DISCOVERY HAS CONFIRMED THAT THERE IS NO ONGOING THREAT OF</u> <u>LIKELY IRREPARABLE HARM TO HIQ.</u> |
| 12 | LIKELT IKKEI AKADLE HAKM 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 <i>Winter</i> 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 | 2 LINKEDIN'S SUPPL. BRIEF ISO MOTION TO DISSOLVE PRELIM INJUN. 17-cv-03301-EMC |

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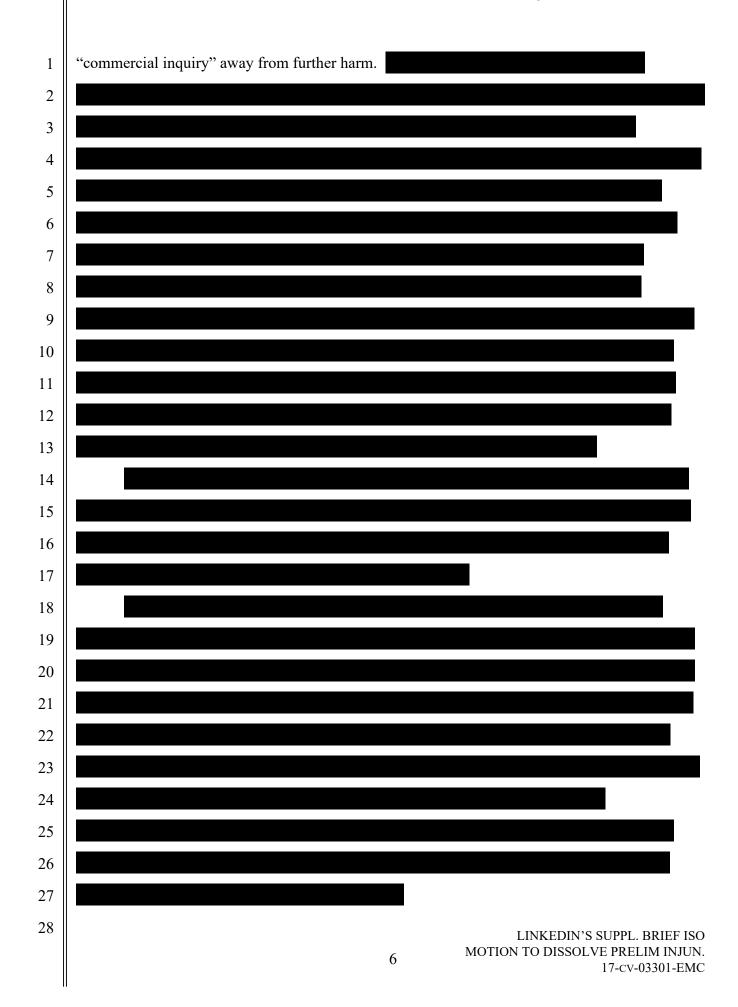


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| 1 | Even before AWS shut hiQ down, hiQ had decommissioned and destroyed the MongoDB |
|----------|--|
| 2 | database necessary to support the operations of its two Products, Keeper and Skill Mapper, |
| 3 | archiving only a portion of that database and none of the parsed data necessary to run its products. |
| 4 | See 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) |
| 8 | |
| 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. |
| 11 | hiQ knew that it had an obligation to |
| 12 | preserve Salesforce. |
| 13 | 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); |
| 16 | |
| 17 | |
| 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. |
| 20 | |
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| 23 | Not only did hiQ shut down its operations, it also purged a substantial quantity of |
| 24 25 | evidence regarding its scraping operations in the process. |
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| 20 | 4 LINKEDIN'S SUPPL. BRIEF ISO MOTION TO DISSOLVE PRELIM INJUN. 17-cv-03301-EMC |
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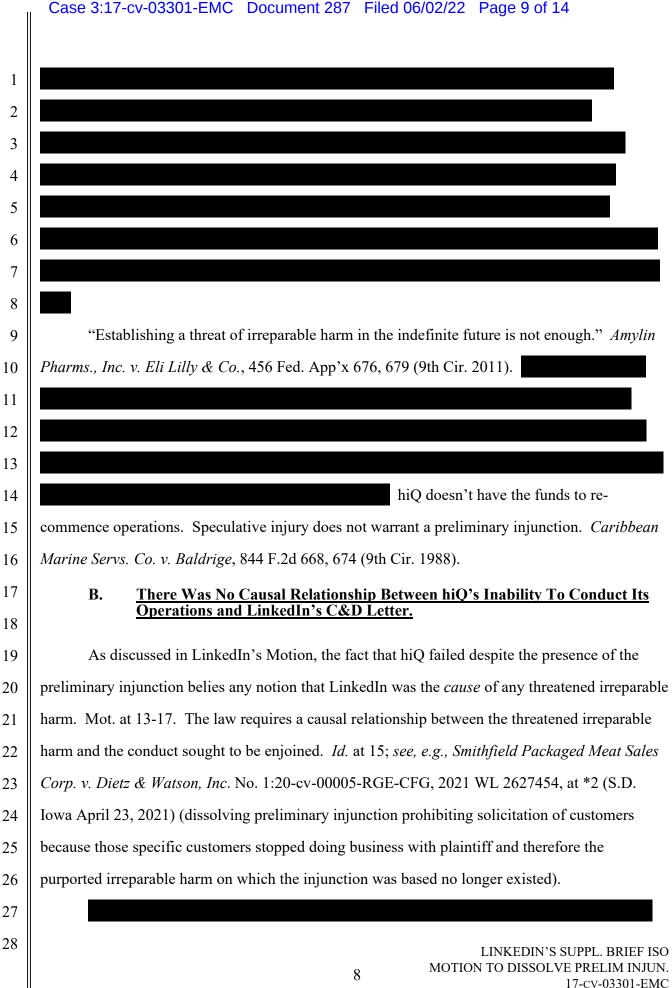
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| 1 | Ex. 6 (Miller May 26 Depo) at 314:2- |
| 2 | 315:25 (CTO Miller testifying that logs related to the operation of the MiFi server would have |
| 3 | been lost with the deletion of the server), 357:1-17 (Miller testifying that he did not save the |
| 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. <u>The Court Should Not Credit Any Prospect Of Future Commercial</u> |
| 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.) \P 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 | <i>Misuse.</i> 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 | $\frac{1}{1}$ hiQ claims that it ran out of money and could not pay for the maintenance of its systems and |
| 20 | data. And, hiO surely has insolvency problems that would plainly prevent it from resuming operations. |
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| 28 | 5 LINKEDIN'S SUPPL. BRIEF ISO MOTION TO DISSOLVE PRELIM INJUN. 17-cv-03301-EMC |

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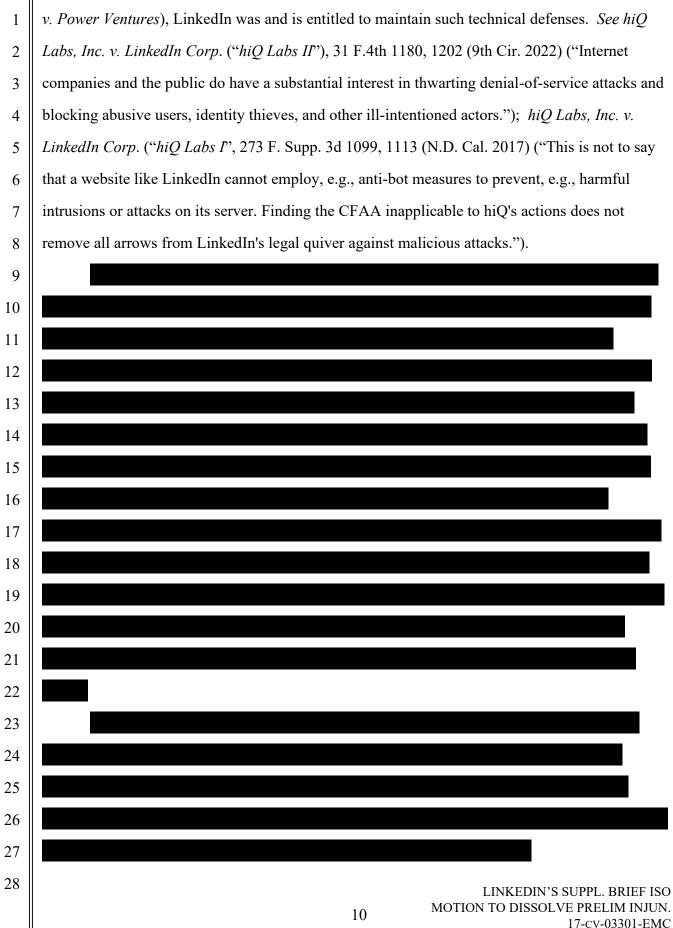


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| 6 | Such inquiries may well involve misuse of the |
| 7 | Court's power for a purpose never contemplated at the time it granted the preliminary injunction. |
| 8 | That is all the more likely when one considers, as hiQ has conceded, that it is in no |
| 9 | position to generate legitimate business opportunities for its products. |
| 10 | |
| 11 | |
| 12 | |
| 13 | |
| 14 | |
| 15 | Ex. 10 (Weidick May |
| 16 | 23 Depo) at 178:12-14, 180:14-181:11, 184:20-185:3 (Mr. Weidick testifying that if he had |
| 17 | received notice of Salesforce would be suspended and deleted, he would have paid the invoice); |
| 18 | 185:4-186:4 (Mr. Weidick acknowledging that he received an email from Salesforce, warning of |
| 19 | suspension). Nor has hiQ otherwise tracked information regarding its potential customers. The |
| 20 | list hiQ provided in discovery of purported prospective customers for its products that it allegedly |
| 21 | lost out on consists of a spreadsheet whose provenance cannot be identified. Ex. 10 (Weidick |
| 22 | May 23 Depo) at 135:18–143:16 (Weidick cannot explain where spreadsheet of prospective |
| 23 | customers came from). |
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II.

THE BALANCE OF HARDSHIPS FAVORS LINKEDIN.

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

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

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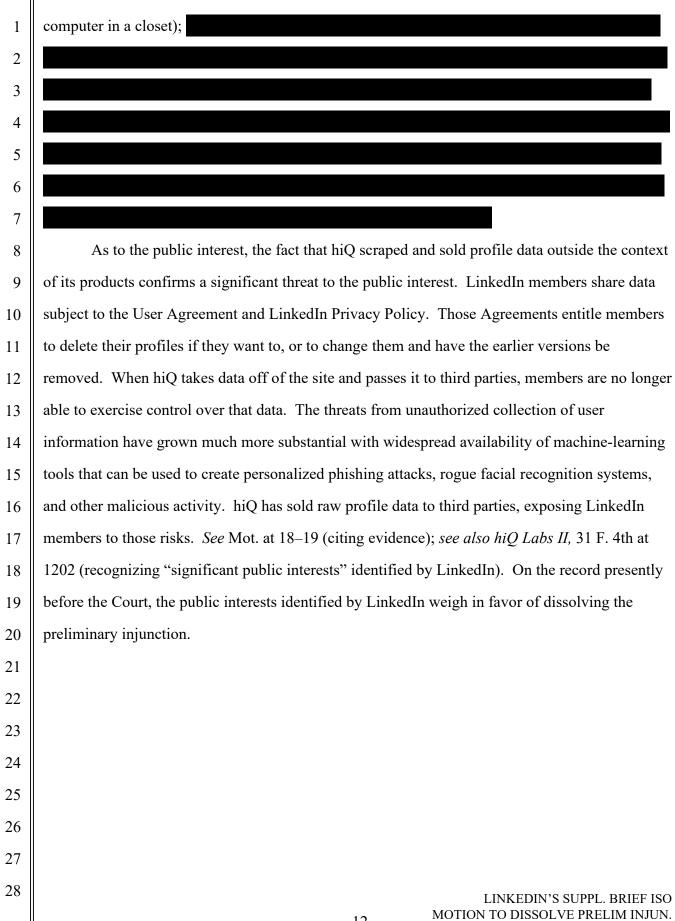
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Ex. 6

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

hiQ has also failed to maintain operational security of the IP addresses.

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| 1 | CONCLUSION | |
| 2 | For all of the reasons set forth herein and in the record previously submitted in support of | |
| 3 | the Motion to Vacate, LinkedIn respectfully requests that the preliminary injunction be dissolved | |
| 4 | and that it no longer be forced to provide privileged access to hiQ through the use of the | |
| 5 | allowlisted IP addresses. | |
| 6 | Dated: June 1, 2022 Orrick, Herrington & Sutcliffe LLP | |
| 7 | | |
| 8 | By: <u>/s/Annette L. Hurst</u> ANNETTE L. HURST | |
| 9 | Attorneys for Defendant LinkedIn Corporation | |
| 10 | Linkedin Corporation | |
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