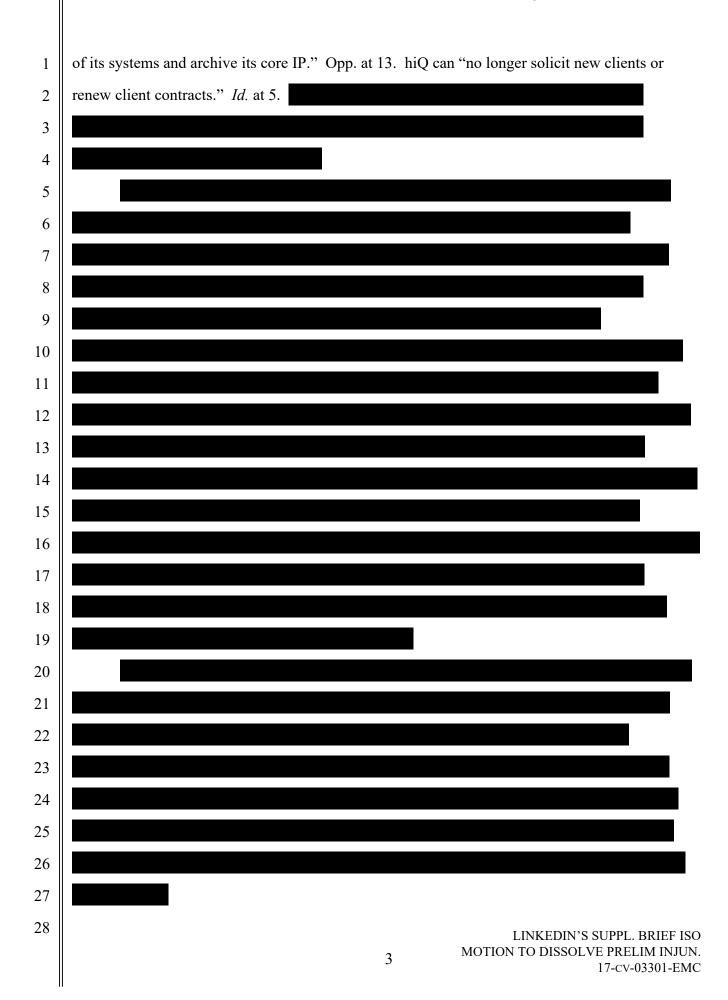
I	Case 3:17-cv-03301-EMC Document	287 Filed 06/02/22	Page 1 of 14
1	ANNETTE L. HURST (SBN 148738)		
2	ahurst@orrick.com RUSSELL P. COHEN (SBN 213105)		
3	rcohen@orrick.com NATHAN SHAFFER (SBN 282015)		
4	nshaffer@orrick.com DANIEL JUSTICE (SBN 291907)		
5	djustice@orrick.com SARAH K. MULLINS (SBN 324558)		
6	sarahmullins@orrick.com MARIA N. SOKOVA (SBN 323627)		
7	msokova@orrick.com ORRICK, HERRINGTON & SUTCLIFFE I	LLP	
8	The Orrick Building 405 Howard Street		
9	San Francisco, CA 94105-2669 Telephone: +1 415 773 5700		
10	Facsimile: +1 415 773 5759		
11	Attorneys for LinkedIn Corporation		
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			
26			
27			
28			
		MOTIO	LINKEDIN'S SUPPL. BRIEF ISO IN TO DISSOLVE PRELIM INJUN.

I	Case 3:17-cv-03301-EMC Document 287 Filed 06/02/22 Page 2 of 14
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	
16	
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.
23	
24	
25	
26	
27	LinkedIn's assertion
28	LINKEDIN'S SUPPL. BRIEF ISO MOTION TO DISSOLVE PRELIM INJUN. 17-cv-03301-EMC

	Case 3:17-cv-03301-EMC Document 287 Filed 06/02/22 Page 3 of 14
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

Case 3:17-cv-03301-EMC Document 287 Filed 06/02/22 Page 4 of 14

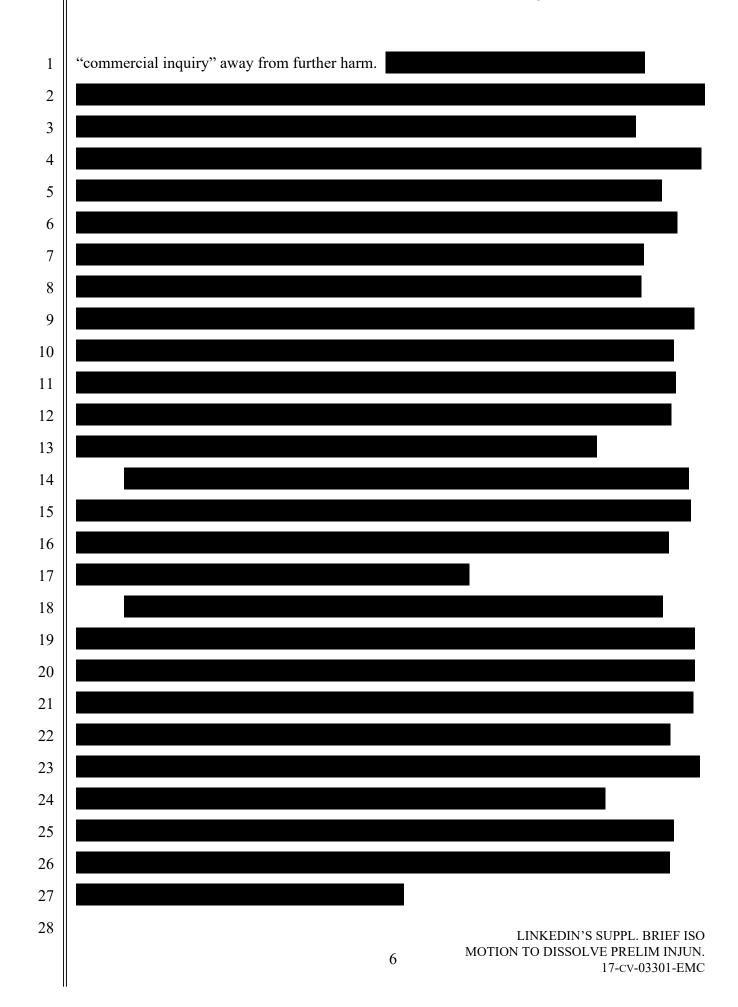


Case 3:17-cv-03301-EMC Document 287 Filed 06/02/22 Page 5 of 14

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	
21	
22	
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.
25 26	
20	
28	
20	4 LINKEDIN'S SUPPL. BRIEF ISO MOTION TO DISSOLVE PRELIM INJUN. 17-cv-03301-EMC

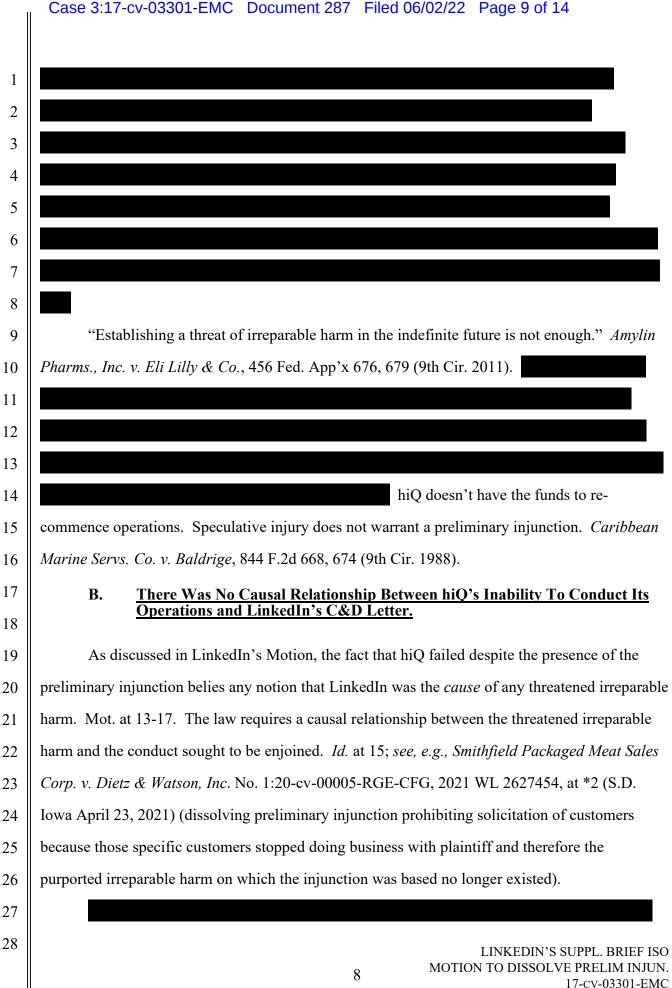
	Case 3:17-cv-03301-EMC Document 287 Filed 06/02/22 Page 6 of 14
1	Ex. 6 (Miller May 26 Depo) at 314:2-
2	315:25 (CTO Miller testifying that logs related to the operation of the MiFi server would have
3	been lost with the deletion of the server), 357:1-17 (Miller testifying that he did not save the
4	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.
21	
22	
23	
24	
25	
26	
27	
28	5 LINKEDIN'S SUPPL. BRIEF ISO MOTION TO DISSOLVE PRELIM INJUN. 17-cv-03301-EMC

Case 3:17-cv-03301-EMC Document 287 Filed 06/02/22 Page 7 of 14



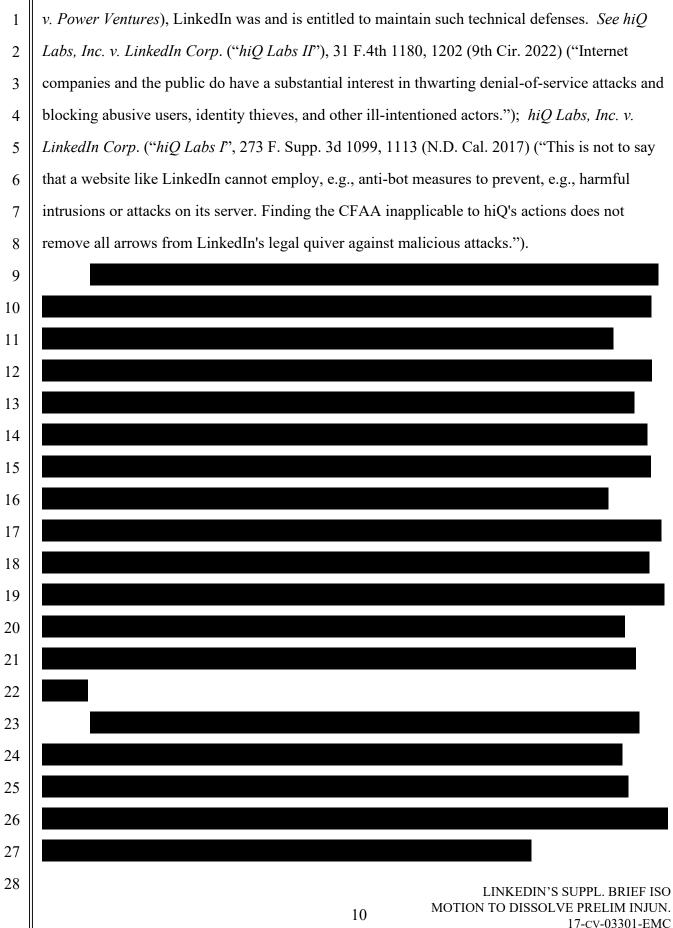


1	
2	
3	
4	
5	
6	Such inquiries may well involve misuse of the
7	Court's power for a purpose never contemplated at the time it granted the preliminary injunction.
8	That is all the more likely when one considers, as hiQ has conceded, that it is in no
9	position to generate legitimate business opportunities 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).
24	
25	
26	
27	
28	LINKEDIN'S SUPPL. BRIEF ISO7MOTION TO DISSOLVE PRELIM INJUN. 17-cv-03301-EMC





17-CV-03301-EMC



1

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.").

25

26

28

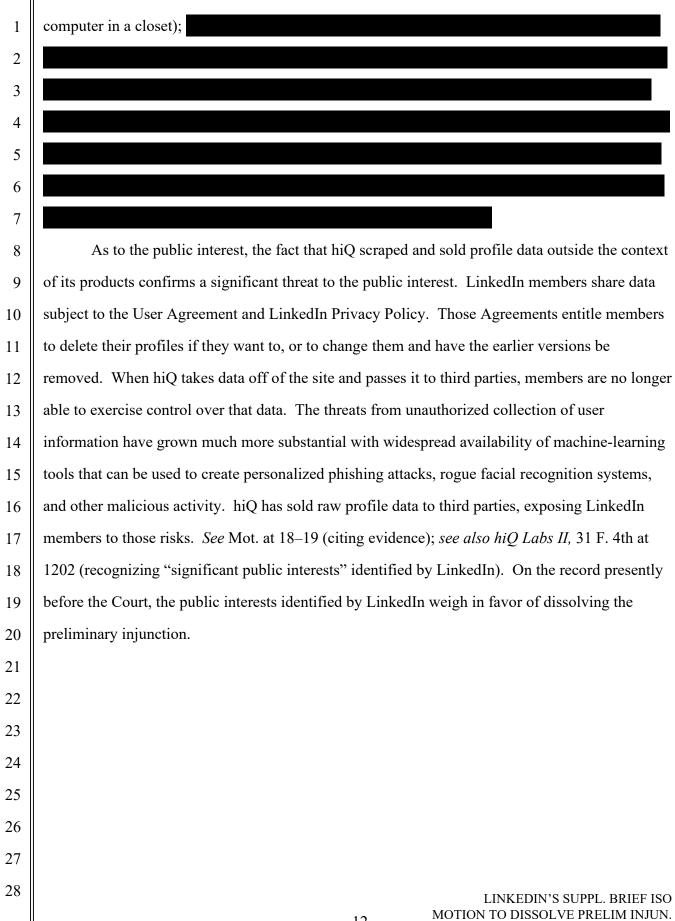
24

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.

Case 3:17-cv-03301-EMC Document 287 Filed 06/02/22 Page 13 of 14



17-CV-03301-EMC

	Case 3:17-cv-03301-EMC Document 287 Filed 06/02/22 Page 14 of 14	
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	
11		
12	4137-6086-3800.12	
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28	LINKEDIN'S SUPPL. BRIEF ISO13MOTION TO DISSOLVE PRELIM INJUN. 17-cv-03301-EMC	