No. 23-35494

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRAND RIVER ENTERPRISES SIX NATIONS, LTD,

Appellant,

v.

AUSTIN KNUDSEN, IN HIS OFFICIAL CAPACITY, ATTORNEY GENERAL OF THE STATE OF MONTANA

Appellee.

On Appeal from the United States District Court for the
District of Montana, No. 23-cv-00048
Hon. Brian Morris, Chief District Judge

REPLY BRIEF OF APPELLANT GRAND RIVER ENTERPRISES SIX NATIONS, LTD.

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INTRODUCTION

GRE is entitled to a preliminary injunction. The Montana Attorney General's enforcement action blatantly violates the Food, Drug, and Cosmetic Act ("FDCA"). Under well-established Supreme Court and Ninth Circuit precedent, only the federal government may enforce the FDCA. Yet, not only has the AG taken it upon himself to enforce the FDCA, he has crowned himself the single most powerful enforcer of the FDCA in the United States. The AG has banned all GRE products statewide, apparently forever, based on his unilateral conclusion that GRE violated the FDCA—a determination that neither a court nor a federal official has ever hinted at. No federal official has enforcement authority that is even close to the authority the AG is now asserting. And to add insult to injury, the AG's interpretation of federal law is wrong. GRE complied with federal law and deserves *no* punishment, let alone the corporate death penalty that the AG inflicted.

The AG's action is preempted. The AG lacks the authority to enforce the FDCA—and certainly lacks the authority to punish GRE based on a patently erroneous interpretation of the FDCA. The AG's primary defense is that he is not enforcing federal law, but instead enforcing state law. But as the Supreme Court has expressly held, nominally state-law claims that are premised on FDCA violations are preempted. That's this case: The AG contends that GRE violated state law *because* GRE purportedly violated the FDCA. And if there were any doubt, it is

resolved by a recent decision by a Montana state court, which the AG wholly ignores, explicitly stating that the AG banished GRE's products from Montana's shelves because he "determined GRE *had violated federal law* and thus the terms of the 2012 AVC." ECF 30-2 at 3 (emphasis added).

The AG's action also violates the Due Process Clause. The AG cannot banish GRE's products from Montana shelves without *any* process. Contrary to the AG's contention, GRE never agreed, and would never agree, to give the AG this remarkable unilateral authority, and the Constitution itself prohibits states from exacting such wholesale surrenders of constitutional rights.

The Court should reverse and remand with instructions to issue a preliminary injunction.

I. This Court Has Jurisdiction.

The Court has jurisdiction under 28 U.S.C. § 1292(a)(1). The district court's order denying an injunction pending appeal, and its subsequent order denying reconsideration, were indistinguishable from the denial of a preliminary injunction—and under this Court's cases, it is substance, not form, that matters. Alternatively, the Court has jurisdiction under the collateral order doctrine.

A. This Court Has Jurisdiction Under 28 U.S.C. § 1292(a)(1).

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because the district court has denied a TRO, and the circumstances of this case make clear that the denial of a preliminary injunction is inevitable. Under *Religious Technology Center, Church of Scientology International, Inc. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989), that suffices to establish appellate jurisdiction under § 1292(a)(1).

In its July 17 order, the district court denied a TRO and refused to rule on GRE's request for a preliminary injunction "pending resolution of the motions now before the Montana state district court." ER-13. On October 4—after GRE filed its opening brief, but before the AG filed his responsive brief—the Montana state court denied GRE's motion for preliminary injunction. *See* ECF 30-2.[1]

Even assuming that, in light of the state court's order, the federal district court would resume consideration of GRE's motion for preliminary injunction, it is plain

[1] Even though the state court issued its order on October 4—a full 15 days before the AG filed his Ninth Circuit brief—the AG does not address the state court's order in his brief. Indeed, the AG's brief appears to have been written before the state court's order and not updated in light of that order. *E.g.*, AG Br. 7 (stating that "the TRO and PI arguments are fully briefed before the State Court").

Nevertheless, it is fair game for GRE to address the effect of the state court's order in this reply brief. The AG was undoubtedly aware of it, given that he is a party to the state court case. Moreover, GRE's reply brief in support of its motion for injunction pending appeal relied on the state court's order and attached that order as an exhibit (ECF 30-1, 30-2), putting the AG on ample notice that GRE would again address the state court's order in this brief.

that the preliminary injunction would be denied. As explained in GRE's Replacement Opening Brief (ECF 19) at 24-25, the district court's September 1 denial of GRE's motion for injunction pending appeal was, for all intents and purposes, the denial of a motion for preliminary injunction. The court held that "GRE has not shown that it will succeed on the merits of the case." ER-143. It further concluded that "GRE has failed to demonstrate that it likely will suffer irreparable harm in the absence of preliminary relief" and that "GRE also failed to demonstrate that the balance of equities tip in its favor." ER-146. These are precisely the factors that the court would consider in deciding whether to grant a preliminary injunction. *See Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1176 (9th Cir. 2021) ("To determine whether to grant an injunction pending appeal," the Court "applies the test for preliminary injunctions.").

The district court subsequently denied reconsideration of its July 17 order, referring back to its order denying an injunction pending appeal. ER-149. GRE noticed an appeal of the denial of reconsideration, ER-159, so the district court's reasoning in its denial of an injunction pending appeal is now teed up on appeal.

Under these circumstances, this Court's precedents establish that the Court has appellate jurisdiction. When a district court denies a TRO, and the "futility of any further hearing" on a preliminary injunction is "patent," this Court has jurisdiction under § 1292(a)(1). *Religious Technology*, 869 F.2d at 1308-09. Under

that standard, the Court has jurisdiction: the futility of any further hearing is patent because the district court has already issued an order that is, for all practical purposes, indistinguishable from the denial of a preliminary injunction.

There are powerful practical reasons to find appellate jurisdiction under these circumstances. If the Court holds that it lacks appellate jurisdiction, then the Court will dismiss the appeal; the district court will reinstate his prior ruling, this time captioned "denial of preliminary injunction" rather than "denial of injunction pending appeal"; and the parties will come right back. This process will waste party and judicial resources. Moreover, it would be prejudicial to GRE, whose products will be banned in Montana until this appeal is resolved. This Court's practical approach in *Religious Technology* is tailor-made to avoid this outcome.

Regrettably, the AG's brief completely ignores this jurisdictional argument, despite it appearing in GRE's Replacement Opening Brief. *See* Replacement Opening Br. at 24-25. Given the AG's total refusal to engage with GRE's arguments, the AG has apparently conceded that GRE satisfies *Religious Technology*'s futility standard. The Court should therefore hold that it has appellate jurisdiction.

B. This Court Has Jurisdiction Under the Collateral Order Doctrine.

If the Court construes the district court's order as a stay, rather than denial, of a preliminary injunction, the Court would still have appellate jurisdiction because

Colorado River stays are immediately appealable. Replacement Opening Br. at 25-27.

The AG insists that "the District Court's deferral was based on traditional abstention and does not constitute a *Colorado River* stay." AG Br. at 5. But "traditional abstention" doctrines such as *Pullman* and *Younger* abstention do not support the district court's ruling. Indeed, the AG does not explain what "traditional" abstention doctrine it is referring to. The only abstention doctrine that is even in the ballpark of the district court's order is *Colorado River*—and such orders are immediately appealable.

II. No Stay Was Warranted.

The AG argues that the district court was justified in staying the case in its July 17 order because the "State Court can adequately protect GRE's rights and resolve all issues between the parties." (AG Br. at 8). The state court's October 4 order makes clear this is wrong. The state court stated: "To the extent GRE wishes to seek an injunction based on a disagreement with the substance of the State's determination, the proper forum is GRE's federal case." ECF 30-2 at 7.

At any rate, it is now irrelevant whether the district court's initial decision to defer consideration of GRE's preliminary injunction motion was correct. As explained above, the district court subsequently *did* address GRE's federal claims,

issuing an order that was tantamount to the denial of a preliminary injunction. The district court's reasoning was erroneous, as GRE next explains.

III. GRE Is Entitled to a Preliminary Injunction.

GRE is likely to prevail on the merits. The AG banned all GRE products from Montana's shelves based on his unilateral—and wrong—interpretation of federal law. GRE is likely to succeed in showing that this action is preempted and violates the Due Process Clause. And the other preliminary injunction factors favor GRE: the AG is immune from suit, so GRE's continuing harm is irreparable, and the balance of equities tips in GRE's favor.

A. GRE is Likely to Succeed on the Merits.

The AG's brief is remarkable for its steadfast refusal to engage with GRE's arguments. The AG does not come close to showing that his actions comply with federal law.

1. Federal Law Preempts the AG's Attempt to Enforce the FDCA.

GRE is likely to prevail on its preemption claim. The AG unilaterally decided that GRE violated federal law and unilaterally banned sales of all GRE products in the state based on that determination. These actions are preempted by the FDCA, because only the FDA may enforce the FDCA. And, making matters worse, the AG got federal law wrong.

a. The AG impermissibly enforced federal law.

The parties' "Assurance of Voluntary Compliance" (AVC) recites that GRE shall "remain in compliance with all local, state, and federal laws." ER-73. The AG determined that GRE violated federal law, and hence violated the AVC. Based on that determination, the AG banned all GRE products in Montana.

That action was plainly preempted. As GRE's opening brief explained, and as the AG does not dispute, only the federal government may enforce the FDCA. Replacement Opening Br. at 32-33. It is no answer for the AG to claim he was enforcing the AVC's requirement to *follow* federal law, rather than federal law itself. In *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), the Supreme Court held that state-law claims are preempted when the FDCA "is a critical element" of the case. *Id.* at 353; *see id.* ("claims that exist solely by virtue of" FDCA violations are preempted). Applying *Buckman*, this Court has explained that actions for violation of state law "may not be pursued when[] … the [action] would require litigation of the alleged underlying FDCA violation in a circumstance where the FDA has not itself concluded that there was such a violation." *Nexus Pharms., Inc. v. Cent. Admixture Pharmacy Servs., Inc.*, 48 F.4th 1040, 1049 (9th Cir. 2022) (quoting *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919, 924 (9th Cir. 2010)). Under those standards, the AG may not enforce federal law via the AVC's requirement to "follow" federal law. Because the asserted FDCA violation was plainly a "critical element"

of the asserted AVC violation, *Buckman*, 531 U.S. at 353, the state's action is preempted.

In an effort to avoid this straightforward reasoning, the AG insists that he was punishing a violation of a state statute, not a federal statute. AG Br. at 14-15. The record squarely contradicts that assertion. The letter notifying GRE of its removal from the directory stated that the AG removed GRE because it violated the AVC by "market[ing] and promot[ing] [its] cigarettes on the Directory for sale in Montana *in violation of federal law*." ER-99 (emphasis added).

The AG similarly argued that GRE violated federal law in his brief opposing GRE's motion for preliminary injunction in state court. The AG's state court brief states that GRE "promoted and marketed the adulterated and misbranded brand/brand styles in violation of FDA's 2/21/2020 Letter to GRE." ER-25; *see also* ER-27 ("GRE's own filing undercuts it[s] theory that it is compliant with federal law"). And in denying GRE's motion for a preliminary injunction, the state court confirmed that the AG "removed all GRE products from the [d]irectory" because he "determined GRE *had violated federal law* and thus the terms of the 2012 AVC." ECF 30-2 at 3 (emphasis added). Based on that determination, the state court held that the proper forum for GRE to litigate its arguments is federal court: "To the extent GRE wishes to seek an injunction based on a disagreement with the substance of the State's determination, the proper forum is GRE's federal case." *Id.* at 7. As noted

above, the AG does not mention, let alone address, the state court's order. *Supra*, at 5 n.1.

Remarkably, having persuaded the state court to hold that GRE's claims present a federal question, the AG now asks a federal court to hold that GRE's claims present a state question. The AG's goal is to avoid judicial review of his action in *any* forum. The AG cannot have it both ways.

Even if the AG's enforcement action was based on a state statute, it would still be preempted under *Buckman* and *Nexus*. The AG maintains that "[u]nder Mont. Code Ann. § 16-11-503(4)[] … GRE is required to immediately notify the AG of any modification to the brands listed in its certification." AG Br. at 14 (emphasis in original). But Mont. Code Ann. § 16-11-503(4) states merely that "[a] tobacco product manufacturer shall update its list of brand families 30 calendar days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the attorney general and the director of the department." And the "update[s]" the provision requires do not include updates about FDA approval. *See id.* § 16-11-503(3)(a)-(c) (requiring a manufacturer to keep current information about the number of units and identity of brand families sold in Montana and the companies that produce brand families, but not requiring manufacturers to report information about FDA review).

Why, then, does the AG claim that GRE violated these provisions? Because, according to the AG, "the FDA had modified the classification of the Eight Brand Styles to adulterated and misbranded products." AG Br. at 14-15. This is *Buckman* all over again. The AG claims that GRE's products are "adulterated and misbranded" under federal law, and because of that, GRE also violated state law. As such, the asserted FDCA violation is a "critical element" (*Buckman*, 531 U.S. at 353) of the AG's case, triggering federal preemption.

The AG attempts to distinguish *Buckman* on the ground that the FDA had approved the product at issue in that case. AG Br. at 16-17. The AG focuses myopically on the specific facts of *Buckman* while completely ignoring the legal standard *Buckman* adopted.[2] As this Court has explained, *Buckman* preempts *any* state-law claim where the purported state-law violation hinges on a violation of federal law. *Nexus*, 48 F.4th at 1049-50. Here, that is exactly how the AG's interpretation of state law operates. Revealingly, the AG does not cite *Nexus*.

[2] The AG also attempts to distinguish *Perez v. Nidek Co.*, 711 F.3d 1109 (9th Cir. 2013), on the ground that there was no independent state law requirement in that case while here state law requires GRE to immediately disclose to the AG any change in the status of GRE's products. AG Br. at 17. But, in fact, Montana law does not require manufacturers to provide updates to the AG about FDA review. *Supra* at Section II.A.1.a.

b. The AG's action conflicts with federal policy.

As GRE pointed out in its opening brief, the Montana AG has appointed himself a super enforcer of federal law with powers that far exceed that of the FDA itself. The FDA Commissioner could not impose any type of injunction on GRE without a court hearing in which GRE would have the opportunity to defend itself. And even a court could not impose what Montana has dictated here: a total ban on *all* GRE products, including products that *no one* alleges were ever misbranded or adulterated. Indeed, the FDA has made the discretionary decision *not* to bring enforcement actions when retail stores merely sell out their existing inventory. The AG's blunderbuss approach dramatically undermines that enforcement choice and the FDA's authority to make it. *See* Replacement Opening Br.at 34-40.

The AG's response to all this is compressed into a single paragraph in which the AG observes that he has authority only in Montana, not in other states. AG Br. at 18. True enough. But the FDCA does not authorize state officials in *any* state to transform themselves into super-enforcers of federal law.

c. GRE did not violate the FDCA.

Preemption is especially clear in this case because the AG's interpretation of federal law is indefensible. GRE did not violate the FDCA.

The FDCA contains three prohibitions related to products deemed "adulterated or misbranded": the "introduction or delivery for introduction" of such

products "into interstate commerce," 21 U.S.C. § 331(a); the "receipt" of such products "in interstate commerce" "and the delivery or proffered delivery thereof," *id.* § 331(c); and the "manufacture" of such product[s]," *id.* § 331(g). GRE violated none of those provisions. After GRE withdrew its substantial equivalence application for the disputed eight brand styles, it did not introduce, deliver, manufacture, or receive *any* of the products on its application. The only thing GRE did was include the names of its brand families on its Montana certification form. This was to ensure that stores could sell out their existing inventories of products that were perfectly legal at the time when they were imported into the United States. No provision in federal law barred GRE from doing this. *See* Replacement Opening Br. 40-41.

The AG does not engage with GRE's argument at all. He simply says that GRE certified that the brand families at issue "are intended to be sold in the United States." AG Br. at 15. That does not suggest that GRE—the manufacturer of the products, who sold them to licensed importers—engaged in the activities the FDCA prohibits or even that GRE intended to engage in those activities. To the contrary, GRE listed the names of the relevant brand families so that retail stores in Montana could sell out their existing inventory, which is standard practice. Replacement Opening Br. at 38. That intent is not illegal. The AG makes literally no arguments

regarding how GRE's actions violated federal law. He does not even identify which provision of § 331 that GRE purportedly violated.

d. If the AG prevails, he could transform himself into an enforcer of federal law.

As GRE pointed out in its opening brief, the certification form that *all* tobacco manufacturers are required to submit to be listed on the Montana directory requires manufacturers to declare that they are "in full compliance with … applicable federal, state and local laws" and acknowledge that they "must remain in compliance with such laws to be listed on the Tobacco Product Directory." *E.g.*, ER-98. Taking Montana's logic to its natural conclusion, then, it can now enforce the FDCA (and any other federal law) against *any* tobacco manufacturer whose products have recently sold in Montana. Replacement Opening Br.at 46.

The AG completely ignores this argument. Apparently, the AG actually does believe that he can coerce every manufacturer in the State into an "agreement" to comply with federal law, and then enforce federal law based on that "agreement." The Court should reject this remarkable effort to circumvent federal preemption.

2. The AG Violated Due Process.

GRE is also likely to succeed on its due process claim. GRE possesses protected property interests in (1) having its products sold in Montana and (2) its goodwill. And the AG deprived GRE of both these interests without providing a

pre-deprivation hearing. The AG thus violated due process. Replacement Opening Br.at 47-51.

The AG claims, in effect, that GRE did not need a pre-deprivation hearing because manufacturers have a right to have their products sold in Montana only if they follow the law. *See* AG Br. at 18 ("GRE shall only be listed on the Directory upon compliance with certain criteria…." (emphasis in original)). But that is precisely what is in dispute—*whether* GRE complied with those criteria. GRE says it did. The AG says it did not. Due process requires a neutral decisionmaker—not the AG on his own say-so—to resolve that dispute before GRE can be stripped of a property right. Indeed, that is what the pre-deprivation hearing guaranteed by due process *is for*.

Next, the AG contends that GRE gave up its due process rights by accepting the AVC. According to the AG, the AVC gives the AG the contractual right to unilaterally ban GRE's products without any process. AG Br. at 19-21. The state court adopted a similar interpretation of the AVC. ECF 30-2 at 7. GRE strongly disagrees with that interpretation for the reasons stated in its opening brief (Replacement Opening Br. at 51-52) and has already appealed the Montana state court's decision to the Montana Supreme Court.

But even assuming the AVC, by its terms, authorizes the AG to act unilaterally, a state "may not exact as a condition of [a] corporation's engaging in business within

its limits that its rights secured to it by the Constitution of the United States may be infringed." Replacement Opening Br. 52-53 (quoting *Hanover Fire Ins. Co. v. Carr*, 272 U.S. 494, 507-08 (1926)); *see also, e.g.*, *S. Pac. Co. v. Denton*, 146 U.S. 202, 207 (1892) (same); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013) (citing *Southern Pacific Co. v. Denton*, 146 U.S. 202 (1892) for this point). And that is so regardless of whether the exaction is purportedly bargained for, as such an exaction "is not ratified by an acceptance." *United States v. Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 282 U.S. 311, 328 (1931). The AG does not address this concern.

Finally, the AG states that GRE was "aware of the AG's intent to remove it from the Directory since its 2021 certification denial," pointing to pending administrative proceedings. AG Br. 21. But the pending administrative proceedings address an entirely different issue—GRE's challenge to the AG's *preliminary* determinations to deny GRE's 2020 and 2021 certifications, in which the AG claimed additional escrow deposits were owed based on the AG's unadjudicated claim against a third party wholesaler alleging reporting errors by the wholesaler. SER-82-83. The pending administrative proceedings do not address the distinct question of whether GRE violated the AVC, thus entitling the AG to ban all GRE products from Montana's shelves. The AG's order taking that position came as a complete surprise. In any event, due process requires not only notice, but also a

hearing. Indeed, the administrative proceedings the AG points to have been adhering to due process requirements, with notice having been given and the parties proceeding to hearing before GRE is deprived of the property right that the AG has now unilaterally taken away without any due process. It is undisputed that GRE never received any hearing on the AG's claim that GRE violated federal law and the AVC.

B. GRE Has Satisfied the Remaining Preliminary Injunction Factors.

GRE has demonstrated irreparable harm, and the balance of equities and public interest favor GRE.

1. Irreparable Harm.

Irreparable harm is obvious: GRE's products are *banned from Montana's shelves*. GRE is losing sales and incurring reputational harm every day. GRE can never get that money back because Montana is immune from suit. Therefore, GRE's harm is irreparable. *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015) (when plaintiff is incurring monetary harm and defendant is immune, harm is irreparable).

The AG completely ignores GRE's argument regarding the AG's sovereign immunity. Instead, it cites case law holding that monetary harm is generally not irreparable *in suits between private parties* unless there is a "threat of extinction." AG Br. at 21-23. In those cases, the harm was not irreparable because "money lost

may be recovered later, in the ordinary course of litigation." *Coeur d'Alene*, 794 F.3d at 1046. But when sovereign immunity "would bar the State from recovering monetary damages incurred during the course of this litigation," the money *cannot* be recovered later, so the harm *is* irreparable. *Id.* *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180 (9th Cir. 2022), on which the AG relies, is consistent with that view: the Ninth Circuit held that harm is irreparable when what the "plaintiff stands to lose cannot be fully compensated by subsequent monetary damages." *Id.* at 1188 (quotation marks omitted). Because GRE cannot obtain any monetary damages here, that standard is satisfied.[3]

2. Balance of the Equities and Public Interest.

As GRE's opening brief explained, while GRE will suffer significant harm absent an injunction, the harm to the AG and the public interest due to any injunction will be minimal. The brand styles that form the basis of the AG's revocation have not been sold in Montana for over three years. Moreover, the AG knew that GRE had requested the FDA withdraw the relevant tobacco products from substantial

[3] What is more, GRE is suffering harm to its goodwill and market share, which suffices to demonstrate irreparable harm. *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001).

equivalence review for over a year before it issued its notice banning sales of GRE products in Montana. *See* Replacement Opening Br. at 55.

The AG disputes none of this. Instead he claims that an injunction would not be in the public interest because GRE is a "second-chance company" that has "repeatedly br[oken] the law." AG Br. at 23. GRE strongly disputes that it has ever broken the law. The AG cites GRE's prior failure to make escrow payments, *id*., but GRE has prevailed in multiple state courts in demonstrating that the states lacked jurisdiction to enforce the subject escrow laws against GRE. Crucially, the AVC, on which the AG relies, stands for "Assurance of Voluntary Compliance." The word "Voluntary" appears because GRE disputes it is or has ever been legally required to pay escrow payments. Having willingly signed on to the "Assurance of Voluntary Compliance," the AG cannot characterize GRE as a "second-chance company." The agreement is not an "Assurance of 'Mandatory' Compliance."

The AG also maintains that the public interest is in his favor because "the public has an interest in the safety of the products it consumes." AG Br. at 23-24. But the products that are currently being banned are *not* the purportedly "adulterated" products. Indeed, after withdrawing its Substantial Equivalence reports, GRE has not manufactured the relevant brand styles, and wholesalers and distributors in Montana sold only 3 cartons (600 cigarettes) of those brand styles from their existing stock, which occurred *years* before the AG's blanket ban. ER-67-68 ¶¶7-8. Instead,

the products currently banned have been expressly authorized for sale by the FDA. The AG's generalized reference to "safety" cannot justify denying an injunction.

The AG insists that an injunction would "upend the status quo." AG Br. at 25. That is wrong. When considering whether a preliminary injunction will disrupt the status quo, courts look "not simply to any situation before the filing of a lawsuit, but instead to the last uncontested status which preceded the pending controversy." *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (internal quotation marks omitted). The last uncontested status between the parties was when GRE's products were included in the Montana Directory and available for sale in the state. An injunction that requires the AG to reinstate GRE's position in the Directory would return the parties to where they were before the current controversy began.

CONCLUSION

This Court should reverse the district court's denial of a preliminary injunction and remand with instructions to grant a preliminary injunction.

DATED this 9th day of November, 2023.

Respectfully submitted,

/s/ Adam G. Unikowsky

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count is 4708, excluding Caption, Certificate of Service and Certificate of Compliance.

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CERTIFICATE OF SERVICE

I certify that on November 9, 2023, I electronically filed the foregoing document with the clerk of the court for the United States Court of Appeal for the Ninth Circuit, using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Adam G. Unikowsky
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