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24 **UNITED STATES DISTRICT COURT,**
25 **NORTHERN DISTRICT OF CALIFORNIA**

26 NATIONAL ABORTION FEDERATION) Case No. 3:15-cv-3522 (WHO)
27 (NAF),)
28) Judge William H. Orrick, III
29 Plaintiff,)
30 vs.) DEFENDANTS' MOTION TO
31) CLARIFY TEMPORARY
32) RESTRAINING ORDER
33 THE CENTER FOR MEDICAL)
34 PROGRESS; BIOMAX PROCUREMENT)
35 SERVICES, LLC; DAVID DALEIDEN (aka)
36 "ROBERT SARKIS"); and TROY)
37 NEWMAN,)
38)
39 Defendants.)

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INTRODUCTION

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2 Defendants Center for Medical Progress, Biomax Procurement Services, LLC, and David
3 Daleiden (together, “Defendants”) respectfully request that this Court clarify, or if necessary
4 amend, the Temporary Restraining Order (“TRO”) entered by this Court on July 31, 2015, and
5 extended on August 3, 2015, to address two issues: (1) to clarify that the TRO does not prohibit
6 Defendants from producing information in response to investigative subpoenas and other requests
7 for information issued to Defendants by government officials conducting official proceedings; and
8 (2) to clarify that the TRO does not mandate the withdrawal or redaction of information that was
9 already widely publicly disclosed prior to the initial entry of the TRO, including by Plaintiff’s
10 members themselves.
11

I. The TRO Should Be Clarified to Permit Defendants to Provide Information in Response to Subpoenas and Other Official Requests from Government Officers or Agencies Conducting Official Proceedings.

12
13
14
15 The TRO prohibits Defendants from “publishing or otherwise disclosing *to any third party*
16 any video, audio, photographic, or other recordings taken, or any confidential information learned,
17 at any NAF annual meetings.” Doc. 27, at 1 (emphasis added). It also prohibits disclosure of
18 dates, locations, names, and addresses related to NAF meetings “to any third party.” *Id.*
19 Defendants respectfully request an order clarifying that the phrase “any third party” in the TRO
20 order does not prohibit them from complying with subpoenas or other demands for disclosure made
21 by government officers or agencies conducting official proceedings.
22

A. The Defendants Have Received, and Will Likely Continue to Receive, Official Requests for Information Arguably Subject to the TRO.

23
24
25 The videos published by the Defendants have resulted in numerous federal and state
26 investigations relating to the practices reflected in the videos. *See* Doc. 22, at 9-12. In connection
27 with these, Defendants have been contacted by investigative agencies conducting official
28 proceedings with requests for information that is arguably covered by the TRO. For example, on

1 July 31, 2015, the date the TRO was entered, Defendants received an official request for
2 information from the Judiciary Committee of the United States Senate, demanding the production
3 of, among other things, “[a]ll video footage in CMP’s possession relating to the provision,
4 acquisition, preparation, transportation, and sale of fetal tissue,” and “all documents and records in
5 CMP’s possession involving . . . any individuals or entities that acquire, provide, or resell fetal
6 tissue.” *See* Letter of Senator Charles Grassley (Jul. 31, 2015) (attached as Exhibit 1).

8 More recently, on August 11, 2015, Defendants were served with a subpoena from the civil
9 enforcement arm of the Arizona Attorney General’s Office. *See* Office of the Arizona Attorney
10 General, Subpoena Duces Tecum directed to the Center for Medical Progress (attached as Exhibit
11 2). This subpoena instructs Defendants to produce information covered by the TRO by August 25,
12 2015. *See id.* at 1. Like the prior request from the Senate Judiciary Committee, this subpoena
13 requests “[a]ll video footage in CMP’s possession relating to the provision, acquisition,
14 preparation, transportation, and sale of fetal tissue,” and “[a]ll documents and records in CMP’s
15 possession involving . . . any individuals or entities that acquire, provide, or resell fetal tissue.” *Id.*
16 Materials covered by the TRO are responsive to this subpoena. The subpoena indicates that failure
17 to comply could result in legal penalties or contempt. *Id.*

19 Moreover, Defendants anticipate that they will likely receive other similar requests on an
20 ongoing basis. *See* Doc. 22, at 9-12. They wish to cooperate in official investigations and also
21 comply fully with the TRO. Accordingly, they request the Court to clarify the TRO to make clear
22 that the TRO does not prevent disclosures to government agencies conducting official proceedings.

24 **B. Under California’s Official-Proceedings Privilege, Disclosing Information to**
25 **Government Investigators in Official Proceedings Does Not Support a Claim for**
26 **Breach of Contract or Common-Law Privacy.**

27 In its request for the TRO, Plaintiff NAF asserted three legal bases for interim injunctive
28 relief. In particular, NAF alleged that disclosure of recordings from NAF meetings would violate

1 (1) putative contractual obligations between the Defendants and NAF, (2) California Penal Code §
2 632, and (3) the common law tort of invasion of privacy. *See* Doc. 3, at 15.

3 California law, however, clearly authorizes the disclosure of recordings and other
4 information to a government agency or officer conducting an official proceeding in each of these
5 circumstances. In particular, disclosure of the requested information (1) would not violate the
6 putative non-disclosure agreements,¹ (2) would not violate California Penal Code § 632, and
7 (3) would not constitute tortious invasion of privacy.
8

9 California law establishes a broad privilege against civil liability for disclosures made in the
10 context of governmental proceedings or investigations. A “publication or broadcast” made “in
11 any . . . official proceeding authorized by law” receives an absolute privilege under California law.
12 Cal. Civ. Code § 47(b); *see also Haberg v. Cal. Fed. Bank FSB*, 32 Cal. 4th 350, 360 (2004)
13 (describing the privilege as “absolute”). Here, a disclosure in an official proceeding constitutes a
14 “publication made in an official proceeding authorized by law,” and § 47(b)’s privilege therefore
15 abrogates any claim for breach of contract or common-law privacy torts.
16

17 **1. A disclosure to a state Attorney General pursuant to an official**
18 **investigation falls within the scope of California’s official-proceedings**
19 **privilege.**

20 Disclosures made to government entities charged with enforcing the law fall within the
21 scope of § 47, regardless of whether those entities have commenced a formal proceeding, or have
22 issued a formal demand for information, such as a subpoena. The privilege “is intended to assure
23 utmost freedom of communication between citizens and public authorities whose responsibility is
24 to investigate and remedy wrongdoing.” *Haberg*, 32 Cal. 4th at 360 (internal quotation marks and
25

26 ¹ For reasons stated by Defendants elsewhere, these non-disclosure agreements are unenforceable,
27 and they do not extend to the disclosure of recordings from NAF meetings in any event. Even
28 assuming that Defendants have a contractual obligation not to disclose such information, however,
that obligation has no force in the face of an official proceeding, for the reasons stated herein.

1 emphasis omitted); *see also Forro Precision, Inc. v. IMB Corp.*, 673 F.2d 1045, 1055 (9th Cir.
2 1982) (“Underlying the privilege is the policy of encouraging freedom of communication between
3 citizens and public authorities charged with investigating wrongdoing.”).

4 For this reason, courts have construed the phrase “publication . . . [in an] official
5 proceeding” in § 47 very broadly. It applies to communications to the California Attorney
6 General’s Office. *Kashian v. Harriman*, 98 Cal. App. 4th 892, 927 (2002); *compare Braun v.*
7 *Chronicle Publ’g Co.*, 52 Cal. App. 4th 1036, 1052 (1997) (holding that official-proceeding
8 privilege applied to statements in connection with investigation by state auditor). The phrase also
9 applies to communications to federal governmental entities, as the term “official proceedings” is
10 not limited to proceedings before California governmental entities. *See, e.g., Tiedemann v.*
11 *Superior Court of Alameda Cnty.*, 83 Cal. App. 3d 918, 925-26 (1978) (holding that official-
12 proceeding privilege applied to communication with federal Internal Revenue Service
13 investigators). Moreover, the privilege applies regardless of whether the governmental entity has
14 commenced a formal investigation or has issued a subpoena or other formal demand for
15 information. *See Haberg*, 32 Cal. 4th at 362, 369 (holding that official-proceedings privilege
16 applies to communications to police intended to instigate investigation); *Slaughter v. Friedman*, 32
17 Cal. 3d 149, 156 (1982) (“The ‘official proceeding’ privilege has been interpreted broadly to
18 protect communications to or from governmental officials which may precede the initiation of
19 formal proceedings.” (emphasis omitted)).
20
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23 For this reason, disclosure in response to any governmental entity’s investigative demands
24 received by Defendants would constitute a “publication . . . in an official proceeding” that would
25 receive “absolute” privilege under California law. This privilege abrogates any claim for breach of
26 contract or violation of common-law privacy by Plaintiff.
27
28

1 **2. The official-proceedings privilege bars claims for breach of contract and**
2 **common-law privacy torts.**

3 Section 47(b) bars claims for breach of contract and for common-law privacy torts based on
4 publications in official proceedings. Thus, disclosing information to government investigators
5 would not violate any non-disclosure agreements, and it would not constitute any privacy tort, even
6 if those claims had any independent substantive merit (which they do not in this case).²

7 First, California courts have recognized that disclosures within the scope of § 47(b) cannot
8 support a breach of contract claim. *See Greka Integrated, Inc. v. Lowrey*, 133 Cal. App. 4th 1572,
9 1581 (2005) (“[S]tatements [that a defendant] made to government officials, such as the district
10 attorney or other regulators, are privileged and cannot form the basis for [a] breach of contract
11 claim.”). Likewise, courts in other jurisdictions have concluded that disclosures pursuant to a
12 governmental investigative subpoena do not constitute breaches of non-disclosure agreements. *See*
13 *United States ex rel. Grandeau v. Cancer Treatment Ctr. of Am.*, 350 F. Supp. 2d 765, 773 (N.D.
14 Ill. 2004) (holding that disclosure pursuant to investigative subpoena could not support claim for
15 breach of confidentiality agreement).

16
17 These cases are in accord with the law of California, and virtually every other jurisdiction,
18 that there can be no putative contractual obligation to refrain from reporting a potential crime.
19 “[C]ontracts barring the reporting of crimes are held to be unenforceable.” *Fomby-Denson v. Dep’t*
20 *of Army*, 247 F.3d 1366, 1376 (Fed. Cir. 2001); see also *id.* at 1377 n.9 (collecting secondary
21 sources for this point). California follows this rule. *See, e.g., Hentzel v. Singer Co.*, 138 Cal. App.
22 3d 290, 295 (1982) (holding that public policy permits an employee to report information that may
23
24

25 ² The official-proceedings privilege does not bar claims brought under Penal Code § 632. *Kimmel*
26 *v. Goland*, 51 Cal. 3d 202, 212 (1990). For the reasons stated below, however, § 632 bans only the
27 creation of the recordings—it does not bar *disclosures* of any kind. *See Lieberman v. KCOP*
28 *Television, Inc.*, 110 Cal. App. 4th 156, 167 (2003) (“Penal Code section 632 does not prohibit the
disclosure of information gathered in violation of its terms.”).

1 lead to criminal prosecution, irrespective of confidentiality obligations); *see also Alderson v.*
2 *United States*, 718 F. Supp. 2d 1186, 1200 (C.D. Ca. 2010) (“Courts have consistently refused to
3 enforce post-employment confidentiality agreements that sought to prevent a former employee
4 from revealing harmful information about the employer’s illegality.”). As the U.S. Supreme Court
5 has stated, “it is obvious that agreements to conceal information relevant to commission of crime
6 have very little to recommend them from the standpoint of public policy.” *Branzburg v. Hayes*,
7 408 U.S. 665, 696 (1972). *See also Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 853
8 (10th Cir. 1972) (“The criminal nature of the offense . . . gives the state a clear and separate interest
9 in voiding a contract which conceals the crime, and hampers the punishment of the offender.”);
10 *Fomby-Denson v. Dept. of Army*, 247 F.3d 1366, 1376 (Fed. Cir. 2001) (“Given the magnitude of
11 the public policy interest here, it is not surprising that contracts barring the reporting of crimes are
12 held to be unenforceable.”).

13
14
15 Similarly, § 47(b)’s privilege also bars common-law invasion-of-privacy claims. *See*
16 *Kimmel v. Goland*, 51 Cal. 3d 202, 209 (1990) (“[Section 47(b)’s privilege] has been interpreted to
17 apply to virtually all torts except malicious prosecution. This includes the tort of invasion of
18 privacy.” (internal citation omitted)); *Wise v. Thrifty Payless, Inc.*, 83 Cal. App. 4th 1296, 1302-03
19 (2000) (explaining that § 47(b)’s “privilege is absolute and precludes recovery on all tort theories,
20 including claims for invasion of privacy” (emphasis omitted)). Accordingly, NAF’s invasion-of-
21 privacy claim cannot bar disclosures pursuant to investigative demands.

22
23 **C. Disclosing Recordings in Connection with Official Proceedings Would Not Violate**
24 **California Penal Code § 632.**

25 Disclosing any recordings to government officers in official proceedings also would not
26 violate California Penal Code § 632. By its plain terms, § 632 prohibits only “eavesdrop[ping]”
27 and non-consensual “record[ing]” of confidential communications; it says nothing about the
28 disclosure of recordings made in violation of the statute. *See* Cal. Penal Code § 632(a) (providing

1 criminal sanctions on any person who “eavesdrops upon or records” any “confidential
2 communication”). For this reason, the California Court of Appeals has held that “Penal Code
3 section 632 does not prohibit the *disclosure* of information gathered in violation of its terms.”
4 *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 167 (2003) (emphasis added); *see also*
5 *Marich v. MGM/UA Telecommunications, Inc.*, 113 Cal. App. 4th 415, 431 (2003) (holding that the
6 subsequent enhancement of an illegal recording did not violate § 632 because the statute “prohibits
7 only a real time interception of a communication” (internal quotation marks omitted)). “Section
8 632 prohibits *recording* a confidential communication without the knowledge of consent of all
9 parties. It says nothing about publishing the communication to a third party.” *Coulter v. Bank of*
10 *Am.*, 28 Cal. App. 4th 923, 930 (1994). “Although a recording preserves the conversation and thus
11 could cause greater damage to an individual’s privacy in the future, these losses are not protected by
12 section 632. Instead, section 632 protects only the speaker’s right to know and control the firsthand
13 dissemination of the conversation as it is occurring.” *Knight v. CashCall, Inc.*, 200 Cal. App. 4th 1377,
14 1393 (2011) (internal citation omitted). For these reasons, Section 632 does not provide any basis to
15 order the non-disclosure of recordings of NAF meetings to government investigators in official
16 proceedings.
17
18

19 **D. Considerations of Federalism and Comity Support Amending the TRO to Permit**
20 **Disclosures to State Investigators.**

21 Furthermore, the TRO would violate significant considerations of federalism and
22 intergovernmental comity if it prohibits disclosure pursuant to the ongoing investigations of state
23 agencies. Federal courts long have recognized that fundamental principles of federalism counsel
24 against federal court interference with the States’ legitimate governmental action. *See, e.g.*,
25 *Younger v. Harris*, 401 U.S. 37, 44 (1971) (explaining that constitutional federalism requires a
26 “sensitivity to the legitimate interests of both State and National Governments” and that “the
27 National Government, anxious though it may be to vindicate and protect federal rights and federal
28

1 interests, always endeavors to do so in ways that will not unduly interfere with the legitimate
2 activities of the States”). Federal courts have recognized consistently that state investigation of
3 healthcare regulatory violations “implicate [an] important state interest.” *Buckwalter v. Nev. Bd. of*
4 *Med. Examiners*, 678 F.3d 737, 747 (9th Cir. 2012). Thus, strong federalism and
5 intergovernmental comity considerations counsel in favor of permitting disclosure of the
6 information in official investigations. *See also* Doc. 22, at 18-19.

8 **E. The TRO Must Be Interpreted Narrowly as a Prior Restraint on Speech.**

9 For the reasons stated in Defendants’ memorandum in opposition to the TRO, the TRO is
10 an unconstitutional prior restraint on speech that violates Defendants’ First Amendment rights. *See*
11 Doc. 22, at 15-18. *See also Alexander v. United States*, 509 U.S. 544, 550 (1993) (“Temporary
12 restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech
13 activities—are classic examples of prior restraints.”); *Nebraska Press Ass’n v. Stuart*, 427 U.S.
14 539, 559-60 (1976) (“Prior restraints on speech and publication are the most serious and the least
15 tolerable infringement on First Amendment rights. . . . The damage can be particularly great when
16 the prior restraint falls upon the communication of news and commentary on current events.”).
17 Accordingly, the TRO should not prohibit any disclosure of information whatsoever, and it should
18 be vacated *in toto*.

20 At very least, the TRO should be interpreted narrowly to impose the least possible
21 restriction on disclosure. *See, e.g., Gooding v. Wilson*, 405 U.S. 518, 522 (1972) (“Because First
22 Amendment freedoms need breathing space to survive, government may regulate in the area only
23 with narrow specificity.”) (*quoting NAACP v. Button*, 371 U.S. 415, 433 (1963)).

25 Because the California law on which the TRO is based clearly authorizes disclosure of
26 recordings and other information to government investigators in official proceedings, the TRO
27 should not be interpreted to foreclose such disclosures.

1 For all these reasons, the TRO should be clarified to authorize disclosures to government
2 officers and agencies conducting official proceedings.

3 **II. The TRO Should Be Clarified To Indicate that It Does Not Mandate the**
4 **Withdrawal or Redaction of Information That Was Already Available in the**
5 **Public Domain at the Time of its Entry.**

6 Second, a recent disagreement has emerged among the parties regarding the transcript of a
7 video that Defendants disclosed nearly a month ago depicting a conversation that the parties agree
8 did not occur at any NAF meeting. The disagreement involves the transcript of a conversation
9 involving Dr. Deborah Nucatola at a restaurant on July 25, 2014 (the “Nucatola Conversation”).
10 The Nucatola Conversation did not occur at, or as part of, any NAF meeting, and Dr. Nucatola is
11 not an NAF employee. *See* Doc. 1, ¶ 72. A full video of the Nucatola Conversation and a
12 transcript of the full conversation were posted on CMP’s website on July 14, 2015. Since the
13 release of the video and transcript, they have been widely disseminated and reposted on the internet
14 and in the media; numerous websites, articles, and news reports have reproduced and publicized the
15 content of the conversation. This reproduction began well before the Court entered its TRO.

17 **A. The Parties Have a Live Dispute About the Publication of Four Excerpts from the**
18 **Nucatola Conversation.**

19 The Nucatola Conversation did not occur at any NAF meeting and did not involve NAF
20 personnel. Moreover, the entirety of the conversation, in both video and transcript form, had been
21 publicly available and widely disseminated before NAF filed this case. Nevertheless, late on
22 Friday afternoon, August 7, 2015, NAF’s counsel sent a letter claiming that the transcript of the
23 Nucatola Conversation discloses four items of information that NAF believes constitute
24 “confidential information” within the scope of the TRO. *See* Letter from Derek Foran (Aug. 7,
25 2015) (attached as Exhibit 3). In particular, NAF’s letter identified four specific items that it
26 alleges constitute “confidential information” within the scope of the TRO: (1) the fact that Dr. Lisa
27 Harris previously gave a presentation on abortion-related stigma at an NAF conference; (2) the fact
28

1 that Dr. Susan Robinson works at a Planned Parenthood branch in Fresno, California; (3) the fact
2 that Dr. Matthew Reeves is the medical director for NAF; and (4) the fact that the speaker had
3 spoken with Dr. Reeves previously. *See id.*

4 Defendants responded to this letter on Monday morning, August 10, 2015. *See* Letter from
5 Catherine Short (Aug. 10, 2015) (attached as Exhibit 4). Defendants pointed out that the
6 information to which Plaintiff objected had already been widely disseminated on the Internet and
7 that there would have been no legal basis to enjoin the disclosure of such widely available
8 information. *Id.* Further, Defendants pointed out that the information to which Plaintiff objects has
9 also been openly publicized by Plaintiff's members themselves. *Id.*

11 On Monday evening, August 10, 2015, Plaintiff's counsel responded with a letter insisting
12 that Defendants are in violation of the TRO through their publication of the selected excerpts of the
13 Nucatola Conversation and threatening to file a motion for contempt. *See* Letter of Linda Shostak
14 (Aug. 10, 2015) (attached as Exhibit 5). The parties conferred about this issue on August 11, 2015,
15 and again on August 12, 2015. The conferences did not result in agreement.

17 To resolve the disagreement between the parties and to clarify Defendants' rights under the
18 TRO (especially in light of the critical First Amendment interests that the TRO implicates),
19 Defendants respectfully request that the Court clarify that the TRO does not prohibit disclosure of
20 information that was already widely available in the public domain before the entry of the TRO.

22 **B. The TRO Should Not Be Interpreted to Require Withdrawal or Redaction of**
23 **Information That Was Already in the Public Domain and Widely Disseminated at**
24 **the TRO's Entry.**

24 The TRO provides, in pertinent part, that Defendants may not "publish[] or otherwise
25 disclos[e] to any third party any video, audio, photographic, or other recordings taken, or any
26 *confidential information* learned, at any NAF annual meetings." Doc. 27, at 1; see also Doc. 15, at
27 2 (emphasis added). Defendants have complied fully and faithfully with the terms of the TRO.
28

1 First, the only reasonable reading of the TRO is that it does not require Defendants to
2 withdraw or redact any of the contents of the Nucatola Conversation. Before the Court entered its
3 TRO, the Nucatola Conversation had been widely disseminated, repeated, and reposted across the
4 internet and in the media. A simple internet search reveals numerous websites on which the
5 entirety of the conversation is reproduced. *See, e.g.,* Kate Scanlon, *Group Behind Undercover*
6 *Video of Planned Parenthood Employee Discussing Fetal Parts Sales Defends Video*, DAILY
7 SIGNAL (Jul. 14, 2015), [http://dailysignal.com/2015/07/14/group-behind-undercover-video-of-](http://dailysignal.com/2015/07/14/group-behind-undercover-video-of-planned-parenthood-employee-discussing-fetal-parts-sales-defends-video)
8 [planned-parenthood-employee-discussing-fetal-parts-sales-defends-video](http://dailysignal.com/2015/07/14/group-behind-undercover-video-of-planned-parenthood-employee-discussing-fetal-parts-sales-defends-video); Rebecca Hamilton, *How*
9 *The Law Applies To Dr. Deborah Nucatola Trafficking [sic] Fetal Body Parts*, AVE MARIA RADIO
10 (Jul. 14, 2015), [https://avemariaradio.net/how-the-law-applies-to-dr-deborah-nucatola-trafficking-](https://avemariaradio.net/how-the-law-applies-to-dr-deborah-nucatola-trafficking-fetal-body-parts)
11 [fetal-body-parts](https://avemariaradio.net/how-the-law-applies-to-dr-deborah-nucatola-trafficking-fetal-body-parts); Rebecca Hamilton, *Planned Parenthood Medical Director Filmed Selling Baby*
12 *Body Parts*, PATHEOS (Jul. 14, 2015), [http://www.patheos.com/blogs/publiccatholic/2015/07/](http://www.patheos.com/blogs/publiccatholic/2015/07/planned-parenthood-medical-director-filmed-selling-baby-body-parts/)
13 [planned-parenthood-medical-director-filmed-selling-baby-body-parts/](http://www.patheos.com/blogs/publiccatholic/2015/07/planned-parenthood-medical-director-filmed-selling-baby-body-parts/).

16 The transcript of the video is also widely available online. *See, e.g.,* Phoenix New Times,
17 *Governor Ducey Orders Investigation into Illegal Fetal Tissue Sales* (Jul. 21, 2015), *at*
18 [http://www.phoenixnewtimes.com/news/governor-ducey-orders-investigation-into-illegal-fetal-](http://www.phoenixnewtimes.com/news/governor-ducey-orders-investigation-into-illegal-fetal-tissue-sales-7505463)
19 [tissue-sales-7505463](http://www.phoenixnewtimes.com/news/governor-ducey-orders-investigation-into-illegal-fetal-tissue-sales-7505463) (reposting the full video and transcript); Heavy.com, *Dr. Deborah Nucatola:*
20 *5 Fast Facts You Need to Know*, [http://heavy.com/news/2015/07/deborah-nucatola-planned-](http://heavy.com/news/2015/07/deborah-nucatola-planned-parenthood-doctor-center-for-medical-progress/)
21 [parenthood-doctor-center-for-medical-progress/](http://heavy.com/news/2015/07/deborah-nucatola-planned-parenthood-doctor-center-for-medical-progress/) (reposting the full video and transcript).

23 The law is clear that a party cannot obtain interim injunctive relief against the disclosure of
24 protected information that already has been disclosed. *See, e.g., Campbell Soup Co. v. ConAgra,*
25 *Inc.*, 977 F.2d 86, 92 (3d Cir. 1992) (reversing grant of preliminary injunction because alleged
26 trade secret already had been disclosed); *Ace Am. Ins. Co. v. Wachovia Ins. Agency, Inc.*, 306 F.
27 App'x 727, 732 (3d Cir. 2009) (“once a secret is revealed, there is nothing for an injunction to
28

1 protect.”); *Scholastic Funding Grp., LLC v. Kimble*, No. 07-557, 2007 WL 1231795, at *9-10
2 (D.N.J. April 24, 2007) (holding that prior disclosure of information rendered injunction against
3 disclosure moot); *Roman Chariot, LLC v. JMRL Sales & Serv., Inc.*, Case No. Civ.A. 06-626, 2006
4 WL 4483165, at *6 (D.N.J. July 11, 2006). As the Third Circuit stated in *ConAgra*, “[a] threat of
5 disclosure may establish immediate irreparable harm but ‘further’ disclosure of something already
6 revealed cannot.” 977 F.2d at 92. Under this black-letter law, the only natural reading is that the
7 TRO does not apply to disclosures that—as a matter of law—could not constitute irreparable harm
8 warranting interim injunctive relief. NAF has cited no case or authority indicating that a TRO or
9 injunction may be entered to prohibit disclosures of information already in the public domain.

11 Further, the purpose of a TRO is to preserve the status quo. *See Rose v. Rhorer*, No. 13-cv-
12 03502-WHO, 2013 WL 5609330, at *2 (N.D. Cal. Oct. 11, 2013) (“[T]he purpose of a temporary
13 restraining order is to preserve the status quo pending the time a court can hear a motion for a
14 preliminary injunction.”) (citing *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck*
15 *Drivers*, 415 U.S. 423, 439 (1974)). At the time of the TRO hearing, NAF was fully aware of the
16 publication of the Nucatola Conversation. *See* Doc. 1, ¶¶ 30-32, 70-72. At the hearing, however,
17 NAF did not request the removal of any portion of the Nucatola Conversation, or any other
18 information already in the public domain. If Plaintiff had wished to change the status quo by
19 seeking a mandatory injunction compelling Defendants to remove material from their website, they
20 should have sought such relief in the first instance.

23 Moreover, the only natural reading of the phrase “confidential information” is information
24 that was confidential as of the date of the TRO’s entry. “[O]nce confidential information is placed
25 in the public realm, it is no longer confidential.” *Uniroyal Goodrich Tire Co. v. Hudson*, 1996 WL
26 520789, at *9 (6th Cir. Sept. 12, 1996) (unpublished per curiam). Thus, the Court’s TRO does not
27 apply to already published and disclosed materials like the Nucatola Conversation.
28

1 For similar reasons, the specific excerpts of the Nucatola Conversation cited in NAF's
2 August 7, 2015 letter cannot be viewed as "confidential information" within the meaning of the
3 TRO, because they refer to information that is openly publicized by NAF and its members
4 themselves. First, NAF points to a statement in the Nucatola conversation indicating that Lisa
5 Harris gave a presentation at an NAF conference discussing "how often times stigma masquerades
6 as ethics or conscience." Exhibit 3, at 1. In fact, Dr. Harris's presentation on this topic is publicly
7 available on the internet. See Lisa Harris, Abortion Stigma Webinar #5: Abortion Provider Stigma,
8 ANSIRH (Jun. 11, 2013), <http://www.ansirh.org/library/presentations.php#stigma5>. It is difficult
9 to see how this general reference to the topic of such a presentation, which anyone may access
10 online, constitutes the disclosure of "confidential information."

12 Similarly, NAF cites a statement in the Nucatola Conversation that Susan Robinson "had
13 experience working with Planned Parenthood in Fresno maybe?" Exhibit 3, at 2. But the fact that
14 Dr. Susan Robinson works at Planned Parenthood in Ukiah, California is also publicly available
15 online. See Dr. Susan Robinson, Ukiah Obstetrics & Gynecology,
16 [http://www.drscore.com/California/Obstetrics%20&%20Gynecology/Susan-Robinson-10647224-](http://www.drscore.com/California/Obstetrics%20&%20Gynecology/Susan-Robinson-10647224-office-locations.html)
17 [office-locations.html](http://www.drscore.com/California/Obstetrics%20&%20Gynecology/Susan-Robinson-10647224-office-locations.html) (last visited Aug 11, 2015). Indeed, Dr. Robinson publicly reported that she
18 works for Planned Parenthood and performs late-term abortions, **in a feature-length interview**
19 **published on August 7, 2015, by the L.A. Times.** See Paso Robles, *An Abortion Doctor Speaks*
20 *Out About A Woman's Right To Choose*, LA TIMES (Aug. 7, 2015, 3:30 AM),
21 [http://www.latimes.com/local/abcarian/la-me-abcarian-abortion-doctor-20150807-](http://www.latimes.com/local/abcarian/la-me-abcarian-abortion-doctor-20150807-column.html#page=1)
22 [column.html#page=1](http://www.latimes.com/local/abcarian/la-me-abcarian-abortion-doctor-20150807-column.html#page=1). Again, the mere facts that Susan Robinson works at Planned Parenthood and
23 performs abortions cannot plausibly be characterized as "confidential information."

26 Third, NAF points to two stray references in the Nucatola Conversation indicating that Dr.
27 Matthew Reeves serves as the medical director of NAF. Exhibit 3, at 2. But the fact that Dr.
28

1 Reeves serves as NAF’s medical director is widely publicized, including on NAF’s own website,
2 and thus cannot constitute “confidential information.” Several pages on NAF’s website identify
3 Dr. Reeves as NAF’s medical director. *See* Press Release, NAF, Politicians should be protecting,
4 not jeopardizing women’s lives and health (May 13, 2015), [http://prochoice.org/politicians-should-](http://prochoice.org/politicians-should-be-protecting-not-jeopardizing-womens-lives-and-health)
5 [be-protecting-not-jeopardizing-womens-lives-and-health](http://prochoice.org/politicians-should-be-protecting-not-jeopardizing-womens-lives-and-health); Press Release, NAF, Birth Control
6 Decisions Should Be Made By Women—Not Their Employers (Nov. 13, 2013),
7 <http://prochoice.org/birth-control-decisions-should-be-made-by-women-not-their-employers>. Dr.
8 Reeves advertises his position as NAF’s medical director on his publicly viewable LinkedIn page.
9 *See* Matthew Reeves, LINKEDIN, <https://www.linkedin.com/in/reevesmf> (last visited Aug. 11,
10 2015). Dr. Reeves also publicizes his affiliation with NAF in many of his published articles. *See*,
11 *e.g.*, Matthew F. Reeves, et al., *New Research at the 2015 National Abortion Federation Annual*
12 *Meeting: Putting Research into Practice*, 91 *CONTRACEPTION* 359 (2015); Bednarek, et al.,
13 *Prophylactic Ibuprofen Does Not Improve Pain with IUD Insertion: A Randomized Trial*, 91
14 *CONTRACEPTION* 1 (2014). And any confidentiality regarding Dr. Reeves’s status as NAF’s
15 medical director surely evaporated when NAF pled this fact in its Complaint. Doc. 1, ¶ 71.

16
17
18 Moreover, to the extent that NAF contends that the mere fact that a conversation with Dr.
19 Reeves occurred at the NAF constitutes “confidential information,” this position has no basis in
20 law. The fact that a conversation occurred does not constitute information “provided by NAF” and
21 thus does not fall within ¶ 17 of the Exhibit Rules and Regulations. *See* Doc. 1-1, ¶ 17. Similarly,
22 the fact that a conversation occurred does not constitute information “distributed or otherwise made
23 available . . . through all written materials, discussions, workshops or other means” by NAF and
24 thus does not fall within ¶ 2 of the Confidentiality Agreement. *See* Doc. 1-2, ¶ 2. And California
25 Penal Code § 632 does not protect against disclosure of the fact that a conversation occurred (or
26
27
28

1 even repetition of the conversation’s content), but only against “simultaneous dissemination” of the
2 conversation. *Flanagan v. Flanagan*, 27 Cal. 4th 766, 775 (2002).

3 For all these reasons, Defendants respectfully request that this Court clarify the TRO to
4 indicate that it does not mandate the withdrawal or redaction of information that was already in the
5 public domain and widely disseminated at the time the TRO was entered, including the Nucatola
6 Conversation.
7

8 **III. Defendants Request a Prompt Hearing on Both Requests for Clarification.**

9 Given the urgency of these issues, Defendants request a telephone hearing on both requests
10 for clarification at the Court’s earliest convenience.

11 **CONCLUSION**

12 For the reasons stated, Defendants Center for Medical Progress, Biomax Procurement
13 Services, LLC, and David Daleiden respectfully request that this Court clarify the Temporary
14 Restraining Order (extended on August 3, 2015) to specify that (1) it does not prohibit disclosures
15 to government officers or agencies conducting official investigations, and (2) it does not mandate
16 the withdrawal or redaction of information that was already in the public domain prior to entry of
17 the TRO.
18

19 Respectfully submitted,

20 Catherine W. Short

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

July 31, 2015

VIA ELECTRONIC TRANSMISSION

Ms. Catherine Short, Esq.
Life Legal Defense Foundation
P.O. Box 2105
Napa, CA 94558

counsel of record for:

The Center for Medical Progress
15333 Culver Dr, Ste 340-819
Irvine, CA 92604

Dear Ms. Short:

In response to the Center for Medical Progress's (CMP) release of videos documenting aspects of Planned Parenthood's involvement in the provision of fetal tissue, Congressional committees, the executive branch, and state governments have initiated inquiries into both the acquisition of fetal tissue and the methods used by CMP in its investigation. In response to the information in the first video, this Committee began an inquiry regarding the provision and acquisition of fetal tissue, and has accordingly contacted the Planned Parenthood Federation of America (PPFA), all of the Planned Parenthood affiliates, and the three companies mentioned in the video series thus far that reportedly acquire fetal tissue from Planned Parenthood.

According to interviews given by members of CMP, the group plans to release several more videos with additional information on this issue and has hundreds of hours of related video footage. In order for the Committee to further its inquiry into the provision and acquisition of fetal tissue, please provide the Committee the following by August 14, 2015, to the extent CMP may lawfully do so:

1. All video footage in CMP's possession relating to the provision, acquisition, preparation, transportation, and sale of fetal tissue, as well as all footage relating to associated training, advertising, contracts, consent forms, and certifications by PPFA, Planned Parenthood affiliates and associated clinics, intermediary businesses, end-users, as well as any other individuals, entities, and organizations involved in these processes.

Ms. Short
July 31, 2015
Page 2 of 2

2. All documents and records in CMP's possession involving PPFA, Planned Parenthood affiliates and associated clinics, as well as any individuals or entities that acquire, provide, or resell fetal tissue, relating to the range of fetal tissue activities described in item 1.

If you have any questions about this request, please contact Jason Foster of my Committee staff at (202) 224-5225. Thank you for your attention to this important matter.

Sincerely,



Charles E. Grassley
Chairman
Senate Committee on the Judiciary



MARK BRNOVICH
ATTORNEY GENERAL

OFFICE OF THE ARIZONA ATTORNEY GENERAL
CIVIL LITIGATION DIVISION
CONSUMER PROTECTION & ADVOCACY SECTION

SUBPOENA DUCES TECUM
PHX INV 2015-0556

TO: The Center for Medical Progress
Attn: David Daleiden
15333 Culver Dr., Suite 340-819
Irvine, CA 92604

YOU ARE HEREBY COMMANDED, pursuant to A.R.S. § 44-1526, to appear before the Attorney General or his authorized delegate, Matthew du Mee, Assistant Attorney General, at 1275 West Washington, in the City of Phoenix on the **25th day of August, 2015** at 3:00 p.m. of that day, regarding an investigation under the Consumer Fraud Act (A.R.S. § 44-1521 *et. seq.*) and bring with you and produce then and there the following information:

Provide physical or electronic copies of the following documents:

- 1. All video footage in CMP's possession relating to the provision, acquisition, preparation, transportation, and sale of fetal tissue, as well as all footage relating to associated training, advertising, contracts, consent forms, and certifications by PPFA, Planned Parenthood affiliates and associated clinics, intermediary businesses, end-users, as well any other individuals, entities, and organizations involved in these processes.**
- 2. All documents and records in CMP's possession involving PPFA, Planned Parenthood affiliates and associated clinics, as well as any individuals or entities that acquire, provide, or resell fetal tissue, relating to the range of fetal tissue activities described in item 1.**

Your failure to comply in full with this subpoena duces tecum will subject you to the proceedings and penalties by law, including but not limited to being held in contempt of court.

[continued on next page]

Note: Compliance with this subpoena duces tecum can be made by delivering copies of the above-described documents, along with the fully completed and notarized Affidavit of Custodian of Records, to the undersigned or his delegate on or before August 25, 2015. Please contact Matthew du Mee at (602) 542-7731 to arrange delivery.

Executed this 11th day of August, 2015.

/s/ Matthew du Mee
Matthew du Mee
Assistant Attorney General
Phone: 602-542-7731

AFFIDAVIT OF CUSTODIAN OF RECORDS

STATE OF _____)
) ss.
County of _____)

The Custodian, being first duly sworn upon oath, deposes and says:

1. I am the duly authorized custodian of records for The Center for Medical Progress, and have the authority to certify the records.
2. The attached copy is a true copy of all the records described in the subpoena issued in PHX INV 2015-0556.
3. The records were prepared by the personnel of the above agency, or persons acting under the control of the above agency.

DATED this ____ day of August, 2015.

Custodian of Records

SUBSCRIBED AND SWORN to before me, the undersigned Notary Public, this ____ day of August, 2015.

Notary Public

My Commission Expires:



MARK BRNOVICH
ATTORNEY GENERAL

OFFICE OF THE ARIZONA ATTORNEY GENERAL
CIVIL LITIGATION DIVISION
CONSUMER PROTECTION & ADVOCACY SECTION

MATTHEW du MEE
Assistant Attorney General
Direct Phone: (602) 542-7731
Matthew.dumee@azag.gov

August 12, 2015

The Center for Medical Progress
Attn: David Daleiden, Project Lead
15333 Culver Dr., Suite 340-819
Irvine, CA 92604

Re: *Subpoena re PHX INV 2015-0556*

Dear Mr. Daleiden:

Enclosed is a Subpoena Duces Tecum which is served upon you for copies of all documents in your possession which are itemized in the subpoena.

You may avoid the necessity of appearing at the time scheduled for the deposition by mailing me a copy of the records subpoenaed and including a properly executed affidavit of the custodian or other qualified witness, before August 25, 2015.

If you must copy the records, we will reimburse you for copying charges incurred, pursuant to A.R.S. § 12-351, at the rate of \$0.10 per page, and \$10.00 per hour for clerical costs. If you have any questions or difficulty in complying with this request, please contact me at (602) 542-7731.

Sincerely,

Matthew du Mee
Assistant Attorney General

MdM/mdm
Enclosure

MORRISON | FOERSTER

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August 7, 2015

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Via Email

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Re: Contempt of Court's TRO in *National Abortion Federation v. Center for Medical Progress, et al.*

Dear Mr. Chavez-Ochoa:

This letter is to place you on notice that CMP and David Daleiden, at minimum, are in breach of the Court's Temporary Restraining Order, entered August 1 and continued on August 3. We demand that the offending material referenced below be **immediately removed** from CMP's website, and any other location in which this material has been posted.

Despite the TRO's clear instruction to refrain from publishing any confidential information learned at NAF annual meetings, CMP and Mr. Daleiden continue to publish video transcripts on CMP's website, www.centerformedicalprogress.org, that violate the Court's order. For example, CMP's July 25, 2014 video transcript of a purported conversation that Mr. Daleiden had with Deborah Nucatola, MD, specifically references NAF attendees by name, including NAF's Medical Director Dr. Matthew Reeves, and discloses the content of confidential communications at NAF's 2014 annual meeting. The transcript is replete with such references. To identify just a few:

- Buyer: Right, and do it in a way that's mindful- often times- **Lisa Harris was a very interesting presentation, the NAF meeting, how often times stigma masquerades as ethics or conscience**, and so again if people are looking at tissue procurement services and looking at it with blinders on, as opposed to seeing the big picture, why are you looking at it with blinders to begin with? That's a manifestation of your own prejudices and judgment.

MORRISON | FOERSTER

Brian R. Chavez-Ochoa
August 7, 2015
Page Two

- Buyer: So, you know for example, Susan Robinson- ... Over in Albuquerque, they start doing dig at 18 weeks. I had a great conversations with Susan at NAF ... we had a great conversation and she was saying she had experience working with Planned Parenthood in Fresno maybe?
- Buyer: I didn't meet her, I met the guy who is also the medical director for NAF. Matt Reeves.
- Buyer: Matt Reeves had actually suggested that to us....

CMP's continued publication of this information is a clear violation of the Court's Temporary Restraining Order. The Court specifically and unequivocally enjoined Defendants, including Mr. Daleiden and The Center for Medical Progress, from "publishing or otherwise disclosing to any third party . . . any confidential information learned, at any NAF annual meetings." The Court was also perfectly clear that "confidential information learned" at NAF annual meetings included "anything that happened during [the] time of the [annual meetings], whether it's in the hallway, in a restaurant, in the meeting hall itself, if its' with [attendees] that [you] wouldn't have had access to but for the fact [you] signed agreements ... under false pretenses." (See 8/3/15 Hr'g Tr. at 19:11-16.)

We demand that this transcript be immediately removed from CMP's website (and anywhere else it was posted). We reserve all our rights in this matter.

Please respond as soon as possible with assurances that the information has been removed.

Sincerely,



Derek F. Foran

cc: Jay Alan Sekulow (sekulow@aclj.org)
Carly F. Gammill (cgammill@aclj-dc.org)
Abigail A. Southerland (asoutherland@aclj.org)
Joseph Williams (joseph.williams.24@gmail.com)
Erik M. Zimmerman (ezimmerman@aclj.org)

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August 10, 2015

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Via Email

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Re: Contempt of Court's TRO in *National Abortion Federation v. Center for Medical Progress, et al.*

Dear Ms. Short:

We are in receipt of your letter from this morning, dated August 10, 2015. We see no proper basis for refusing our request that the Center for Medical Progress and David Daleiden cease the ongoing publication of information that they learned at NAF's annual meetings.

Your letter reflects an unjustifiably narrow reading of the Defendants' obligations under both the Court's Temporary Restraining Order of July 31 ("TRO"), as well as the nondisclosure agreements that the Court based its order upon. The Court was explicit: Defendants' nondisclosure obligations are "quite broad," and prohibit Defendants from publishing "[a]ll information distributed or otherwise made available at this conference by NAF or any conference participants through all written materials, discussions, workshops or other means." (August 3, 2015 Hr'g Tr. at 15:8-12; *see also* Dkt. No. 1-1 ¶ 17.) On its face, this prohibition covers the Defendants' present and ongoing conduct. In addition, when Defendants signed agreements with NAF in order to obtain access to NAF's annual meetings, and the discussions held therein, they repeatedly and explicitly agreed that "**all information is confidential** and should not be disclosed to any other individual or third parties." (Dkt. No. 1-1 ¶ 17; Dkt. No. 1-2 ¶¶ 2-3.)

The TRO contains no exception that would allow Defendants to continue their ongoing publication merely because they have previously disclosed the information that they learned through their fraudulent and illegal conduct. Nor can Defendants avail themselves by pointing to websites that contain some of the information disclosed. Unlike the trade secret case law that your letter cites, the purpose of the TRO and Defendants' nondisclosure

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obligations is not limited to preventing a “secret” fact from reaching the public. Rather, they exist to make sure that the information made available at NAF annual meetings will not be used to invade the privacy of NAF members and meeting participants in the *very* public way that CMP’s website does, and to protect those persons from harassment, intimidation, threats, and attacks by anti-abortion extremists. Defendants’ continued publication of this information only serves to aggravate and perpetuate the harm to NAF, its members, and its meeting participants caused by Defendants’ unlawful activities.

Because the offending material remains posted on Defendants’ website and Youtube account, Plaintiff intends to seek an order to show cause as soon as practicable. The Court’s order is clear and requires no clarification. We are nevertheless prepared to further discuss our position with you before we file a contempt motion, if you so wish. We are available between 2:00 and 4:00 tomorrow, August 11, 2015. As you may already know, my partner Derek Foran is unavailable today and tomorrow, so please respond to me for the purposes of setting up this meeting.

Sincerely,

/s/ Linda E. Shostak

Linda E. Shostak

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