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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DIVISION

STEMEXPRESS, LLC, and CATHERINE DYER, Plaintiffs, vs. THE CENTER FOR MEDICAL PROGRESS; BIOMAX PROCUREMENT SERVICES, LLC, DAVID DALEIDEN (aka "ROBERT SARKIS", DOE 1 (aka "SUSAN TENNENBAUM") and DOES 2 through 100, inclusive, Defendants.	Case No. BC589145 **DEFENDANTS' OPPOSITION TO PLAINTIFFS' ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION** Date: August 21, 2015 Time: 9:30 a.m. Dept: 86 Judge: Hon. Joanne O'Donnell Complaint Filed: July 27, 2015 Trial Date: None Set

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I. INTRODUCTION.

This lawsuit was filed by Plaintiffs StemExpress, LLC and Catherine Dyer on July 27, 2015 against Defendants The Center for Medical Progress ("CMP"), David Daleiden, and BioMax Procurement Services, LLC. The Plaintiffs seek, among other things, to prevent Defendants from releasing a video recording of a May 22, 2015 dinner meeting between Plaintiffs and Defendants, which is the subject of Plaintiffs' First Cause of Action in their Complaint.

On July 28, 2015, Plaintiffs brought an *ex parte* application for a temporary restraining order and order to show cause re: preliminary injunction. Defendants did not receive Plaintiffs' papers until minutes before 5:00 PM on the afternoon of July 27, 2015, and did not have the opportunity to meaningfully oppose Plaintiffs' application, which contained numerous misstatements of fact and law. Relying on Plaintiffs' misrepresentations of the facts, this Court granted Plaintiffs' *ex parte* application for a temporary restraining order and an order to show cause re: preliminary injunction to enjoin Defendants from releasing any video of the May 22, 2015 meeting. This Court also permitted Plaintiffs to engage in expedited discovery in order to prepare for the hearing on the order to show cause re: preliminary injunction.

On August 4, 2015, Defendants filed a special motion to strike under C.C.P. § 425.16, which stayed all discovery in the matter. On August 10, 2015, this Court permitted an expedited motion schedule with a hearing set for August 13, 2015 on whether the discovery stay should be partially lifted so that Plaintiffs can perform discovery necessary for the order to show cause re preliminary injunction.

On August 13, 2015, this Court denied Plaintiffs' motion on the grounds that "it appears unlikely that the Court is going to grant the preliminary injunction." Order on Plaintiffs' Motion to Conduct Specified Discovery on Shortened Time, p. 1. The Court noted that "[f]irst, this proposed injunction would constitute a prior restraint on the Defendants' rights under the First Amendment" and "[s]econd even if Plaintiff's evidence demonstrates that the videotapes were obtained in violation of Penal Code Section 632, Section 632 does not prohibit the disclosure of information gathered in violation of its terms." *Id.* In addition, Plaintiffs cannot meet the requirements for a

preliminary injunction because they are unlikely to prevail on their claims, they will not face irreparable harm, and the public interest weighs in favor of denying the injunction.

Through this order to show cause re: preliminary injunction, Plaintiffs seek to suppress information legally obtained by CMP from being released to the public and to chill CMP and Daleiden from exercising their First Amendment rights to engage in effective investigative journalism. This is despite the fact that as a result of Defendants' laudable investigative reporting, the United States Congress and twelve states have now commenced official investigations into the illegal harvesting of fetal tissue, fetal body parts, and whole fetal bodies, for profit.

II. A PRELIMINARY INJUNCTION WOULD CONSITUTE AN UNCONSTITIONAL PRIOR RESTRAINT.

Plaintiffs briefly address the constitutional issues in this case by stating that "the First Amendment does not permit Defendants to make illegal recordings." (Plaintiffs' *Ex Parte* Application for a Temporary Restraining Order, p. 15.) While this statement is tautologically true, it completely ignores the reality that the First Amendment only permits Plaintiffs to attempt to restrict Defendants speech, regardless of whether the content of that speech was lawfully obtained. The only way Plaintiffs could restrict Defendants' speech would be through **seeking monetary damages**. Prior restraint on an individual's speech is "the essence of censorship" and the "chief purpose of the guaranty [of the liberty of the press is] to prevent previous restraints upon publication." *Near v. Minn.* (1931) 283 U.S. 697, 713; see also *Neb. Press Ass'n v. Stuart* (1976) 427 U.S. 539, 559 ("prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"). Instead, the proper remedies are damages and, if appropriate, a permanent injunction to preclude further statements once a case has been resolved on the merits. *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141. This is the case even if the content of the speech was improperly obtained.

> **Without a doubt, the district court's temporary restraining order constitutes a prior restraint of the use of the [undercover] video footage obtained in [the plaintiff's] office. Protection of the right to information that appeals to the public at large and which is disseminated by the media is the cornerstone of the free press clause of the first amendment. *No matter how inappropriate the acquisition*, or its correctness, the right to disseminate that information is what the Constitution intended to protect.**

In re King World Productions, Inc. (6th Cir. 1990) 898 F.2d 56, 59 (temporary restraining order overturned by writ of mandamus) (emphasis added); *New York Times Co. v. United States* (1971) 403 U.S. 713, 714 (certiorari granted to overturn preliminary injunction against publication of classified and stolen Pentagon Papers); *CBS v. Davis* (1994) 510 U.S. 1315, 1318 (Justice Blackmun staying preliminary injunction against release of undercover video footage and noting "[i]f CBS has breached its state law obligations, the First Amendment requires that Federal remedy its harms through a damages proceeding rather than through suppression of protected speech."); see also *Balboa, supra*, Cal.4th at 1169 (Kennard, J., concurring and dissenting) ("The California Constitution's guarantee of the right to free speech and press is more protective and inclusive than that contained in the First Amendment to the federal Constitution"). The granting of a preliminary injunction to preclude Defendants from releasing their undercover video footage would be entirely unconstitutional and subject to reversal. See *Elrod v. Burns* (1976) 427 U.S. 347, 373 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")

III. THE CALIFORNIA INVASION OF PRIVACY ACT DOES NOT AUTHORIZE INJUNCTIVE RELIEF TO PREVENT THE RELEASE OF RECORDINGS.

Plaintiffs contend that Penal Code § 637.2(b) authorizes injunctive relief to prevent *publication* of recorded materials. (Plaintiffs' *Ex Parte* Application For a Temporary Restraining Order, p. 8.) This is flat wrong. Section 637.2 allows injunctive relief to issue "to enjoin and restrain any violation of this chapter, . . ." Nothing in the California Invasion of Privacy Act (Penal Code §§ 630-68) prohibits the release of materials illegally recorded under section 632. "**Penal Code section 632 does not prohibit the disclosure of information gathered in violation of its terms.**" *Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 167. The relief allowed under section 637.2 does not authorize the imposition of an unconstitutional prior restraint, and even limits damages to those caused by the recording itself – such as "emotional distress or outrage" – and not the publication of the recording. *Id.* Rather, the injunctive relief authorized in this section is limited to injunctions against **future** unlawful eavesdropping or recording. This is made evident through the fact that **neither Plaintiffs nor Defendants have been able to find a**

single case in which the dissemination of a recording which violated Penal Code section 632 was enjoined because doing so would violate the First Amendment and the California Constitution. *Wilkins v. National Broadcasting Co.* (1999) 71 Cal.App.4th 1066 (NBC permitted to release videotape of business meeting); *In re King*, *supra*, 898 F.2d 56 (Inside Edition permitted to release videotape of doctor committing medical malpractice); *CBS*, *supra*, 510 U.S. 1315 (CBS permitted to release videotape of unsanitary practices at meat packing facility); *New York Times*, *supra*, 403 U.S. 713, 714 (New York Times permitted to publish stolen pentagon papers); *Wilson v. Superior Court of Los Angeles County* (1975) 13 Cal.3d 652, 658 (Political candidate permitted to release newsletter with allegedly libelous information concerning opponent).

IV. PLAINTIFFS CANNOT MEET THE REQUIREMENTS FOR A PRELIMINARY INJUNCTION.

Plaintiffs cannot meet their burden to receive a preliminary injunction. A preliminary injunction is an extraordinary power to be exercised always with great caution and only in those cases where the following factors exist: it fairly appears that the plaintiff will suffer irreparable injury if it not be issued; it is necessary to preserve the estates of the parties, or there is sufficient cause showing that the need of hasty action exists. *Tiburon v. Northwestern P.R. Co.* (1970) 4 Cal.App.3d 160, 179. The power to enjoin must be exercised with great caution and should rarely, if ever, be exercised in a doubtful case. *Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1041.

Trial courts are directed to evaluate the following two interrelated factors when deciding whether to issue a preliminary injunction: (1) the likelihood that the plaintiff will prevail on the merits; and (2) the interim harm that the plaintiff is likely to suffer if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued. *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70. Where there is no showing of a likelihood of success on the merits, it is an abuse of discretion to issue a preliminary injunction. *Auto v. City and County of San Francisco* (2011) 201 Cal.App.4th 1347, 1355 (preliminary injunction to maintain status quo reversed).

The burden is on the applicant to show all of the elements necessary to support the issuance of a preliminary injunction. *Casmalia Resources v. County of Santa Barbara* (1987) 195 Cal.App.3d 827, 838. In addition, if the evidence before the trial court is in conflict, the trial court determines the credibility of declarations and affidavits and resolves the conflicts among them and the other evidence. *Hub, Rogal & Hamilton Ins. Services v. Robb* (1995) 33 Cal.App.4th 1812, 182. Therefore, it is the role of the Court here to view the video clips provided, and to determine whether Plaintiffs' declarations are credible or not. See Exhibit A to the Notice of Lodgment in Support of Defendants' Motion to File Under Seal (clips from the video recording of the May 22, 2015 meeting).

A. Plaintiffs Will Not Prevail On Their Claims For Violation Of The Privacy Act (Pen. Code § 632).

Plaintiffs are not likely to succeed on the merits of their claim for invasion of privacy for two reasons: (1) the dinner conversation on May 22, 2015, was not a confidential communication; and (2) assuming *arguendo* the conversation was a confidential communication, the recording was permissible because it was done for the purpose of gathering evidence related to the commission of a felony involving violence against a person.

1. The May 22 Meeting Did Not Constitute A "Confidential Communication."

Penal Code section 632(a) prohibits recording any "confidential communication" without the consent of all parties to the communication. Section 632(c) defines "confidential communication" to exclude a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the *parties* to the communication *may reasonably expect that the communication may be overheard.* Pen. Code § 632(c); see also *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 768 ("a conversation is confidential if a party to that conversation has an *objectively reasonable* expectation that the conversation is not being overheard") (emphasis added).

The fact that it is not objectively reasonable to expect privacy in the open dining area of a restaurant on a Friday night has already been addressed by the California Court of Appeal for the

Second Appellate District. See *Wilkins*, *supra*, 71 Cal.App.4th at 1079. In that case the court expressly held that the plaintiffs "had no objective expectation of privacy in their business lunch meeting." *Id.* The facts in *Wilkins*, in which investigative journalists set up a lunch meeting with a business in order to covertly film the business negotiations, are practically identical to the situation here. *Id.* at 1072-73. The case law has already decided this issue in favor of the Defendants.

In their papers, Plaintiffs have attempted to distinguish *Wilkins* by focusing on the fact that the Court in *Wilkins* used an older and easier test, the "*O'Laskey*" test, which incorporates an analysis of the content of a conversation, and whether an individual would reasonably desire to have that content be confidential. While the Court's reasoning in *Wilkins* did include the *O'Laskey* test, the Court also performed an in depth analysis of whether the plaintiffs had an objective expectation of privacy as part of its adjudication of the claim that videotaping the lunch meeting constituted the Tort of Intrusion. *Id.* at 1075-1079 ("Wilkins and Scott contend that NBC invaded their privacy by intrusion into their solitude, seclusion or private affairs by videotaping them at the lunch meeting. We disagree."). In that regard, the Court held that "we conclude that Wilkins and Scott had no objective expectation of privacy in their business lunch meeting." *Id.* at 1079. It was only after the Court determined that the plaintiffs had no reasonable expectation of privacy, that it rather summarily dismissed the plaintiffs claims regarding Penal Code section 632. *Id.* at 1079-80.

Plaintiffs also cite a series of other cases, mostly federal and unpublished, as evidence that public conversations can still be confidential. The facts of each of those cases, however, show that they are completely dissimilar to the situation here. See *Lieberman*, *supra*, 110 Cal.App.4th 156 (bringing a third party into a private doctor's appointment did not destroy the doctor's right to believe the appointment was confidential); *Turnbull v. ABC*, 2004 U.S. Dist. LEXIS 24351 (C.D. Cal. Aug. 19, 2004) (having many people in the same room does not necessarily make a conversation public when the conversing parties are "chatting amongst themselves in a corner, apparently oblivious to [the defendant's] surveillance"); *Cuviello v. Feld Entm't, Inc.* (N.D.Cal. 2015) 304 F.R.D. 585 (possible to have a private conversation on a public sidewalk "after having looked around to visually ensure no one else was listening") (internal quotation marks omitted); *Vera v. O'Keefe*, 2012 U.S. Dist. LEXIS 112406 (S.D. Cal. Aug. 9, 2012) (communication of

parties inside an office was confidential when it began with "[Defendant]: Wait, before you . . . before you begin . . . can you . . . this is confidential, right? [Plaintiff]: Yeah.")

Even if the Court does not consider *Wilkins* to be determinative, the facts of the situation here amply demonstrate that Plaintiffs did not have an objectively reasonable expectation of privacy. These facts, which were initially denied by Plaintiffs, are now undisputable because both Plaintiffs and Defendants have the video recording of the meeting. (Compare Declaration of Catherine Dyer in Support of *Ex Parte* Application for Temporary Restraining Order ("Dyer Dec.") with Declaration of David Daleiden in Support of *Ex Parte* Application to Dissolve the Temporary Restraining Order ("Daleiden Dec.") and Exhibit A to the Notice of Lodgment in Support of Defendants' Motion to File Under Seal.)

a. *The meeting did not occur in a secluded place.*

It is an undisputable fact that the meeting between Plaintiffs and Defendants did not occur in a secluded place. Despite this undisputable fact, Plaintiff Catherine Dyer has attempted to mislead the Court in her declaration through her suggestions that she set the time and place of their business meeting and intentionally chose a secluded corner of a public restaurant in order to make their business meeting private:

> On May 22, 2015, Mr. Cooksy, Ms. Barr, and I attended a meeting with "Sarkis" and "Tennenbaum" at Bistro 33 in El Dorado Hills, California. We arrived at the restaurant together at around 4:30 p.m. . . . **We were seated in a booth in a remote area of the restaurant situated on a segregated floor that had no other diners.**

Dyer Dec., ¶¶ 19-20 (emphasis added).

The reality, however, as explained by both the video and Defendant David Daleiden's Declaration, is that he arrived at the restaurant before Plaintiff Dyer and her party, and that she played no role in choosing the table:

> On the evening of Friday, May 22, 2015, I had a dinner meeting with Catherine Dyer, Kevin Cooksy, and Megan Barr of Stem Express. My purpose was to gather evidence about the procurement practices of StemExpress, including the actual procurement techniques utilized by procurement technicians. . . . I arrived at the restaurant before Dyer, Cooksy, and Barr and was seated by the hostess at a table in the dining area. Dyer and the others had not arrived yet and did not choose the table.

Daleiden Dec., ¶¶ 6-7. Here, Defendants have provided the entire video of the meeting to Plaintiffs

and also to the Court. The Court can see within the first minute of the video that Daleiden was waiting in a booth when Dyer and the others arrived.

Moreover, in contrast to Plaintiff Dyer's suggestion that "I did not believe that anyone else at the restaurant was in a position to overhear our conversation, and I certainly did not believe that anyone was in a position to record our conversation," (Dyer Dec., ¶ 24); Defendant Daleiden states that "nearby booths filled up as the Friday evening progressed, including the booth immediately behind Dyer. Dyer's tone of voice and volume did not change." Daleiden Dec., ¶ 9.

b. *Plaintiff Dyer did not keep her voice at a low volume.*

It is an undisputable fact that Plaintiff Dyer did not keep her voice at a low volume. Once again, despite this undisputable fact, Plaintiff Catherine Dyer has attempted to mislead the Court in her declaration through her statements that she kept her voice at a low volume and requested that Defendants do the same:

> I took every step possible to ensure that that did not happen and that the conversation was only audible to the persons sitting at our table: me, Mr. Cooksy, Ms. Barr, "Sarkis," and "Tennenbaum." . . . Due to the extensive background noise in the dining hall, at no point did I believe that the new dining patrons could overhear our conversation or were in a position to record it. At one point, when "Tennenbaum" began speaking loudly, I specifically asked her to keep her voice down so that our conversation would not be overhead by dining party in the adjacent booth.

Dyer Dec., ¶¶ 24-25.

The reality, however, as explained once again by the video and Defendant David Daleiden is that Plaintiff Dyer's voice was uniformly robust and never changed in volume despite the regular presence of third parties:

> They were seated at the table and we proceeded to have a meeting over dinner that lasted approximately two and a half hours. During that meeting, Dyer spoke for the most part in a normal conversational tone. Dyer's normal conversational tone was uniformly robust. During that meeting, Dyer gave no sign of concern that others might overhear the conversation. . . . [N]earby booths filled up as the evening progressed, including the booth immediately behind Dyer. Dyer's tone of voice and volume did not change.

Daleiden Dec., ¶¶ 8-9. Video clip "A2" of Defendant's Exhibit A, conditionally lodged under seal, clearly shows that Plaintiff Dyer's tone of voice did not change when there was another party seated behind her.

c. *Plaintiff Dyer did not halt conversation when restaurant staff approached, nor did she caution Tennenbaum or anyone else to lower their voice.*

It is also an undisputable fact that Plaintiff Dyer did not halt conversation when restaurant staff approached, nor cautioned anyone else to lower their voice. Plaintiff Dyer here also has attempted to mislead the Court through her statements that she stopped speaking, and requested that Defendants stop speaking, when restaurant staff approached: "Throughout the meeting, whenever any employees of the restaurant would approach our table, I would put up my hand to stop conversation until we were alone again." Dyer Dec., ¶ 24.

The video footage, and Defendant Daleiden's testimony, however, correctly reveal that Plaintiff Dyer made no effort to stop the conversation when restaurant staff was near:

> Dyer did not make any effort to ensure that restaurant staff would not hear our conversation. When staff came to the table, she made no effort to stop the conversation, whether she or others were speaking. Also, immediately behind where I was sitting, facing Dyer, was a station with a credit card slider where the waiters and waitresses could print up receipts. Dyer did not pause in her conversation while the staff was working there. At no time did Dyer indicate any concern that we might be overheard or ask anyone at our table to lower his or her voice. On the contrary, at one point, Cooksy told Dyer to lower her voice, because Dyer was speaking without any regard for the fact that people were seated in the booth immediately behind her. Despite Cooksy's warning, Dyer continued to speak in the same tone and volume.

Daleiden Dec., ¶¶ 10-11. Video clips "A3" and "A4" of Defendants' Exhibit A, conditionally lodged under seal, supports Defendant Daleiden's statements. Additionally, the Court should view the entire video if Plaintiffs continue to maintain that Dyer took these steps to prevent the conversation being overheard.

d. *Plaintiff Dyer did not state that the meeting was confidential.*

Again, Plaintiff Dyer's Declaration misled the Court through her suggestions that she told Defendants that she desired their conversation to be covered by a confidentiality agreement:

> The meeting with "Sarkis" and "Tennenbaum" ended around 6:45 p.m. "Sarkis" and "Tennenbaum" paid for the dinner. Around that time, I recall telling "Sarkis" and "Tennenbaum" that StemExpress could provide a template supply agreement for their consideration, but that a comprehensive confidentiality agreement intended to be retroactive to cover our private conversation [needed to be signed].

Dyer Dec., ¶ 26.

Defendant Daleiden stated that:

> At no time in our conversation did Dyer mention anything about a confidentiality agreement, nor had any confidentiality agreement been discussed before the meeting. **The first time a confidentiality agreement was mentioned in my dealing with anyone at StemExpress was in an e-mail from Cooksy on June 18, 2015**, at which time he attached a confidentiality agreement to be signed.

Daleiden Dec., ¶ 13 (emphasis added). Again, Defendants have made the video footage of the meeting available to both the Plaintiffs and the Court. The Court can watch the video footage should Plaintiffs maintain that Dyer discussed a confidentiality agreement at this meeting with Defendants.

This misrepresentation is particularly egregious because without it there is absolutely no reason to deprive Defendants of their right to free speech. The non-disclosure agreement signed by Defendants nearly a month ***after*** the meeting does not contain any language indicating that it applied to the prior May 22, 2015 meeting. Daleiden Dec. Ex. 1. The only alleged "evidence" that Defendants may have waived their right to free speech is Plaintiff Dyer's false statement that, at the end of the meeting, she indicated her desire that the meeting be covered by a confidentiality agreement. Plaintiffs' attempt to fabricate such evidence in order to violate Defendants' constitutional rights should not be tolerated. See Section IV below.

Based on all of the above, going into this situation, it was objectively reasonable for Defendant Daleiden to believe that he would not be recording a confidential communication, but rather a public event, and objectively unreasonable for Plaintiff Dyer to believe that their meeting was a confidential communication.

2. Even If The May 22 Meeting Was A Confidential Communication, Recording The Meeting Was Not Prohibited Because The Purpose Was To Gather Evidence Of A Felony Involving Violence Against A Person.

Penal Code section 633.5 provides, "Nothing in Section . . . 632 . . . prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of . . . . any felony involving violence against the person." Pen. Code § 633.5.

Prior to their meeting with Plaintiff Dyer, Daleiden had spent over two years investigating

fetal tissue and organ procurement practices. Daleiden Dec. ¶¶ 3-4. In the course of his investigation, he learned that, in order for fetal tissue and organs to be usable, the fetus cannot be killed with digoxin before the procedure begins. He also learned that abortion providers will alter the procedure to obtain more intact, and thus more valuable organs and tissues. Finally, he learned that some providers will attempt to deliver the fetus intact, including an intact head. Daleiden Dec. ¶¶ 3-4. In addition, Plaintiffs actually confirmed Defendants' suspicions that Plaintiffs were involved in the procurement of intact cadavers: "During our conversation, Dyer said that StemExpress's procurement technician see 'a lot' of intact fetuses at clinic, which intact fetuses are then shipped to their laboratory." *Id.* at ¶ 12.

Immediately after an abortion procedure, procurement technicians employed by companies such as StemExpress step in to take over the handling of the tissue, organs, or "intact cases", to ensure the best preservation of usable material. Daleiden Dec. ¶¶ 3-4. Daleiden had been informed by a former StemExpress contractor that they sometimes will even receive a fetus whose heart is still beating. Because fetuses marked for organ donation are not killed before the procedure begins, and because some of these fetuses are delivered intact, it is reasonable to surmise that these babies either die or are killed shortly after they are born. This is, depending on the precise location of the infant at the time of its demise, either partial birth abortion (prohibited under 18 U.S.C. §1531) or homicide. *United States v. Montgomery* (8th Cir. 2011) 635 F.3d 1074, 1086 ("Congress has defined the word 'person' to include any infant who is born alive.")

Moreover, even if Plaintiffs are not harvesting and killing live babies for resale, the participation in partial-birth abortions in order to harvest intact body parts would also constitute a felony involving violence against the person. This is because it is a homicide to kill a fetus with malice aforethought, and it is a felony to participate in a partial-birth abortion – vitiating any possibility that the mother has consented to the procedure. See Pen. Code § 187(a) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."); 18 U.S.C. § 1531 (Partial-Birth Abortion Ban – punishable by two years in prison).

Megan Barr and Cate Dyer act as procurement technicians. Daleiden Dec. ¶ 6. Thus, CMP and Daleiden reasonably believed that Dyer and Barr were involved in the commission of the

crimes of partial birth abortion and/or homicide. Daleiden Dec. ¶ 6. Moreover, Dyer, as CEO of StemExpress, hires and arranges for the compensation of other procurement technicians to engage in these acts. CMP and Daleiden thus reasonably believed that Dyer was involved in the commission of solicitation to commit murder and/or conspiracy to commit murder. *People v. Baker* (1978) 88 Cal.App.3d 115, 123 (verbal evidence of potential extortion sufficient to permit recording of confidential communication); *People v. Suite* (1980) 101 Cal.App.3d 680, 688-689 (verbal evidence of bomb threat sufficient to permit recording of confidential communication); *People v. Parra* (1985) 165 Cal.App.3d 874, 879-880 (verbal threat of physical violence sufficient to permit recording of confidential communication).

Because CMP, BioMax, and Daleiden recorded their conversation with Dyer, Cooksy, and Barr for the purpose of obtaining evidence relating to the commission by Dyer and Barr of felonies involving crimes against the person, the recording was not prohibited by Penal Code § 632, and therefore Plaintiffs' First Cause of Action fails.

B. <u>Plaintiffs Will Not Face Irreparable Harm If Injunctive Relief Is Denied.</u>

In their papers, Plaintiffs identify three categories of irreparable harm which will allegedly occur if a preliminary injunction is not granted with regard to the video: (1) the release of a "misleadingly-edited" video; (2) the loss of contracts with fetal tissue providers, and the emergence of governmental investigations into their practices, and (3) the creation of an alleged safety risk for Catherine Dyer and Kevin Cooksy if images of them are released to the public. (Plaintiffs' *Ex Parte* Application For a Temporary Restraining Order, pp. 12-14.)

All of these categories of harm, however, are satisfied by damages. See *Thayer Plymouth Center, Inc. v. Chrysler Motor Corp.* (1967) 225 Cal.App.2d 300 (when damages provide adequate compensation, injunctive relief should be denied.); *In re King, supra,* 898 F.2d at 60 (court rejecting argument that release of undercover video would cause damages or irreparable harm); see also *Helms Bakeries v. State Board of Equalization* (1942) 53 Cal.App.2d 417,425; and *Tahoe Keys Property Owners' Ass 'n v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1472. Moreover, injunctive relief has no application to wrongs which have been completed, absent a showing that past violations will probably recur. *Madrid v. Perot Systems Corp.* (2005) 130

Cal.App.4th 440, 465. Similarly, injunctive relief should be held unavailable when Plaintiffs cannot show that any alleged future harms will be caused by future acts, and not be the continuing result of past acts. See *Id.* Importantly, where there is no showing of a likelihood of success on the merits, it is an abuse of discretion to issue a preliminary injunction. *Auto*, *supra*, 201 Cal.App.4th at 1355.

1. The Release Of A "Misleadingly-Edited" Video.

Defendants have so far released six distinct videos as part of their investigative journalism called "The Human Capital Project." Four of six videos are edited portions of meetings with individuals in the abortion industry. The other two are portions of a documentary which edits together many undercover videos with interviews and other information. For all of those videos, Defendants have also released a longer, unedited video as part of their efforts to ensure transparency. Plaintiffs have not, because they cannot, argue that the shorter, edited videos which have so far been released misrepresent the content of the longer, unedited videos. As such, Plaintiffs have no basis for believing that any shorter, edited video of their meeting with Defendants would also misrepresent the content of the longer, unedited video. It is likely that the release of a video concerning Plaintiffs May 22, 2015 meeting with Defendants will cause them harm, but that harm will not be caused by edits – *because the longer video will also be released.* Rather any harm will result from Plaintiffs' own incriminating words and illegal actions.

2. The Loss Of Contracts With Fetal Tissue Providers And The Emergence Of Governmental Investigations Into Their Practices.

Ironically, Plaintiffs make the argument that the disclosure of their activities to the public would likely cause them to be vilified, to lose business and be subject to Congressional (and perhaps even criminal) inquiries. They base this argument on the fact that the release of videos concerning Planned Parenthood, in which StemExpress is mentioned, has already caused them to be vilified and be subject to Congressional inquiries. Once again, however, this argument rests on Plaintiffs' false assertion that Defendants "mislead" the public through their edits of their videos. Since Defendants release longer videos alongside the shorter, edited videos, any harm results only from the publication of Plaintiffs' speech, not Defendants' edits. Injunctive relief for such harm is unavailable because Defendants have complied with all applicable laws. Moreover, the damages

alleged here, concerning the loss of donors and important contracts are ascertainable, could be remedied by damages, and therefore cannot form the basis for a preliminary injunction.

3. The Creation Of An Alleged Safety Risk For StemExpress Employees.

The health and safety of all individuals should be of paramount importance to the Court and to all parties, and arguments concerning it should not be taken lightly. Plaintiffs argument however, that the release of the video will make their identities public, and make them subject to harassment by extremists, fails because Plaintiffs cannot show that the harassment will be caused by the release of the video itself. In their papers, Plaintiffs note that Plaintiff Dyer has already been subject to harassment because of the information available concerning the relationship between StemExpress and Planned Parenthood. Her identity is already widely available on the internet, largely as a result of her present lawsuit, and therefore the video cannot make her identity public. The name of the other StemExpress employees in the video, Kevin Cooksy and Megan Barr, are also public, and have been mentioned in numerous news articles. Instead, it is only the content of the video which might cause her to suffer harassment. Since the video was obtained lawfully, however, any potential harassment she might suffer cannot serve as a basis for a preliminary injunction.

C. <u>The Public Interest Weighs In Favor Of Denying The Injunction.</u>

The Court should weigh the public interest in deciding whether to grant or deny an injunction. See *San Diego v. Southern California Tel. Corp.* (1954) 42 Cal.2d 110, 120. Here, the public interest clearly weighs in favor of permitting Defendants to make Plaintiffs' disreputable and potentially criminal conduct public. The United States Congress and twelve states have now commenced official investigations into the illegal harvesting of fetal tissue, fetal body parts, and whole fetal bodies, for profit, and Defendants' legitimately acquired evidence will be crucial to those investigations. See Steven Ertelt, *South Carolina Becomes 12th State to Investigate Planned Parenthood for Selling Aborted Babies*, Life News, Jul 30, 2015, http://www.lifenews.com/2015/07/30/south-carolina-becomes-12th-state-to-investigate-planned-parenthood-for-selling-aborted-babies/. Plaintiffs have sought not only to enjoin the release of an edited video, but also the release of the entire video because they fear that the public awareness of what they are actually doing would be harmful to their business and potentially subject them to criminal penalties. The public

has a legitimate interest in seeing justice done, and in ensuring that human life is given the protection and respect it deserves. See *Gonzales v. Carhart* (2007) 550 U.S. 124, 157 (democratic "government may use its voice and its regulatory authority to show its profound respect for the life within the woman"). Nor is the suppression of evidence to avoid potential criminal prosecution a proper basis to restrain speech.

V. CONCLUSION.

In light of the foregoing, the Court should deny Plaintiffs' Order to Show Cause re: Preliminary Injunction.

FREEDOM OF CONSCIENCE DEFENSE FUND

Dated: August 13, 2015

By: _____

Charles S. LiMandri
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Attorneys for Defendants

COURT OF THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES - CENTRAL		FOR COURT USE ONLY
TITLE OF CASE (Abbreviated) **STEMEXPRESS, LLC, et al. v. THE CENTER FOR MEDICAL PROGRESS, et al.**		
ATTORNEY(S) NAME AND ADDRESS Charles S. LiMandri, SBN 110841 Paul M. Jonna, SBN 265389 Teresa L. Mendoza, SBN 185820 FREEDOM OF CONSCIENCE DEFENSE FUND P.O. Box 9520 Rancho Santa Fe, California 92067 Tele: (858) 759-9948; Fax: (858) 759-9938		
ATTORNEY(S) FOR: Defendants THE CENTER FOR MEDICAL PROGRESS, DAVID DALEIDEN, and BIOMAX PROCUREMENT SERVICES, LLC	HEARING Dept. 73 Trial Date:	CASE NO.: BC 589145 JUDGE: Hon. Rafael A. Ongkeko

CERTIFICATE OF SERVICE

I, Kathy Denworth, declare that: I am over the age of 18 years and not a party to the action; I am employed in, or am a resident of the County of San Diego, California; where the mailing occurs; and my business address is Box 9520, Rancho Santa Fe, CA 92067, Telephone number (858) 759-9948; Facsimile number (858) 759-9938. I further declare that I am readily familiar with the business practice for collection and processing of correspondence, pleadings, and discovery for mailing via U.S. MAIL, UPS OVERNIGHT MAIL, FACSIMILE AND/OR PERSONAL SERVICE pursuant to which practice I served the following original document(s) or true copies thereof, with exhibits:

- **DEFENDANTS' OPPOSITION TO PLAINTIFFS' ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION.**

by one or more of the following methods of service to:

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____ **(BY U.S. MAIL)** I caused such document(s) to be sealed in envelopes, and with the correct postage thereon fully prepaid, either deposited in the United States Postal Service or placed for collection and mailing at San Diego, California, following ordinary business practices.

_X_ **(BY E-MAIL/ELECTRONIC MAIL)** I caused a copy of the foregoing document(s) to be sent to the persons at the e-mail addresses listed above, this date via internet/electronic mail.

____ **(BY FACSIMILE)** I caused such document(s) to be transmitted via facsimile to the named persons at their respective fax numbers at San Diego, California. I then confirmed receipt of the facsimile transmission. The facsimile machine used complied with the California Rules of court, Rule 2003 and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 13, 2015.

Kathy Denworth