

No. 15-A_____

In the Supreme Court of the United States

**In re The Center for Medical Progress, BioMax Procurement Services, LLC,
David Daleiden, and Troy Newman,**

Petitioners-Appellants,

v.

**United States District Court for the Northern District of California, and
National Abortion Federation,**

Respondents-Appellees

To the Honorable Anthony Kennedy
Associate Justice of the United States Supreme Court and
Circuit Justice for the Ninth Circuit

Appendix to Emergency Application for Stay by December 4, 2015

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NATIONAL ABORTION FEDERATION,
Plaintiff,
v.
CENTER FOR MEDICAL PROGRESS, et
al.,
Defendants.

Case No. [15-cv-03522-WHO](#)

**ORDER REGARDING SCOPE OF
STIPULATED PROTECTIVE ORDER,
DISCOVERY RESPONSES AND
DISCLOSED MATERIALS**

Re: Dkt. Nos. 162, 173, 178-3, 179

This Order addresses several pending issues.

**I. MOTION FOR CLARIFICATION REGARDING SCOPE OF THE STIPULATED
PROTECTIVE ORDER**

On October 19, 2015, plaintiff’s counsel erroneously served counsel for the Reporters Committee for Freedom of the Press (Reporters Committee) with a copy of NAF’s October 19, 2015 letter to the Court. That letter (Dkt. No. 177) identified portions of the video recordings covered by the TRO that were referenced by defendants in the parties’ Joint Discovery Letter (Dkt. No. 157) and in Court on October 16, 2015.

Having accidentally received a copy of NAF’s October 19th letter and having had conversations with plaintiff’s counsel regarding the same, the Reporters Committee requests that I clarify the scope of the parties’ stipulated Protective Order to make it clear that the Protective Order does not bind the Reporters Committee or its counsel and that the Reporters Committee and its counsel have no obligations of confidentiality with respect to the October 19, 2015 letter. Dkt. No. 173.

The October 19, 2015 letter – while appropriately covered by the Protective Order and sealed in the Court’s docket under the Rule 26(c) good cause standard – discusses one small segment of the video recordings that was briefly discussed in open court. Neither party has filed with the Court a response to the Reporters Committee’s request. For these reasons, I GRANT the

United States District Court
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1 request and clarify that the Reporters Committee is not a party to nor bound by the Protective
2 Order at issue.

3 **II. AMENDED DISCOVERY RESPONSES FOLLOWING COURT'S ORDER**

4 Following my October 16, 2015 Order, defendant Daleidin lodged with the Court an
5 unredacted copy of his "Supplemental Responses to NAF's First Set of Preliminary Injunction
6 Interrogatories." Dkt. No. 182. Defendant CMP/Biomax lodged with the Court an unredacted
7 copy of their "Supplemental Responses to NAF's First Set of Preliminary Injunction Requests for
8 Production."¹ I will address the redactions made in those documents. No other documents have
9 been submitted to the Court for in camera review.

10 **A. First Amendment Privilege**

11 In my October 16, 2015 Order, I asked the parties to submit briefing on whether the First
12 Amendment allows defendants to redact the identities of individuals and organizations who
13 received confidential NAF information from defendants. Dkt. No. 162. Having reviewed the
14 parties' briefs on the issue I find that for purposes of allowing NAF to prepare for the Preliminary
15 Injunction proceedings, defendants SHALL disclose to NAF (by providing unredacted documents
16 and written responses) the identities of individuals and organizations who received confidential
17 NAF information. This information, however, shall be maintained as "Attorneys' Eyes Only"
18 confidential under the Protective Order. Absent further order of the Court, these identities shall be
19 referred to in publicly filed pleadings and Court proceedings by "Doe" identifiers. I find that
20 NAF's need for this information – to adequately prepare for the Preliminary Injunction
21 proceedings and to ensure the appropriate scope of any resulting injunction – makes this limited
22 disclosure appropriate. Upon a fuller record – submitted during the Preliminary Injunction
23 proceedings or on the merits of NAF's conspiracy claims – the Court may determine that public
24 disclosure of some or all of these identities are appropriate. I reiterate my prior conclusion that the
25 Protective Order adequately protects any First Amendment associational rights of CMP and these
26 few individuals/organizations, if such rights exist.

27 _____
28 ¹ Whenever any party lodges a document for in camera review, that party shall file a "Notice of
Manual Lodging" in CM/ECF.

B. Fifth Amendment Assertions

In his supplemental written responses to NAF's Interrogatories, "without waiting his Fifth Amendment objections or those of the individuals," defendant Daleidin identified but then redacted from the document served on NAF, the names of individuals who attended a NAF annual meeting at Daleidin's direction.² Daleidin cannot refuse to identify these individuals based on those individual's Fifth Amendment rights. *See, e.g., Couch v. United States*, 409 U.S. 322, 328 (1973) ("It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him."). However, as clarified during the October 16, 2015 hearing, Daleidin is invoking his own Fifth Amendment right to avoid self-incrimination with respect to "conspiracy." Transcript (Dkt. No. 167) at 9:5-12.

NAF and Daleidin shall submit supplemental briefing regarding whether Daleidin can appropriately assert his personal Fifth Amendment right to shield the names of these individuals and/or whether any such privilege has been waived. The briefs shall not exceed seven pages and shall be filed on or before **5:00 p.m. Wednesday, November 3, 2015**.³

In their supplemental written responses to NAF's Requests for Production, CMP/Biomax redacted the name of David Daleidin as the individual who provided documents to counsel regarding NAF materials, notes on NAF materials, documents that contain NAF confidential information, communications with NAF, materials displayed at NAF meetings, documents regarding transmission of confidential NAF information, and communications with NAF attendees, for production by CMP/Biomax. Supp. RFP. at 6, 7, 8, 9, 10. During the Court's October 16, 2015 hearing counsel for Daleidin confirmed that he was only asserting the Fifth Amendment for documents regarding allegedly fake identification. Transcript at 9:18-22. There is no basis to redact Daleidin's name from the Supplemental Responses.⁴

² In accordance with my instructions, Daleidin lodged with the Court an unredacted copy of his Supplemental Interrogatory Responses. Dkt. No. 182.

³ In this Order, I have not considered whether Daleidin's supplemental interrogatory responses are otherwise adequate. Daleidin did not submit to the Court a copy of his supplemental written responses to NAF's Requests for Production.

⁴ I do not consider whether CMP/Biomax's supplemental RFP responses are otherwise adequate. I note that the only other redaction in their Supplemental Responses is the name of one other individual in response to RFP No. 6, who produced attorney-client privileged documents. CMP/Biomax did not submit for in camera review their supplemental responses to the

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Northern District of California

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III. NAF’S REQUEST RE DISCLOSED MATERIALS

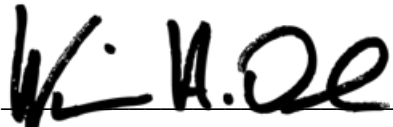
On October 22, the defendants notified me that a third party allegedly received videotapes covered by the TRO from a “source on Capitol Hill” and had posted them online. Given the security procedures imposed by the House committee that defendants described during the last hearing, it is unclear whether defendants’ representation is accurate.

In its October 22, 2015 letter (Dkt. No. 171-3), NAF notified me that it has identified who is posting the disclosed videos. NAF asks me to order Daleidin to turn over all originals and copies of material covered by the TRO to outside counsel for CMP for safekeeping. NAF also requests permission to serve a deposition subpoena on the individual it identified who is posting the information covered by the Court’s TRO.

No response has been filed by the defendants in opposition to NAF’s requests. I GRANT NAF’s request for permission to serve a deposition subpoena on the identified individual and ORDER defendant Daleidin to turn over all copies of all materials covered by the TRO to outside counsel for CMP.

IT IS SO ORDERED.

Dated: October 30, 2015



WILLIAM H. ORRICK
United States District Judge

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NATIONAL ABORTION FEDERATION,
Plaintiff,
v.
CENTER FOR MEDICAL PROGRESS, et
al.,
Defendants.

Case No. [15-cv-03522-WHO](#)

**ORDER ON MOTION TO STAY,
CERTIFY OR RECONSIDER AND
DEFENDANTS’ INVOCATION OF THE
FIFTH AMENDMENT**

Re: Dkt. Nos. 199, 202, 206

I. DEFENDANTS’ MOTION TO STAY, CERTIFY OR RECONSIDERATION

In my October 30, 2015 Order (Dkt. No. 185), I directed defendants to provide to NAF the names of the individuals and entities who received NAF confidential information under an “Attorneys Eyes Only” designation and ordered that the individuals and entities – for the time being – be referred to by Doe identifiers in any public filing or proceeding absent further order of the Court. *Id.* at 2. Defendants seek relief from that Order in three ways; they first ask me to stay that portion of my order, so they can appeal it to the Ninth Circuit; second, they ask me to certify that portion of my ruling for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b); and third, in the alternative, they seek leave to file a motion for reconsideration on this issue. Defendants’ Motion (Dkt. No. 205-4). NAF opposes all three forms of relief. NAF Opposition (Dkt. No. 207-4).

Because I have reviewed the arguments of the parties, I GRANT defendants’ motion for reconsideration. But nothing in the arguments causes me to change my earlier decision, as I explain more fully below.¹

¹ This matter is set for hearing on December 9, 2015. Under Civil Local Rule 7-1(b), I find this matter appropriate for determination on the papers and VACATE the hearing.

A. Reconsideration

1 Having fully reviewed the substance of defendants' arguments for reconsideration
2 (expressed in their opening and reply briefs), as well as NAF's opposition, I find that disclosure of
3 the small number of CMP supporters at issue is still warranted. Defendants argue that my order –
4 disclosing to NAF's counsel the identities of a discrete, small number of individuals and entities
5 ("supporters") who received NAF confidential information from defendants – is akin to a
6 compelled disclosure of membership and supporter lists that burdens defendants' and their
7 supporters' First Amendment right to freedom of association. *See, e.g., NAACP v. Alabama*, 357
8 U.S. 449, 462-63 (1958) (order compelling disclosure of memberships lists "a substantial restraint
9 upon the exercise by petitioner's members of their right to freedom of association" based on
10 showing that disclosure "is likely to affect adversely the ability of petitioner and its members to
11 pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in
12 that it may induce members to withdraw from the Association and dissuade others from joining it
13 because of fear of exposure of their beliefs shown through their associations and of the
14 consequences of this exposure."); *cf. NAACP v. Button*, 371 U.S. 415, 417 (1963) (law restricting
15 provision of advice and counsel was not justified by state's rationale and unconstitutionally
16 restricted the NAACP's freedom of expression and association). Defendants' argument misses the
17 mark.

18 The Order at issue does not require defendants to disclose the members or funders of CMP,
19 much less "lists" of the same. It is narrowly tailored to allow NAF to learn the identities of who
20 received NAF's confidential information from defendants in order for NAF to ensure that the
21 appropriate individuals are covered by the Court's TRO and included in the scope of its requested
22 preliminary injunction. This critically important fact distinguishes this case from the cases relied
23 on by defendants.

24 However, even assuming that First Amendment associational rights are implicated by my
25 Order, the limited disclosure must still be made. As the Ninth Circuit explained in *Perry v.*
26 *Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2010), claims that discovery would unduly
27 interfere with First Amendment privileges are subject to a two-part framework. First, the party
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1 asserting the privilege must make a “prima facie showing” of “arguable first amendment
2 infringement,” demonstrating that enforcement of the discovery requests will result in: (1)
3 harassment, membership withdrawal, or discouragement of new members, or (2) other
4 consequences which objectively suggest an impact on, or “chilling” of members’ associational
5 rights. *Id.* at 1160-61. If that showing is made, at the second step the “evidentiary burden” shifts
6 and the party seeking the information must show that the information sought is “rationally related
7 to a compelling governmental interest” and that there are no other less restrictive means of
8 securing that information. *Id.* (internal quotations omitted).

9 At the second step, the “analysis is meant to make discovery that impacts First Amendment
10 associational rights available only after careful consideration of the need for such discovery, but
11 not necessarily to preclude it. The question is therefore whether the party seeking the discovery
12 ‘has demonstrated an interest in obtaining the disclosures it seeks . . . which is sufficient to justify
13 the deterrent effect . . . on the free exercise . . . of [the] constitutionally protected right of
14 association.’” *Id.* at 1161 (quoting *NAACP*, 357 U.S. at 463.). This standard is applied by
15 balancing the burden imposed on individuals and associations against the significance of the
16 interest in disclosure to determine whether the interest outweighs the harm. *Id.* Courts take into
17 account the importance of the litigation, the centrality of the information sought to the issues in the
18 case, the existence of less intrusive means of obtaining the information, and the substantiality of
19 the First Amendment interests at stake. *Id.* Finally, “the party seeking the discovery must show
20 that the information sought is highly relevant to the claims or defenses in the litigation – a more
21 demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1)” and
22 the request “must also be carefully tailored to avoid unnecessary interference with protected
23 activities, and the information must be otherwise unavailable.” *Id.*²

24
25 ² In *Perry*, plaintiffs challenged the constitutional validity of a statewide proposition and served a
26 request for production of documents on the proponents of the proposition. The plaintiffs sought,
27 among other things, production of the proponents’ internal campaign communications relating to
28 campaign strategy and advertising. The plaintiffs sought those materials in order to gather
evidence concerning the purpose of the proposition, as well as evidence concerning the rationality
and strength of purported state interests for the proposition. Based on the declarations of several
individuals, the Ninth Circuit concluded that disclosure of campaign strategies could deter
protected interests, including participation in political campaigns and the free flow of ideas within

1 Turning to the first step, there is scant evidence in the record regarding the nature of CMP
2 as a membership organization and the interests of its members; *e.g.*, how many members CMP
3 has, how many funders CMP has, how those members or funders participate in the organization or
4 otherwise support CMP's goals and aims. The only evidence regarding CMP before the Court is
5 the information I considered in ruling that CMP could not assert the Fifth Amendment, which
6 focused solely on CMP's status as a non-profit corporation and the number of its officers. *See*
7 September 23, 2015 Order, Dkt. No. 137. The only evidence regarding supporters of CMP is from
8 Chris Doe (a pseudonym), who declares that he would not have provided financial support to
9 CMP if he knew his support would become public, and that he could not provide further support to
10 CMP if his support became publicly known because of financial repercussions to his business.
11 Dkt. No. 179-1. There is no evidence from other funders or members of CMP.

12 This thin record regarding CMP and its supporters is why I ordered that the names of the
13 individuals/entities who received confidential NAF information be disclosed to NAF and
14 identified by Doe identifiers in public filings absent "a fuller record." Dkt. No. 185 at 2. Without
15 more information about CMP and its supporters, I can only speculate how or whether the limited
16 disclosure at issue could adversely impact CMP's ability to undertake its mission or chill
17 individuals' rights to associate freely or voice personal views through organizational ties with
18 CMP.³

19 However, for purposes of this ruling on this motion for a stay, certification, or
20 reconsideration, I will *assume* that defendants have met their prima facie case showing that the
21 limited disclosure at issue will result in harassment or discouragement of new supporters.
22 Turning to the second step of the *Perry* analysis, I find that the limited disclosure at issue should

23
24 a campaign. *Id.* at 1162-64. At the second step, the Court concluded that "bearing in mind other
25 sources of information," plaintiffs had not shown a sufficient need for the information. The
26 information plaintiffs seek is attenuated from the issue of voter intent, while the intrusion on First
27 Amendment interests is substantial." *Id.* at 1165.

28 ³ NAF argues that defendants cannot make their prima facie showing because "[t]he freedom of
association protected by the First Amendment does not extend to joining with others for the
purpose of depriving third parties of their lawful rights." *Madsen v. Women's Health Ctr., Inc.*,
512 U.S. 753, 776 (1994); *Oppo.* (Dkt. No. 1207-4) at 2. NAF assumes the merits of its claims
against defendants, which is premature.

1 be made to NAF as “Attorneys Eyes Only.” I find that NAF is entitled to this information in order
 2 to make sure all appropriate parties are covered by both the TRO and any resulting preliminary
 3 injunction. There is no dispute that the individuals/entities at issue received confidential NAF
 4 information; the redacted documents produced by CMP demonstrate that. Dkt. No. 156-7.⁴ It is
 5 important to emphasize again the narrow nature of the mandated disclosure and the obvious fact
 6 that NAF cannot secure this information from any other source. Only CMP can identify to whom
 7 CMP released NAF’s confidential information. The information is central to determine the
 8 appropriate scope of any preliminary injunction and there is no less intrusive way to obtain that
 9 information.⁵ While I have assumed in this Order that defendants have shown a prima facie case
 10 of some impact on their associational rights, even though the record to this point does not establish
 11 it, whatever impact there is has not been shown to be *substantial*. There is no evidence, for
 12 example, that Chris Doe is such a major or important financial contributor that CMP’s operations
 13 will be affected without his support or that other unknown supporters will be chilled from funding
 14 or otherwise supporting CMP.

15 With respect to narrow tailoring, the disclosure covers only a handful of supporters and
 16 does not reach CMP’s membership or funder “lists.” The Attorneys Eyes Only designation and
 17 protection from public disclosure also demonstrate the narrow tailoring of the disclosure Order.
 18 While the *Perry* Court determined that a protective order limiting dissemination of the information
 19 would only ameliorate but not necessarily eliminate the threatened harms at issue in that case
 20 (chilling of participation and free speech in political campaigns), given the much narrower
 21 disclosure at issue here and my requirement that Doe identifiers be used, the concerns of Chris

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 23
 24 ⁴ As far as the record shows, NAF confidential information was shared in a CMP “First Quarter
 25 Report” dated April 12, 2014 and an “Operation Report” dated April 12, 2014, by email to a small
 26 number of individuals. Dkt. No. 156-7. The email addresses and names of most of the recipients
 27 and senders of those emails have been redacted.

28 ⁵ While not necessary (or ripe) for my Order at this juncture, I note that the identities of the
 “supporters” at issue could be relevant to the merits of NAF’s conspiracy claims, as the redacted
 emails produced by CMP indicate that some of the supporters knew of and expressly funded
 CMP’s efforts to infiltrate the NAF meetings before that infiltration occurred. *See* Dkt. No. 156-7
 at 25 of 44. Therefore, defendants’ repeated assertion that the supporters at issue are mere
 “passive recipients of information,” Reply (Dkt. No. 211) at 3, may not be accurate.

1 Doe – the only CMP declarant in this case – and CMP are adequately protected at this time.⁶
 2 Given that information covered by the TRO has already been leaked – although the source of that
 3 leak has not been identified – and the individual who has been identified as having received that
 4 information is apparently intending to refuse to answer questions as to his sources (Dkt. No. 230),
 5 I reject defendants’ proposal that the “best means” to protect against further disclosure of NAF’s
 6 confidential information is to “order Defendants to inform those with redacted identities of any
 7 preliminary injunction.” That will not adequately protect NAF’s interests concerning the
 8 confidentiality of its information and discovery of the identity of the recipients.⁷ Motion at 6. On
 9 this record, the *Perry* test has been met.⁸

10 Having considered the parties’ additional arguments concerning the limited disclosure of
 11 the recipients of NAF’s confidential information, I affirm my prior Order requiring that discrete

12
 13 ⁶ Chris Doe’s declaration explains that his fear of retaliation against his business if his support of
 14 CMP is publicly disclosed is based on prior incidents where his business was boycotted when
 15 Doe’s pro-life support was revealed and because one of his business’ managers was informed by
 16 an unidentified Planned Parenthood “senior official” that Doe’s business would be “destroyed.”
 17 Dkt. No. 179-1. There is no other *evidence* of potential for harassment or chilled speech or
 18 association if, contrary to my Order, the CMP supporters’ identities become publicly known.

19 ⁷ The cases relied on by defendants for the proposition that production pursuant to a protective
 20 order is insufficient to protect First Amendment associational rights are factually inapposite. *See*,
 21 *e.g.*, *Sexual Minorities of Uganda v. Lively*, 2015 U.S. Dist. LEXIS 104636, *13 (D. Mass. Aug.
 22 10, 2015) (protective order would not adequately protect individuals and entities associated with
 23 plaintiff organization where enforcement of terms of the protective order in Uganda would be
 24 problematic and disclosure of members could subject them to criminal prosecution and
 25 documented safety concerns); *Centro De La Comunidad Hispana De Locust Valley v. Town of*
 26 *Oyster Bay*, 954 F. Supp. 2d 127, 144 (E.D.N.Y. 2013) (protective order would not adequately
 27 protect immigration status of plaintiffs challenging an ordinance restricting day laborers, “the
 28 agreement does nothing to assuage the plaintiffs’ fears about harassment from the Town, the very
 entity to whom the plaintiffs’ members wish to remain anonymous.”); *Tree of Life Christian, Sch.*
v. City of Upper Arlington, 2012 U.S. Dist. LEXIS 32205, *2 (S.D. Ohio Mar. 12, 2012)
 (disclosure of identity of a confidential donor whose donation allowed plaintiff to purchase a
 property was not mandated in a Religious Land Use and Institutionalized Persons Act action
 against the government for failure to allow a conditional use permit, because disclosure to
 government would inhibit donor’s future donations and donor identity not “highly relevant” to the
 case); *see also Marfork Coal Co. v. Smith*, 274 F.R.D. 193, 206 (S.D. W. Va. 2011) (rejecting
 disclosure of identities of activists who joined in a protest with defendants because plaintiff did
 not need the information to prove its case, plaintiff sought identity of activists to presumably to
 sue them in state court proceedings).

⁸ Defendants’ reliance on California Code of Civil Procedure §§ 1985.3, 1985.6 and Article I,
 section 1 of the California Constitution is not helpful. C.C.P. § 1985.3 regulates subpoenas for
 information regarding “consumers”; C.C.P. § 1985.6 regulates subpoenas for employment records;
 and defendants fail to show that the right to privacy under the California Constitution is implicated
 (*i.e.*, that the supporters at issue are citizens of California) or that their privacy rights would be
 violated by the limited discovery at issue given my analysis of the *Perry* factors.

1 disclosure.

2 **B. Stay & Certification**

3 Turning to defendants' request for a stay, it is DENIED, except that I will grant a limited
 4 14 day stay to allow defendants to seek mandamus relief from the Ninth Circuit. I also DENY the
 5 request for certification under 28 U.S.C. § 1292(b). There is no controlling question of law at
 6 issue and an immediate appeal of this determination will not materially advance the ultimate
 7 termination of the litigation.⁹ The law applied – the two-step *Perry* test – is not in dispute and the
 8 narrow disclosure at issue is not likely to advance the ultimate termination of the litigation,
 9 although the identities are relevant (as discussed above) to the scope of the preliminary injunction
 10 and NAF's arguments on the merits.

11 **II. DEFENDANTS' INVOCATION OF THE FIFTH AMENDMENT**

12 Defendant Daleidin has refused to identify the individuals who attended the NAF annual
 13 meetings at his direction, invoking the Fifth Amendment privilege against incrimination based on
 14 his concern about conspiracy liability. Dkt. No. 202.¹⁰ CMP has refused, or in its view been
 15 unable, to identify the individuals who attended the NAF annual meetings based on its "insulated
 16 witness" objection. *See* Defendant CMP/Biomax Responses to NAF's First Set of Preliminary
 17 Injunction Interrogatories, Response to Interrogatory No. 2. Dkt. No. 157-13.¹¹

18 _____
 19 ⁹ "A non-final order may be certified for interlocutory appeal where it 'involves a controlling
 20 question of law as to which there is substantial ground for difference of opinion' and where 'an
 21 immediate appeal from the order may materially advance the ultimate termination of the
 22 litigation.'" *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 687-88 (9th Cir. 2011) (quoting 28
 23 U.S.C. § 1292(b)).

24 ¹⁰ In the October 16, 2015 hearing, I advised Daleidin's counsel that I would allow Daleidin to
 25 invoke the Fifth Amendment – at least at the preliminary injunction stage – regarding allegedly
 26 false identification. The only other subject matter Daleidin's counsel identified about which
 27 Daleidin intended to assert the Fifth was with respect to the names of individuals who attended a
 28 NAF meeting at Daleidin's direction in light of potential conspiracy liability. October 16, 2015
 Transcript at 9:3-12.

¹¹ CMP raised the "insulated witness" objection, explaining that it was not withholding documents
 based on that objection but that it was unable to get this information from the unidentified
 "insulated witnesses." Dkt. No. 156-4 at 31. I have already held that CMP/Biomax may not
 invoke the Fifth Amendment. *See* September 23, 2015 Order (Dkt. No. 137 at 12 ("Biomax and
 CMP do not have any Fifth Amendment rights and may not invoke the Fifth Amendment in this
 case.")). To determine whether CMP was nevertheless withholding any documents under any
 individual's assertion of the Fifth Amendment privilege against self-incrimination, I ordered CMP
 to lodge with the Court any such documents for in camera review by October 23, 2015. October
 16, 2016 Order (Dkt. No. 162) at 2 ("If CMP is withholding documents in CMP's possession

1 As an initial matter, it appears that there are CMP corporate records that might disclose
 2 some or all of the identities of these individuals. In his deposition, Daleidin testified that these
 3 individuals were “independent contractors for CMP,” and that the contracts with these individuals
 4 (he was unsure whether they were original drafts or executed contracts) were turned over to “his
 5 counsel.” Daleidin Deposition Transcript (Dkt. No. 187-3) at 194:1, 194:10 – 195:6. These
 6 contracts are CMP corporate records that CMP should have access to, as are the emails, texts, and
 7 other correspondence between Daleidin and these independent contractors generated during the
 8 project. Daleidin Depo. Tr. at 198:18 – 199:8.

9 These CMP/Biomax corporate records will likely identify the independent contractors and
 10 allow CMP to provide a full answer to Interrogatory No. 2. As an officer of CMP, Daleidin
 11 cannot refrain from providing these to CMP’s agent in order to prevent CMP from disclosing the
 12 identities of the CMP independent contractors.¹² Daleidin, it appears, is attempting to hide the
 13 ball, contrary to my prior Orders.

14 With respect to Daleidin’s own refusal to identify these independent contractors, in my
 15 October 30, 2015 Order, I asked the parties to submit supplemental briefing on whether Daleidin
 16 could assert the Fifth Amendment privilege with respect to potential conspiracy charges or
 17 whether he had “waived” that right based on prior disclosures. Dkt. No. 191.¹³ Having reviewed
 18 the supplemental briefing and the record in this case, I find that Daleidin cannot assert the Fifth
 19 Amendment privilege against self-incrimination to refuse to identify the CMP independent
 20 contractors because he fails to show that the narrow disclosure at issue could reasonably subject
 21 him to *further* criminal liability in light on his prior disclosures.¹⁴

22
 23 based on any individual’s Fifth Amendment rights, CMP shall produce those documents for in
 camera review.”). CMP did not lodge any documents for the Court’s review.

24 ¹² In my September 23, 2015 Order, I explained in detail why Daleidin *could not* refuse to produce
 CMP/Biomax corporate documents under the Fifth Amendment. Dkt. No. 137 at 11.

25 ¹³ In the October 30, 2015 Order I also held that Daleidin could not invoke the Fifth Amendment
 on behalf of those individuals because the Fifth Amendment privilege to avoid self-incrimination
 26 is personal. Dkt. No. 185 at 3.

27 ¹⁴ In his Supplemental Brief re Invocation of 5th Amendment (Dkt. No. 202) Daleidin identified a
 number of crimes which NAF has asserted he committed, including federal racketeering, criminal
 wiretap, conspiracy, civil fraud and violation of Cal. Penal Code § 632. Daleidin Supp. Brief at 2.
 28 However, as his counsel confirmed, the potential incriminating testimony at issue is related only to
 conspiracy. Daleidin has not asserted the Fifth Amendment privilege with regards to his video or

1 The Fifth Amendment privilege against self-incrimination provides protection against
 2 compelled disclosure of facts that have a tendency to incriminate. As the Supreme Court
 3 explained in *Maness v. Meyers*, 419 U.S. 449, 461 (1975), “[t]he protection does not merely
 4 encompass evidence which may lead to criminal conviction, but includes information which
 5 would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence
 6 which an individual reasonably believes could be used against him in a criminal prosecution.” *See*
 7 *also Hoffman v. United States*, 341 U.S. 479, 488 (1951) (upholding invocation of privilege where
 8 it was not “perfectly clear” that answers “cannot possibly” have a “tendency” to incriminate the
 9 witness). The privilege protects against compelled disclosure of associational contacts where that
 10 testimony could incriminate a witness. *See, e.g., Emspak v. United States*, 349 U.S. 190, 192
 11 (1955); *Convertino v. United States DOJ*, 795 F.3d 587, 593 (6th Cir. 2015) (“Both the Supreme
 12 Court and this Court have repeatedly applied *Hoffman* to sustain invocation of the Fifth
 13 Amendment privilege in response to questions regarding the individual’s personal or professional
 14 associations ‘when asked in a setting of possible incrimination.’” (quoting *Emspak*, 349 U.S. at
 15 199)).

16 However, when “incriminating facts have been revealed without claiming the privilege, the
 17 privilege cannot then be invoked to avoid disclosure of the details.” *In re Master Key Litig.*, 507
 18 F.2d 292, 294 (9th Cir. 1974). The issue is not so much one of waiver as it is “whether the
 19 question presented a reasonable danger of further crimination in light of all the circumstances,
 20 including any previous disclosures.” *Rogers v. United States*, 340 U.S. 367, 374 (1951). In the
 21 context of a civil action, a witness may disclose some information about a subject without
 22 “waiving” the Fifth Amendment privilege as to other undisclosed information on the same subject
 23 matter, but *only* where disclosure of additional information would subject him to additional
 24 liability. As the Ninth Circuit has explained, “an ordinary witness may ‘pick the point beyond
 25 which he will not go’, and refuse to answer any questions about a matter already discussed, even if
 26 the facts already revealed are incriminating, as long as the answers sought may tend to further

27
 28 audio taping and his entrance to and securing ¹⁶ materials from NAF annual meetings except concerning his use of allegedly fake identification, which is not at issue here.

1 incriminate him.” *In re Master Key Litig.*, 507 F.2d at 293-94.

2 Here, Daleidin has already voluntarily disclosed too much for disclosure of the identities of
3 the independent contractors to “further” incriminate him. To review, Daleidin has disclosed the
4 following: he used false pretenses to provide him and the independent contractors access to NAF
5 meetings (Daleidin Depo. Trans. 117:17-118:4, 152:4-160:22, 180:4-11); at his direction and in
6 roles assigned by him, the independent contractors acted as investigators and attended NAF annual
7 meetings (Daleidin Supp. Resp. to NAF Interrogatory No. 2, Daleidin Depo. Trans. at 131:7-24,
8 135:21-136:11); during the course of the NAF meetings, Daleidin and the independent contractors
9 covertly video and/or audiotaped those proceedings (as shown by the recordings submitted for in
10 camera review) with equipment controlled by Daleidin (Daleidin Supp. Resp. to NAF
11 Interrogatory No. 7, Daleidin Depo. Trans. at 118 – 123); at the end of each day, Daleidin
12 retrieved from each investigator all recording equipment, memory cards, and other storage devices
13 as well as all materials picked up the investigators. Daleidin Supp. Resp. to NAF Interrogatory
14 No. 7.

15 To support his Fifth Amendment invocation, Daleidin wraps himself in the “reporter’s
16 shield” and relies on a series of cases where courts have upheld reporters’ assertions of the Fifth to
17 avoid disclosing the identity of their sources, despite having admitted receiving information from
18 government sources. Those cases are not on point. In those cases, the criminal statutes at issue
19 made the identity of the source *matter* to the witness’s potential liability. For example, in
20 *Convertino v. United States DOJ*, 795 F.3d 587, 589 (6th Cir. 2015), the reporter disclosed he had
21 a government source for his reporting on a confidential investigation into the conduct of an
22 Assistant United States Attorney. The reporter refused to identify his source when he was
23 subpoenaed in the underlying Privacy Act suit brought by the AUSA against the government. The
24 Sixth Circuit upheld the reporter’s invocation of the Fifth because the reporter’s potential criminal
25 liability hinged on the actual identity of the government source (e.g., was the government source
26 authorized to release the information) and the source could provide testimony to further
27 incriminate the reporter (e.g., the reporter participated in illegal conduct to secure the
28 information).

1 Similarly, in *In re Seper*, 705 F.2d 1499, 1500 (9th Cir. 1983), a reporter published an
2 article based in part on confidential tax information. The taxpayer whose information was
3 disclosed, sued the government. The Ninth Circuit upheld the invocation of the Fifth Amendment
4 because in order to convict the reporter, the government would need to prove the disclosure at
5 issue was “unauthorized” and that the reporter “willfully” disclosed the information, proof that
6 “would be more difficult if his sources remain undisclosed. In addition, to prove willfulness, the
7 government probably must show that Seper knew that the information was disclosed to him in
8 violation of the law. . . . Nothing in Seper’s previous testimony supplies these two essential
9 elements.” *Id.* at 1502.

10 Here Daleidin’s potential criminal liability does not depend on the identity of the alleged
11 co-conspirators or their testimony about Daleidin’s role. Daleidin has already disclosed that
12 himself, as well as that the contractors were acting at his direction.¹⁵

13 Nor does Daleidin’s reliance on *In re Master Key Litig.*, 507 F.2d 292, 293 (9th Cir. 1974),
14 help him. In that civil antitrust conspiracy case, the witness testified regarding certain corporate
15 practices but invoked the Fifth as to others. He was allowed to invoke the Fifth because his
16 “knowledge and intent [regarding] specific instances of attempted restraint on competition, could
17 very well provide a link in the chain of evidence needed in a subsequent prosecution.” *Id.* at 294.
18 Here, Daleidin has already disclosed what the NAF project entailed; not only his role but the roles
19 of the contractors who acted at his direction. The only thing not disclosed is their actual identities.
20 Daleidin fails to explain how the disclosure of those identities – or the testimony of the contractors
21

22 ¹⁵ The Supreme Court has recognized that a “voluntary witness” in a lawsuit “has the choice, after
23 weighing the advantage of the privilege against self-incrimination against the advantage of putting
24 forward his version of the facts and his reliability as a witness, not to testify at all.” *Brown v.*
25 *United States*, 356 U.S. 148, 155 (1958). In that circumstance, the witness has less room to pick
26 and choose where to stop his or her testimony in order to avoid waiver of the Fifth Amendment
27 privilege. *Id.* at 156. While not technically a “voluntary witness” in this action, I note that
28 Daleidin has sought public attention for his role and efforts in directing the CMP project to
infiltrate the NAF meetings, yet now seeks to protect the identity of those he organized and
directed for his own interests. The facts of this case also steer closer to *Hiibel v. Sixth Judicial*
Dist. Court, 542 U.S. 177, 191 (2004), where the Supreme Court recognized that answering “a
request to disclose a name is likely to be so insignificant in the scheme of things as to be
incriminating only in unusual circumstances. . . . Even witnesses who plan to invoke the Fifth
Amendment privilege answer when their names are called to take the stand.”

United States District Court
Northern District of California

1 once identified – could subject him to *further* incrimination or provide a link to additional
2 evidence that the government would not otherwise have. *Cf. Rogers v. United States*, 340 U.S. at
3 374-75 (“After petitioner’s admission that she held the office of Treasurer of the Communist
4 Party of Denver, disclosure of acquaintance with her successor presents no more than a ‘mere
5 imaginary possibility’ of increasing the danger of prosecution.”).

6 On this record, Daleidin has not shown that disclosing the identity of the CMP independent
7 contractors could possibly subject him to further criminal liability based on his fulsome
8 admissions regarding the scope of his role in the NAF project concerning the independent
9 contractors.¹⁶

10 Daleidin and CMP have had a choice in disclosing the identities of the independent
11 contractors. CMP could have, after reviewing all relevant corporate records, disclosed this
12 information in response to NAF’s interrogatory. Despite my September 23, 2015 Order, CMP
13 attempted to constrain itself by asserting an “insulated witness” objection and not seeking and/or
14 viewing its own corporate records, apparently possessed by Daleidin, that likely disclose this very
15 information. Daleidin, having failed to return those corporate documents and apparently
16 concealing them from view by the agent responding on behalf of CMP to NAF’s interrogatories,
17 wants to avoid identifying the independent contractors by invoking the Fifth Amendment. But
18 having failed to identify any reasonable possibility that disclosure of their identities could subject
19 him to further incrimination, Daleidin cannot retreat behind the privilege against self-
20 incrimination. It is time to end this shell game.

21 **CONCLUSION**

22 For the foregoing reason, absent a stay imposed by the Ninth Circuit, within 14 days of the
23

24 _____
25 ¹⁶ The amount of testimony Daleidin has already provided and the nature of the potential criminal
26 liability distinguish this case from ones he relies on where courts have allowed witnesses to refuse
27 to testify about their associates. *See, e.g., Emspak v. United States*, 349 U.S. 190, 200-01 (1955)
28 (“To reveal knowledge about the named individuals – all of them having been previously charged
with Communist affiliations – could well have furnished ‘a link in the chain’ of evidence needed
to prosecute petitioner for a federal crime. . . .”); *United States v. Seifert*, 648 F.2d 557, 561 (9th
Cir. 1980) (non-defendant witness allowed to invoke the Fifth Amendment to refuse to identify the
source of funds he used to purchase goods from the defendants on trial for interstate transport of
property taken by fraud).

United States District Court
Northern District of California

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date of this Order defendants shall disclose to NAF as “Attorneys Eyes Only” the identity of the recipients of NAF’s confidential information and disclose unredacted documents regarding the same. Defendant CMP shall also, within 14 days of the date of this Order, produce the contracts with its independent contractors, as well as communications with them regarding the project. Finally, defendant Daleidin shall, within 14 days of the date of this Order, provide a supplemental interrogatory response identifying the independent contractors who attended NAF meetings at his direction.¹⁷

IT IS SO ORDERED.

Dated: November 20, 2015



WILLIAM H. ORRICK
United States District Judge

¹⁷ I will not certify, reconsider, or grant a longer stay with respect to my ruling on the Fifth Amendment, but provide a limited 10 day stay to allow defendants to seek mandamus relief at the Ninth Circuit if they so choose.

FILED

UNITED STATES COURT OF APPEALS

DEC 03 2015

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NATIONAL ABORTION FEDERATION,
NAF,

Plaintiff - Appellee,

v.

CENTER FOR MEDICAL PROGRESS;
et al.,

Defendants - Appellants.

No. 15-17318

D.C. No. 3:15-cv-03522-WHO
Northern District of California,
San Francisco

ORDER

In re: CENTER FOR MEDICAL
PROGRESS; et al.,

CENTER FOR MEDICAL PROGRESS;
et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA, SAN FRANCISCO,

Respondent,

NATIONAL ABORTION FEDERATION,
NAF,

No. 15-73617

D.C. No. 3:15-cv-03522-WHO
Northern District of California,
San Francisco

Real Party in Interest.

Before: REINHARDT, TASHIMA, and RAWLINSON, Circuit Judges.

Before us is a second petition for a writ of mandamus and a motion for a stay of discovery from Petitioners/Defendants-Appellants Center for Medical Progress et al. (“the Center”) in the above titled action. We described that proceeding in our previous order, and need not repeat here the facts in the underlying case. *See* Case No. 15-72844, Dkt. No. 13. Previously, we denied the Center’s petition for a writ of mandamus to stay all discovery in the district court until it ruled on the Center’s anti-SLAPP motion to strike.¹ *Id.* At issue in this matter is a subsequent discovery order regarding a series of emails that Petitioner/Defendant David Daleiden sent to individuals and organizations with some connection to the Center. Attached to these emails was a report that included information gleaned from the Center’s infiltration and surreptitious recording at conferences held by real party in interest the National Abortion Federation (“the Federation”). The Center produced the emails but redacted the names of the

¹ “California law provides for the pre-trial dismissal of certain actions, known as Strategic Lawsuits Against Public Participation, or SLAPPs.

recipients. The district court then ordered the Center to produce unredacted copies. It is that order that is now before us.²

As we stated in our previous order, mandamus “is a ‘drastic and extraordinary remedy’ reserved for ‘only exceptional circumstances.’” *In re Perez*, 749 F.3d 849, 854 (9th Cir. 2014) (quoting *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380, 124 S. Ct. 2576, 159 L. Ed.2d 459 (2004)). “This limit on our mandamus power is particularly salient in the discovery context because the courts of appeals cannot afford to become involved with the daily details of discovery.” *In re Anonymous Online Speakers*, 661 F.3d 1168, 1174 (9th Cir. 2011) (internal quotation marks omitted).

We consider five factors when reviewing a mandamus petition: “(1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court’s order is clearly erroneous as a matter of law; (4) whether the district court’s order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court’s order raises new and important problems or issues of first impression.” *Bauman v. United States Dist. Ct.*, 557 F.2d 650, 654–55 (9th Cir. 1977). Here,

² Order on Motion to Stay, Certify, or Reconsider. D.Ct. Dkt. 244.

the Center has failed to demonstrate that the district court's discovery ruling was clearly erroneous, a factor that "is a necessary prerequisite for the writ to issue," *In re Perez*, 749 F.3d at 855.

The two-step framework of *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2009), governs claims of First Amendment associational privilege in the discovery context. Under *Perry*, the "party asserting the privilege must demonstrate . . . a prima facie showing of arguable First Amendment infringement." *Id.* (ellipsis in original and internal quotation marks omitted). If the party claiming the privilege establishes such a prima facie showing, the party seeking the contested information bears the burden of demonstrating that it has "an interest in obtaining the disclosures it seeks . . . which is sufficient to justify the deterrent effect . . . on the free exercise . . . of [the] constitutionally protected right of association." *Id.* at 1161 (ellipsis and alteration in original). We conclude that the district court did not clearly err at either step of the *Perry* framework.

The Center relies on *National Ass'n for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958), in which the Supreme Court prohibited the state's attempt to compel disclosure of the NAACP's membership and contribution lists, *id.* at 472, and *Perry*, in which the Ninth Circuit barred the request for disclosure of all internal communications of a political campaign, 591 F.3d at

1153-54. We have reviewed the emails at issue in their redacted form,³ however, and conclude that the district court did not clearly err in distinguishing this case from the First Amendment harms recognized in *NAACP* and *Perry*. First, contrary to the Center’s contention that the district court’s order will require it to disclose the “identities of [its] members, supporters, and donors” as in *NAACP*, Pet. for Writ of Mandamus at 18, the emails in question were sent to “only a handful of supporters” intimately involved in the planning and funding of the Center’s alleged conspiracy, not general lists of the Center’s rank-and-file membership, D.Ct. Dkt.244 at 5.

Second, even if CMP had established a prima facie showing of First Amendment harm, its petition would fail at the second step. The district court ordered discovery pursuant to “a carefully tailored request for the production of highly relevant information”—exactly the sort of request that *Perry* noted fell outside the scope of its holding. 591 F.3d at 1165 at n.13. The district court did not clearly err in concluding that NAF had met its burden of demonstrating that the identities of the recipients who received confidential information are highly relevant to the scope of any preliminary injunction, should one issue.

³ The emails were filed under seal with the district court and with our court.

Finally, the district court further limited the potential for First Amendment infringement by ordering that the unredacted copies of the emails be subject to a protective order limited to “Attorneys Eyes Only.”⁴ The district court therefore did not clearly err in concluding that the disclosures would not infringe on the Center’s First Amendment rights under *NAACP* and *Perry*.

The Center has also filed a motion to stay discovery pending appeal of the district court’s discovery order and pending our ruling on the petition for a writ of mandamus. Because we deny the petition for a writ of mandamus, we dismiss the motion for a stay pending its disposition as moot. As for the stay pending appeal, the Center is required to demonstrate “a strong showing that [it] is likely to succeed on the merits” of the appeal. *Nken v. Holder*, 556 U.S. 418, 434 (2009). For the reasons discussed in this order, the Center is unlikely to succeed in its appeal. Accordingly, we deny that motion as well.

⁴ We do not suggest that the district court will be required to maintain the protective order covering these documents throughout the litigation. The court retains its discretion to modify or lift the order if and when appropriate.

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEC 03 2015

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NATIONAL ABORTION FEDERATION,

Plaintiff - Appellee,

v.

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et al.,

Defendants - Appellants.

No. 15-17318

D.C. No. 3:15-cv-03522-WHO
Northern District of California,
San Francisco

ORDER

In re: CENTER FOR MEDICAL
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Petitioners,

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
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Respondent,

NATIONAL ABORTION FEDERATION,

Real Party in Interest.

No. 15-73617

D.C. No. 3:15-cv-03522-WHO
Northern District of California,
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Before: REINHARDT, TASHIMA, and RAWLINSON, Circuit Judges.

Petitioners-Appellants' emergency motion for a temporary stay is denied.

FILED

UNITED STATES COURT OF APPEALS

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FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
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³ The emails were filed under seal with the district court and with our court.

Finally, the district court further limited the potential for First Amendment infringement by ordering that the unredacted copies of the emails be subject to a protective order limited to “Attorneys Eyes Only.”⁴ The district court therefore did not clearly err in concluding that the disclosures would not infringe on the Center’s First Amendment rights under *NAACP* and *Perry*.

The Center has also filed a motion to stay discovery pending appeal of the district court’s discovery order and pending our ruling on the petition for a writ of mandamus. Because we deny the petition for a writ of mandamus, we dismiss the motion for a stay pending its disposition as moot. As for the stay pending appeal, the Center is required to demonstrate “a strong showing that [it] is likely to succeed on the merits” of the appeal. *Nken v. Holder*, 556 U.S. 418, 434 (2009). For the reasons discussed in this order, the Center is unlikely to succeed in its appeal. Accordingly, we deny that motion as well.

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FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEC 03 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

<p>NATIONAL ABORTION FEDERATION,</p> <p style="text-align: center;">Plaintiff - Appellee,</p> <p>v.</p> <p>CENTER FOR MEDICAL PROGRESS; et al.,</p> <p style="text-align: center;">Defendants - Appellants.</p>

No. 15-17318

D.C. No. 3:15-cv-03522-WHO
Northern District of California,
San Francisco

ORDER

<p>In re: CENTER FOR MEDICAL PROGRESS; et al.</p> <hr/> <p>CENTER FOR MEDICAL PROGRESS; et al.,</p> <p style="text-align: center;">Petitioners,</p> <p>v.</p> <p>UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO,</p> <p style="text-align: center;">Respondent,</p> <p>NATIONAL ABORTION FEDERATION,</p> <p style="text-align: center;">Real Party in Interest.</p>
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No. 15-73617

D.C. No. 3:15-cv-03522-WHO
Northern District of California,
San Francisco


Before: REINHARDT, TASHIMA, and RAWLINSON, Circuit Judges.

Petitioners-Appellants' emergency motion for a temporary stay is denied.

Certificate of Service

I, James Bopp, Jr., a member of the bar of this court, certify that on December 4, 2015, I served a copy of the foregoing on the following by Federal Express, and served a courtesy copy *via* e-mail on:

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James Bopp, Jr.