

1 **McDERMOTT WILL & EMERY LLP**  
CHARLES E. WEIR (State Bar No. 211091)  
2 cweir@mwe.com  
GREGORY JONES (State Bar No. 229858)  
3 gjones@mwe.com  
KATE M. HAMMOND (State Bar No. 293433)  
4 khammond@mwe.com  
2049 Century Park East, Suite 3800  
5 Los Angeles, CA 90067  
Telephone: 310.277.4110  
6 Facsimile: 310.277.4730

7 Attorneys for Plaintiffs

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF LOS ANGELES – CENTRAL DISTRICT

11 STEMEXPRESS, LLC, and  
12 CATHERINE DYER,

13 Plaintiffs,

14 v.

15 THE CENTER FOR MEDICAL  
16 PROGRESS, BIOMAX  
17 PROCUREMENT SERVICES, LLC,  
18 DAVID DALEIDEN (aka “ROBERT  
19 SARKIS”), DOE 1 (aka “SUSAN  
20 TENNENBAUM”), and DOES 2 through  
21 100, inclusive,

22 Defendants.

CASE NO. BC589145

**PLAINTIFFS’ EX PARTE APPLICATION  
FOR A TEMPORARY RESTRAINING  
ORDER, ORDER TO SHOW CAUSE RE:  
PRELIMINARY INJUNCTION, AND  
EXPEDITED DISCOVERY ORDER;  
MEMORANDUM OF POINTS AND  
AUTHORITIES; DECLARATIONS OF  
KATE M. HAMMOND AND GREGORY R.  
JONES**

[COMPENDIUM OF EVIDENCE FILED  
CONCURRENTLY HEREWITH; PROPOSED  
ORDER LODGED CONCURRENTLY  
HEREWITH]

Hearing

Date: July 28, 2015  
Time: 8:30 a.m.  
Dept: 86  
Judge: Hon. Joanne O’Donnell



1 shareholders, members, employees, agents, and all persons acting with The Center for Medical  
2 Progress or BioMax Procurement Services, LLC or on their behalf, to show cause why a  
3 **preliminary injunction** should not be issued pending trial in this action as follows:

4 1. refrain from (i) any manner of releasing, publishing, disclosing, posting, sharing,  
5 uploading, downloading, transferring, or any other means of disseminating, including on the  
6 website of The Center Medical Progress, located at <http://www.centerformedicalprogress.org>, (ii)  
7 any file, media, device, or document be it electronic, digital, analog, or physical in nature (iii) that  
8 contains or represents a recording of any portion (in whole or part) of (iv) any communication  
9 (verbal and non-verbal) (v) made by Catherine Dyer, Kevin Cooksy, or Megan Barr (vi) on the  
10 evening of May 22, 2015 at approximately between 4:30 p.m. PST and 6:45 p.m. PST (vii) that  
11 occurred at, near, or in the restaurant known as Bistro 33, located at 4364 Town Center  
12 Boulevard, El Dorado Hills, California 95762; and

13 2. refrain from (i) any manner of releasing, publishing, disclosing, posting, sharing,  
14 uploading, downloading, transferring, or any other means of disseminating (ii) any file or  
15 physical document (iii) on which StemExpress, LLC is identified, including the three  
16 “documents” presently posted on the “Document Vault” website of The Center Medical Progress,  
17 located at <http://www.centerformedicalprogress.org/human-capital/document-vault/>, bearing the  
18 dates January 10, 2013, March 20, 2013, and January 1, 2013.

19 Plaintiffs hereby also apply on an *ex parte* basis for an order permitting Plaintiffs to  
20 conduct the following limited **expedited discovery**: (a) no more than 3 depositions to be noticed  
21 on 3 days and completed no later than 5 court days before any hearing on the Order to Show  
22 Cause re: Preliminary Injunction; and (b) no more than 10 document requests to which written  
23 responses and responsive documents are due within 7 calendar days from the date on which they  
24 are served.

25 This application is made pursuant to Code of Civil Procedure § 527, Penal Code §§ 632 &  
26 637.2(b), and Penal Code § 496 on the grounds that: (i) Plaintiffs are likely to succeed on the  
27 merits of their claims for violations of the Invasion of Privacy Act (Pen. Code § 632), Penal Code  
28 § 496, and conversion; (ii) that unless the temporary restraining order is granted, Plaintiffs will

1 suffer irreparable injury in that Defendants have stated their intention to release on CMP's  
2 website further video containing Plaintiffs' illegally-recorded private conversation and that the  
3 release of the video, as well as the disclosure of StemExpress's confidential and sensitive  
4 business documents, will result in permanent reputational harm to StemExpress and subject Dyer  
5 and the other participants of the meeting to additional harassment and the danger of physical  
6 harm; and (iii) that the balance of hardships weighs sharply in Plaintiffs' favor, as Defendants  
7 will suffer little, if any, harm if the requested injunction is granted.

### 8 NOTICE OF APPLICATION

9 Notice of the application was given in accordance with California Rule of Court  
10 3.1203(a). As set forth in the attached declaration of Kate M. Hammond, before 10:00 a.m. on  
11 July 27, 2015, Plaintiffs took the following steps to notify each of the Defendants that Plaintiffs  
12 would be seeking the above-described relief at the above-described date, time, and location:

- 13 1. A facsimile was sent to the attorney identified as the registered agent for  
14 service of process (Catherine Short) for defendant The Center for Medical  
Progress. Hammond Decl. ¶ 2, Ex. A.
- 15 2. A voicemail was left for the attorney identified as the registered agent for  
16 service of process (Catherine Short) for defendant The Center for Medical  
Progress. Hammond Decl. ¶ 3.
- 17 3. Emails were sent to email addresses associated with defendants The Center  
18 for Medical Progress (info@centerformedicalprogress.org), BioMax  
Procurement Services, LLC (bob@biomaxps.com), David Daleiden  
19 (bob@biomaxps.com), and Doe 1 (aka "Susan Tennenbaum")  
(susan@biomaxps.com). Hammond Decl. ¶¶ 4-5, Exs. B-C.
- 20 4. A voicemail was left for defendant David Daleiden on the telephone number  
21 that is published on the website of defendant The Center for Medical Progress.  
Hammond Decl. ¶ 6.
- 22 5. In addition, at 10:30 a.m., a second email was sent to another email address  
23 associated with defendant David Daleiden  
(david@centerformedicalprogress.org). Hammond Decl. ¶ 5, Ex. D.

24 Catherine Short, counsel for defendant The Center for Medical Progress, indicated that  
25 she will appear at the hearing, but she stated that her client will not indicate whether it will  
26 oppose the application until it is served with the moving papers. Jones Decl. ¶ 2. Initially, Ms.  
27 Short stated that she also represented David Daleiden and BioMax Procurement Services, LLC,  
28 but later recanted her representation of those parties. *Id.* ¶ 3. As of 5 p.m., no other responses

1 were received. *Id.* ¶ 3; Hammond Decl. ¶ 7.

2 This application is based upon the attached memorandum of points and authorities and the  
3 declarations of Kate M. Hammond and Gregory R. Jones, the accompanying Compendium of  
4 Evidence, which contains the declarations of Catherine Dyer, Megan Barr, Kevin Cooksy, and  
5 Gregory R. Jones, and the exhibits attached thereto, the accompanying Appendix of Non-  
6 California Authorities, the complaint filed in this action on July 27, 2015, and upon such further  
7 argument or evidence as may be presented at the hearing on the application.

8 Dated: July 27, 2015

**McDERMOTT WILL & EMERY LLP**

9  
10  
11 By: \_\_\_\_\_  
12 CHARLES E. WEIR  
13 Attorneys for Plaintiffs  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

**Page**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

**Page(s)**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 On July 14, 2015, defendant The Center for Medical Progress (“CMP”), an anti-abortion  
4 group founded by defendant David Daleiden, launched a highly-charged public campaign  
5 accusing Planned Parenthood of illegally using “partial-birth abortions to sell baby parts.” The  
6 centerpiece of CMP’s attack on Planned Parenthood is a series of heavily-edited and misleading  
7 videos cobbled together from secret video footage taken by Daleiden posing as an employee of a  
8 fake biomedical company and questioning Planned Parenthood doctors about the sale of fetal  
9 tissue. Using the same ruse, Daleiden also took secret and illegal video of Plaintiffs. And  
10 Plaintiffs believe that a similar highly-edited and misleading video designed to enflame anti-  
11 abortion supporters has been created and will be released. California’s Invasion of Privacy Act  
12 criminalizes the recording of a “confidential communication” without consent. Pen. Code §  
13 632(a). Last week, the United States Department of Justice and the California Department of  
14 Justice announced the initiation of criminal investigations into the Planned Parenthood videos  
15 released by CMP. Plaintiffs are victims of the same illegal tactics.

16 On May 22, 2015, Daleiden (using the pseudonym “Robert Sarkis”) and his associate  
17 (defendant Doe One aka “Susan Tennenbaum”) posed as representatives of a fake biomedical  
18 company (defendant “BioMax Procurement Services, LLC”) and met with several employees of  
19 StemExpress, including plaintiff Catherine Dyer (the chief executive officer), Kevin Cooksy, and  
20 Megan Barr. The meeting occurred in a restaurant selected for the private setting of its dining  
21 area and at a time when the restaurant was not crowded. Dyer took overt steps to ensure that their  
22 conversation was not overhead. The meeting lasted a little over two hours. Afterward, “BioMax”  
23 signed a nondisclosure agreement with StemExpress and obtained several of its confidential  
24 documents. It was not until CMP’s release of the Planned Parenthood videos in the past weeks  
25 that Dyer and her team realized that they had been tricked by Daleiden with an identical ruse.  
26 Defendants’ secret recording of the May 22 meeting is a clear violation of the Invasion of Privacy  
27 Act. And because CMP has now publicly threatened to release the “hundreds of hours of  
28 undercover footage” it has amassed, Plaintiffs face the imminent and irreparable harm of having

1 their illegally-recorded private conversation and their faces broadcast to the entire world.  
2 Defendants should be temporarily restrained and preliminarily enjoined from doing this, as  
3 authorized by the Act. *See* Pen. Code § 637.2(b).

4 Defendants' secret video is not the only confidential information they have illegally  
5 obtained from Plaintiffs. Defendants have also acquired (and published on CMP's website)  
6 documents containing StemExpress's confidential and sensitive business information, including  
7 the identities, locations, contact information, and specimen orders of StemExpress's research  
8 clients. Exposing this information not only jeopardizes StemExpress's relationships with its  
9 clients, which are strictly confidential for proprietary research reasons, it also endangers those  
10 researchers' personal safety. Even CMP's limited exposure of StemExpress's purported business  
11 relationship with two Planned Parenthood affiliates over the past few weeks has led to harassment  
12 and serious violent threats to Dyer, which has prompted its own criminal investigation and caused  
13 her to take security measures. Indeed, just this past Saturday night, Dyer's now-necessary  
14 security detail chased away a suspicious character photographing her home and found evidence of  
15 another stranger on her property. StemExpress believes Defendants obtained copies of  
16 StemExpress's confidential documents in part from a former employee who publicly shares  
17 Daleiden's views on abortion in violation of her confidentiality and nondisclosure obligations.  
18 The disclosure (and continued publication) of these documents threatens StemExpress's business.  
19 Defendants also should be temporarily restrained and preliminarily enjoined from doing this.

20 StemExpress and Dyer are caught in CMP's public crusade against Planned Parenthood.  
21 Given the intense news and social media attention that CMP's campaign has already garnered, it  
22 will be virtually impossible to unring the bell if the illegally-recorded video is released. Only a  
23 temporary restraining order and preliminary injunction can avoid this harm. Plaintiffs respect  
24 Defendants' right to freedom of speech, and this lawsuit is not intended to suppress the lawful  
25 exercise of those rights. But the First Amendment does not permit Defendants to violate the law  
26 by illegally recording Plaintiffs and publishing documents that do not belong to them. The Court  
27 should grant the application and issue the requested temporary restraining order, order to show  
28 cause re: preliminary injunction, and expedited discovery order.

1 **II. FACTUAL BACKGROUND**

2 **A. StemExpress**

3 StemExpress is a small life sciences company based in Placerville, California that  
4 specializes in the procurement and distribution of human blood, tissue products, primary cells,  
5 and other clinical specimens to biomedical researchers around the world for the purpose of  
6 conducting medical research. Dyer Decl. ¶ 2. StemExpress’s products and services support  
7 leading research institutions in the United States and internationally, including medical schools,  
8 pharmaceutical companies, and federal agencies, to provide stem cells and other human tissue  
9 critical to medical research. *Id.* ¶¶ 3-4. Cells produced by the physicians, scientists, medical  
10 technicians at StemExpress are used in research globally aimed at finding cures and treatments  
11 for cancer, diabetes, HIV/AIDS, cardiac disease, and other significant medical conditions. *Id.*

12 A relatively small portion of StemExpress’s business relates to the procurement of human  
13 fetal tissue. Dyer Decl. ¶ 7. This tissue is collected from clinical abortion procedures in state  
14 licensed facilities from consenting donors. *Id.* Approximately 90% of the fetal tissue collected  
15 by StemExpress is shipped to its laboratory to be processed down to specific cells. *Id.* Medical  
16 researchers engage StemExpress to procure specific types of fetal specimens (or cells derived  
17 therefrom), and StemExpress procures those specimens from medical facilities that perform the  
18 procedures, such as Planned Parenthood. *Id.* ¶ 8. StemExpress only actively works with 2 of the  
19 59 total affiliates that make up Planned Parenthood. *Id.* StemExpress requires that an informed  
20 consent be discussed and signed by each donor for any donation of tissue of all types, including  
21 human fetal tissue or blood. *Id.* ¶ 9.

22 Protecting the privacy of its researchers and suppliers is critical. Dyer Decl. ¶ 10.  
23 StemExpress’s agreements contain strict provisions protecting the privacy of its client-  
24 researchers, their proprietary information, and above all, the donors’ information. *Id.* This is  
25 because biomedical research is intensely competitive and based largely on proprietary intellectual  
26 property. *Id.* ¶ 11. The consequences of unauthorized disclosure of confidential information may  
27 damage the competitive position of the researcher, cause a loss of market opportunities, or cause  
28 loss of intellectual property rights, all of which will harm StemExpress’s reputation. *Id.*

1 As part of its commitment to the privacy and confidentiality of its donors and clients,  
2 StemExpress requires its employees and independent contractors to sign agreements imposing  
3 confidentiality obligations for a broad range of information and prohibiting them from disclosing  
4 such information publicly. Dyer Decl. ¶ 12, Exs. 5 (§§1-2), 6 (§§1-2). Those agreements also  
5 require them to maintain confidentiality after termination of employment and to return  
6 StemExpress documents and materials upon leaving the company. *Id.*, Exs. 5 (§10), 6(§4). These  
7 confidentiality policies are reiterated in other employment documents, such as StemExpress’s  
8 Code of Conduct and Clinic Procedures and Policies. *Id.* ¶ 13, Exs. 7-8.

9 **B. CMP’s Campaign Against Planned Parenthood**

10 CMP is an anti-abortion group founded by Daleiden.<sup>1</sup> Jones Decl. ¶ 2, Ex.13. CMP’s  
11 ostensible objective (titled the “Human Capital Project”) is to expose “how Planned Parenthood  
12 sells the body parts of aborted babies.” *Id.* ¶ 3, Ex. 14, p. 1. CMP implores the public and  
13 Congress to take action in response to the alleged “black market in aborted baby parts.” *Id.* p. 2.

14 CMP’s website went live on July 6, 2015. Jones Decl. ¶ 3, Ex. 15, p. 12. On July 14 at  
15 8:00 a.m. ET, CMP released a heavily-edited video from “undercover footage” of Daleiden  
16 posing as a representative for a fake biomedical company and questioning a doctor for Planned  
17 Parenthood about the sale of fetal tissue. *Id.* p. 8-11. Daleiden is identified as the “contact” for  
18 the release. *Id.* The video is edited to present a misleading story on multiple fronts. Chiefly, it  
19 inaccurately suggests that StemExpress violated the law and that the Planned Parenthood clinics  
20 where the doctor works sell fetal tissue specimens to StemExpress when the truth is that  
21 StemExpress has never even had a relationship with that doctor or those clinics. Dyer Decl. ¶ 41.

22 CMP’s claims that the July 14 video is the product of “thousands of research hours to  
23 painstakingly gather *hundreds of hours of undercover footage*, dozens of eye-witness testimonies,  
24 and nearly two *hundred pages of primary source documents*.” Jones Decl. ¶ 3, Ex. 14, p. 1  
25 (emphasis added). CMP promises that “[t]his information will continue to be made available to  
26 the public [on its website].” *Id.* (emphasis added).

27 \_\_\_\_\_  
28 <sup>1</sup> It appears that CMP’s corporate address listed on the Secretary of State’s website is a shopping  
mall in Irvine, California. Jones Decl. ¶¶ 4-5, Ex. 17.

1 True to its word, on July 14, CMP published documents on its website that were illegally  
2 obtained from StemExpress. Jones Decl. ¶ 3, Ex. 15, p. 7; Ex. 16, p. 1-4; Dyer Decl. ¶¶ 42-43.  
3 While certain of the StemExpress documents posted by CMP contain non-confidential  
4 information, such as its brochure, several of the documents contain confidential and sensitive  
5 information, such as the names and addresses of the researchers to whom StemExpress supplies  
6 specimens. *Id.* The information contained on these documents suggests they were given to CMP  
7 by Holly O’Donnell, a former employee of StemExpress. *Id.* This inference is reinforced by  
8 public posts that O’Donnell made on her Facebook page on July 15 linking to CMP’s website, the  
9 July 14 video, and Daleiden’s July 15 interview with Bill O’Reilly. Jones Decl. ¶ 6, Exs. 18-20.

10 On July 21 at 8:00 a.m. ET, *which is exactly one week after the July 14 video release*,  
11 CMP released another heavily-edited video of “undercover footage” of Daleiden posing as a  
12 representative for a fake biomedical company and questioning another Planned Parenthood  
13 doctor. Jones Decl. ¶ 3, Ex. 15, p. 1-4. As with the July 14 video, the July 21 video again attacks  
14 Planned Parenthood and accuses it of profiteering on the sale of human fetal tissue as well as  
15 changing medical techniques in response specimen orders. *Id.*

16 Last week, both the United States Department of Justice and the California Department of  
17 Justice announced the initiation of criminal investigations of CMP into the Planned Parenthood  
18 videos. Jones Decl. ¶ 7, Ex. 21; *id.* ¶ 8, Ex. 22. On July 22, CMP released a statement suggesting  
19 that it would continue with its plan to release additional information and that “Planned  
20 Parenthood is trying to use the power of their political cronies to shut down free speech, to silence  
21 the freedom of the press, [and] to persecute David Daleiden.” *Id.* ¶ 3, Ex. 15, p. 1.

22 **C. Defendants’ Illegal Recording Of StemExpress’s Employees**

23 In April 2015, Megan Barr, the Procurement Manager of StemExpress, attended a  
24 women’s health conference in Baltimore, Maryland. Barr Decl. ¶¶ 2-3. During the conference,  
25 Barr was approached by two people who claimed that their names were “Robert Sarkis” and  
26 “Susan Tennenbaum.” *Id.* ¶ 4. These people stated that they work for a company called BioMax  
27 Procurement Services, LLC (“BioMax”), which they claimed was a company that also procured  
28

1 and distributed human fetal tissue.<sup>2</sup> *Id.* “Sarkis” and “Tennenbaum” asked Barr a number of  
2 questions concerning StemExpress’s business and pricing, expressed interest in partnering with  
3 StemExpress, requested a meeting with StemExpress’s chief executive officer (Dyer), and  
4 provided Barr with their email addresses (bob@biomaxps.com; susan@biomaxps.com). *Id.* ¶ 5.

5 On May 19, “Sarkis” emailed Barr stating that he would be “in the Bay Area meeting with  
6 investors” during the upcoming weekend and invited Barr and Dyer to be his “guests for lunch or  
7 dinner” in Sacramento on May 22. Barr Decl. ¶ 8, Ex. 11. The parties agreed to meet at Bistro  
8 33, a restaurant in El Dorado Hills, California at 4:30 p.m. on May 22. *Id.* ¶ 9, Ex. 11. Dyer  
9 chose that restaurant because at the time they were scheduled to meet, the restaurant typically has  
10 open seating in its large dining room with remote tables and is typically only sparsely attended  
11 before the regular evening dinner period. Dyer Decl. ¶ 19.

12 On May 22, Dyer, Barr, and Kevin Cooksy (StemExpress’s Vice President of Corporate  
13 Development and Legal Affairs) attended a dinner meeting with “Sarkis” and “Tennenbaum” at  
14 Bistro 33. Dyer Decl. ¶ 20; Barr Decl. ¶ 10; Cooksy Decl. ¶ 3. Unbeknownst to them at the time,  
15 the man posing as “Bob Sarkis” was actually defendant David Daleiden. Dyer Decl. ¶ 39; Barr  
16 Decl. ¶ 21; Cooksy Decl. ¶ 17. Dyer, Barr, and Cooksy arrived at the restaurant together at  
17 around 4:30 p.m. Dyer Decl. ¶ 20; Barr Decl. ¶ 10; Cooksy Decl. ¶ 3. They were seated in a  
18 remote area of the restaurant situated on a segregated floor that had no other diners. Dyer Decl. ¶  
19 20, Ex. 9; Barr Decl. ¶ 10; Cooksy Decl. ¶ 3.

20 During the meeting, “Sarkis” and “Tennenbaum” asked numerous questions concerning  
21 StemExpress’s fetal tissue procurement business, including how it develops relationships with  
22 fetal tissue clinics, the financial interchange between the clinics and StemExpress and  
23 StemExpress’s revenues, and specific abortion and tissue collection practices used by physicians.  
24 Dyer Decl. ¶ 22; Barr Decl. ¶ 12; Cooksy Decl. ¶ 5. In addition, “Tennenbaum” also asked Dyer  
25 personal questions concerning her family and their opinions about StemExpress’s work procuring  
26 fetal tissue. Dyer Decl. ¶ 23; Barr Decl. ¶ 13.

27 <sup>2</sup> As with CMP, BioMax’s corporate address also appears to be a shopping mall (in Norwalk,  
28 CA). Jones Decl. ¶¶ 9-10, Ex. 23. But unlike CMP, BioMax does not have a registered agent for  
service of process because he resigned on July 7 – one day after CMP’s website went live. *Id.*

1 Throughout the meeting, whenever any restaurant staff approached the table, Dyer would  
2 put her hand up to the stop conversation until they were alone again. Dyer Decl. ¶ 24; Barr Decl.  
3 ¶ 14; Cooksy Decl. ¶ 6. Dyer and Cooksy also asked “Tennenbaum” to lower her voice after she  
4 began speaking loudly. Dyer Decl. ¶ 25; Barr Decl. ¶ 15; Cooksy Decl. ¶ 7. Neither Dyer, Barr,  
5 nor Cooksy believed that anyone at the restaurant was in a position to overhear or record their  
6 conversation. Dyer Decl. ¶ 24; Barr Decl. ¶ 14; Cooksy Decl. ¶ 6. To the contrary, the  
7 conversation was only audible to the persons sitting at their table. *Id.*

8 Dyer, Barr, and Cooksy believed that their conversation during the May 22 meeting with  
9 “Sarkis” and “Tennenbaum” was confidential. Dyer Decl. ¶ 38; Barr Decl. ¶ 20; Cooksy Decl. ¶  
10 16. At no point did any of them know, believe, or consent to the conversation being recorded (by  
11 video or any other means) by either “Sarkis” or “Tennenbaum.” *Id.* And if they had known that  
12 this was the intention, they never would have agreed to meet with them or answer the questions  
13 they asked about StemExpress or their personal lives. *Id.* This belief was made clear when Dyer  
14 stated to “Sarkis” and “Tennenbaum” that the parties would enter into a non-disclosure agreement  
15 that would cover the May 22 meeting. Dyer Decl. ¶ 26.

16 Continuing the ruse after the May 22 meeting, “Sarkis” made repeated requests for  
17 StemExpress’s confidential documents. Cooksy Decl. ¶¶ 10-15, Ex. 12. StemExpress repeatedly  
18 rebuffed “Sarkis’s” requests until BioMax had executed a nondisclosure agreement. *Id.* After  
19 delaying its consent to do so, “Tennenbaum” finally signed the agreement for BioMax. Dyer  
20 Decl. ¶ 35, Ex. 10. Thereafter, on June 25, StemExpress provided “Sarkis” with the requested  
21 confidential documents, and that was the last communication with anyone on behalf of  
22 “BioMax.” Cooksy Decl. ¶¶ 14-15, Ex. 12; Dyer Decl. ¶ 37; Barr Decl. ¶ 19.

23 Based on the series of video releases made by CMP starting on July 14, CMP’s admission  
24 of having “hundreds of hours” of undercover video footage, the fact that the Planned Parenthood  
25 doctors were questioned by the same people that pretended to be representatives of “BioMax”  
26 using the same line of questions during the May 22 meeting with Dyer, Barr, and Cooksy, the fact  
27 that Daleiden was involved in all three meetings posing as a representative for a fake biomedical  
28 company, and looking back in hindsight at the strange behavior exhibited by “Sarkis” and

1 “Tennenbaum” during the May 22 meeting, Dyer, Barr, and Cooksy each believe that Daleiden  
2 and/or the woman posing as “Tennenbaum” recorded their private conversation on May 22. Dyer  
3 Decl. ¶ 39; Barr Decl. ¶ 21; Cooksy Decl. ¶ 17.

4 **III. PLAINTIFFS ARE ENTITLED TO A TEMPORARY RESTRAINING ORDER,  
5 ORDER TO SHOW CAUSE, AND EXPEDITED DISCOVERY ORDER**

6 **A. Legal Standard Applicable to Temporary Restraining Orders**

7 In deciding whether to issue a temporary restraining order, courts must assess “two  
8 interrelated factors”: (1) “the likelihood that the plaintiff will prevail on the merits at trial”; and  
9 (2) “the interim harm that the plaintiff is likely to sustain if the [restraining order] were denied as  
10 compared to the harm that the defendant is likely to suffer if the [order] were issued.” *Church of  
11 Christ in Hollywood v. Superior Court*, 99 Cal. App. 4th 1244, 1251 (2002) (citations omitted).

12 Courts evaluate these two factors on a continuum such that “[t]he more likely it is that  
13 plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the  
14 injunction does not issue.” *Right Site Coalition v. Los Angeles Unified School Dist.*, 160 Cal.  
15 App. 4th 336, 338-339 (2008). Furthermore, “if the party seeking the injunction can make a  
16 sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to  
17 issue the injunction notwithstanding that party’s inability to show that the balance of harms tips in  
18 his favor.” *Common Cause v. Board of Supervisors*, 49 Cal. 3d 432, 441-442 (1989).

19 **B. Plaintiffs Will Prevail On Their Claims For Violation Of The Privacy Act  
20 And Receipt Of Stolen Property/Conversion**

21 **1. *Violation Of The Invasion Of Privacy Act (Pen. Code § 632)***

22 California’s Invasion of Privacy Act criminalizes the recording of a “confidential  
23 communication” without the consent of all parties to the communication. Pen. Code § 632(a).  
24 The Act is designed to effectuate California’s strong public policy interest in protecting the  
25 privacy of its citizens. *Flanagan v. Flanagan*, 27 Cal. 4th 766, 775 (2002). To that end, “courts  
26 are required to liberally construe section 632 to effectuate [this] important public policy.” *Kight v.  
27 CashCall, Inc.*, 231 Cal. App. 4th 112, 130 (2014). The Act specifically authorizes any person  
28 injured by a violation of Section 632 to bring “an action to *enjoin and restrain* any violation.”  
Pen. Code § 637.2(b) (emphasis added).

1 The Act defines a “confidential communication” as “any communication carried on in  
2 circumstances as may reasonably indicate that any party to the communication desires it to be  
3 confined to the parties thereto, but excludes a communication made in a public gathering ... or in  
4 any other circumstance in which the parties to the communication may reasonably expect that the  
5 communication may be overheard or recorded.” Pen. Code § 632(c). The Supreme Court has  
6 interpreted this definition to mean that “a conversation is confidential if a party to that  
7 conversation has an objectively reasonable expectation that the conversation is not being  
8 overheard or recorded.” *Flanagan*, 27 Cal. 4th at 768 (citing *Coulter v. Bank of Am.*, 28 Cal.  
9 App. 4th 923, 929 (1994); *Frio v. Superior Court*, 203 Cal. App. 3d 1480, 1488 (1988)).

10 In determining whether a party had an objectively reasonable expectation that a  
11 communication was not overheard or recorded, courts examine the specific factual circumstances  
12 in which the communication took place, such as the location and setting of the conversation,  
13 whether any of the parties conveyed their expectation that the conversation would not be  
14 overheard or recorded, any affirmative actions taken by the party to maintain the confidentiality of  
15 the communication, the identity of the party recording the communication, and the parties’  
16 awareness of the recording. *See, e.g., Coulter*, 28 Cal. App. 4th at 929; *Lieberman v. KCOP*  
17 *Television, Inc.*, 110 Cal. App. 4th 156, 169 (2003); *Cuviello v. Feld Entm’t, Inc.*, 304 F.R.D.  
18 585, 591 (N.D. Cal. 2015); *Bernstein v. United Collection Bureau, Inc.*, No. 13-cv-01251, 2013  
19 U.S. Dist. LEXIS 158451, at \*9 (S.D. Cal. Nov. 5, 2013). “The test of confidentiality is  
20 objective.” *Coulter*, 28 Cal. App. 4th at 929.

21 Consistent with this approach, when a conversation occurs in a public setting or in the  
22 presence of others, courts still evaluate the totality of the circumstances surrounding the  
23 communication to determine if it qualifies as “confidential” under the Act. *See Lieberman*, 110  
24 Cal. App. 4th at 169 (holding that communication was “confidential” despite presence of other  
25 people); *Turnbull v. ABC*, No. 03-3554, 2004 U.S. Dist. LEXIS 24351, at \*26-34 (C.D. Cal. Aug.  
26 19, 2004) (rejecting argument that communications during casting workshop were not  
27 “confidential” simply because others present); *Cuviello*, 304 F.R.D. at 591 (holding that parties  
28 can have reasonable expectation of privacy for conversation on public sidewalk); *Vera v.*

1 *O’Keefe*, No. 10-cv-1422, 2012 U.S. Dist. LEXIS 112406, \*13-15 (S.D. Cal. Aug. 9, 2012)  
2 (holding that parties to office communication could have a reasonable expectation of privacy).

3 Plaintiffs will prevail in establishing that Defendants violated Section 632 of the Act.  
4 First, the weight of the evidence provides a strong inference that Daleiden and “Tennenbaum”  
5 recorded their conversation with Dyer, Cooksy, and Barr on May 22. Dyer Decl. ¶¶ 21, 39;  
6 Cooksy Decl. ¶¶ 4, 17; Barr Decl. ¶¶ 11, 21; Jones Decl. ¶ 3, Exs. 14-16. Indeed, the entire  
7 meeting fits squarely within the *modus operandi* that Defendants have displayed through the  
8 release of the other “undercover videos” published on CMP’s website. Jones Decl. ¶ 3, Ex. 15.  
9 Second, Dyer, Cooksy, and Barr unquestionably had “an objectively reasonable expectation that  
10 the conversation is not being overheard or recorded.” *Flanagan*, 27 Cal. 4th at 768. At Dyer’s  
11 request, the meeting was held at a time when the restaurant would be virtually empty (4:30 p.m.),  
12 the restaurant was in fact not crowded, they were seated in a remote area of the restaurant where  
13 other diners could not hear their conversation, Dyer would stop the conversation anytime a staff  
14 member approached the table, and both Dyer and Cooksy instructed “Tennenbaum” to lower her  
15 voice when they suspected that she might be overheard. Dyer Decl. ¶¶ 19-26; Cooksy Decl. ¶¶  
16 3-7; Barr Decl. ¶¶ 9-16. Third, Dyer, Cooksy, and Barr all considered the conversation to be  
17 private, they did not believe that they were being overheard or recorded, they did not consent to  
18 being recorded, and they would not have participated in the meeting if they had known that they  
19 were going to be recorded. Dyer Decl. ¶ 38; Cooksy Decl. ¶ 16; Barr Decl. ¶ 20. Therefore,  
20 under *Flanagan*, Defendants’ secret recording of the May 22 conversation constitutes a violation  
21 of the Invasion of Privacy Act.

22 Plaintiffs anticipate that Defendants will attempt to justify their actions under *Wilkins v.*  
23 *Nat’l Broad. Co.*, 71 Cal. App. 4th 1066 (1999). This fails for multiple reasons. First, *Wilkins*  
24 predates and applies a legal standard that was expressly rejected by the Supreme Court in  
25 *Flanagan*. See *Turnbull*, 2004 U.S. Dist. LEXIS 24351, at \*9 & fn. 4 (noting that *Wilkins* test  
26 “was discarded by the California Supreme Court in *Flanagan*”). In *Wilkins*, the court rejected a  
27 claim brought under the Act based on a conversation that was videotaped during a business lunch  
28 meeting at a restaurant because the plaintiff did not “say anything secret,” did not indicate that the

1 information he shared “was private,” or that the listeners “could not pass on this information.” 71  
2 Cal. App. 4th at 1080. By focusing on the content of the plaintiff’s communication, rather than  
3 his expectation that no one else was eavesdropping, the *Wilkins* court applied the wrong legal  
4 standard for determining confidentiality. *Flanagan*, 27 Cal. 4th at 775 (rejecting argument that  
5 the Act prohibits eavesdropping “only if a party seeks to keep the *content* of the conversation  
6 secret”) (emphasis in original). In other words, the Act does not forbid a person from relaying the  
7 content of a private conversation; it forbids eavesdropping on a conversation where the party  
8 expected that it would not be overheard or recorded.<sup>3</sup> *Wilkins* is no longer good law.

9         Second, *Wilkins* involved facts that are materially different than what occurred here.  
10 *Wilkins* involved a lunch meeting that took place at a restaurant where the parties were seated “in  
11 the middle of a crowded [open, outdoor] patio within close proximity to other tables.” 71 Cal.  
12 App. 4th at 1078. As the court noted, “[t]he location was not secluded.” *Id.* Moreover, even  
13 though restaurant staff “frequently came to the table,” the plaintiff “did not acknowledge them,  
14 pause his sales pitch, or even lower his voice.” *Id.* at 1080. Indeed, the conversation continued  
15 “while waiters stood at the table.” *Id.* at 1078. Here, in contrast to *Wilkins*, the May 22 meeting  
16 occurred in a virtually-empty dining room outside of the earshot of other diners, Dyer ensured  
17 that the conversation ceased when employees approached the table, and both Dyer and Cooksy  
18 asked “Tennenbaum” to lower her voice when they believed she might be overheard. Dyer Decl.  
19 ¶¶ 19-26, Ex. 9; Cooksy Decl. ¶¶ 3-7; Barr Decl. ¶¶ 9-16. The circumstances of the May 22  
20 conversation are materially different than what was at issue in *Wilkins*.<sup>4</sup> Defendants violated the  
21 Invasion of Privacy Act.

22  
23 <sup>3</sup> This distinction is the reason why a statutory injunction restricting someone who violates the  
24 eavesdropping law from distributing or publishing an illegal recording does not implicate First  
25 Amendment concerns. Such an injunction does not prohibit “speech” at all, as the violator could  
26 retransmit (verbally or in writing) what was said during the conversation, assuming no other  
27 contractual or confidentiality obligations. But what they cannot do is retransmit an illegal  
28 recording of the conversation.

<sup>4</sup> Even if it were relevant under *Flanagan*, the content of the two conversations are also  
materially different. *Wilkins* involved a canned “sales pitch” that was “freely provided” to  
“hundreds of other potential investors.” 71 Cal. App. 4th at 1078. There were no questions about  
the plaintiff’s personal life, intimate relationships, or private affairs. *Id.* Here, there was no sales  
pitch. Rather, “BioMax” asked questions about StemExpress’s business and Dyer’s personal life.

1                                   **2.      Receipt Of Stolen Property (Pen. Code § 496) & Conversion**

2                   California law criminalizes the knowing receipt of stolen property. Pen. Code § 496(a). It  
3 also authorizes victims to bring a civil action seeking three times the amount of actual damages as  
4 well as reasonable attorneys’ fees and costs. *Id.* § 496(c). For purposes of this section,  
5 “property” includes proprietary business documents and trade secrets. *See People v. Parker*, 217  
6 Cal. App. 2d 422 (1963) (confidential advance telephone directory supplements, listing new  
7 subscribers, are property); *People v. Gopal*, 171 Cal. App. 3d 524 (1985) (trade secrets). A  
8 criminal conviction is not a prerequisite to suit. *See Bell v. Feibush*, 212 Cal. App. 4th 1041,  
9 1046 (2013). In addition, conversion requires proof of “[1] the plaintiff’s ownership or right to  
10 possession of the property at the time of the conversion; [2] the defendant’s conversion by a  
11 wrongful act or disposition of property rights; and [3] damages.” *Shopoff & Cavallo LLP v.*  
12 *Hyon*, 167 Cal. App. 4th 1489, 1507 (2008) (internal quotations omitted).

13                   StemExpress will prevail in establishing that Defendants violated Penal Code § 496 and  
14 are liable for conversion. First, Defendants possess confidential documents belonging to  
15 StemExpress. Jones Decl. ¶ 3, Exs. 15-16; Dyer Decl. ¶¶ 42-43. Certain of these documents (the  
16 January 2013 fax; the March 2013 email; the January 2013 bonus policy) contain confidential and  
17 sensitive information, including the identities, locations, contact information, and specimen  
18 orders of StemExpress’s research clients. Dyer Decl. ¶ 42. Second, the weight of the evidence  
19 provides a strong inference that these documents were acquired from a former employee in  
20 violation of her express confidentiality and nondisclosure obligations. *Id.* ¶¶ 12-13, 42-43, Exs.  
21 5-6. Moreover, Defendants are also in possession of documents that were acquired from  
22 StemExpress by fraudulent means. Cooksy Decl. ¶¶ 9-15. Defendants have no legal right to  
23 possess, let alone publish, these documents. Therefore, they are in violation of Penal Code § 496,  
24 liable for conversion, and subject to injunctive relief.

25                                   **C.      Plaintiffs Face Irreparable Harm Unless Injunctive Relief Is Granted**

26                   The central goal of provisional injunctive relief is to preserve the status quo and avoid  
27 irreparable harm. *See Dodge, Warren & Peters Ins. Services, Inc. v. Riley*, 105 Cal. App. 4th  
28 1414, 1418 (2003). Irreparable harm includes both (a) harms arising from wrongs of a

1 “continuing character” and (b) harms in which monetary compensation would not afford adequate  
2 relief or it would be extremely difficult to ascertain the amount that would afford adequate relief.  
3 *See People ex rel. Gow v. Mitchell Brothers’ Santa Ana Theater*, 118 Cal. App. 3d 863, 870-871  
4 (1981); *Wind v. Herbert*, 186 Cal. App. 2d 276, 285 (1960). Examples of irreparable harm  
5 include the continuous publication of injurious media (*Gow*, 118 Cal. App. 3d at 870-871),  
6 damage to reputation (*Regents of Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511, 520 (9th Cir.  
7 1984)), loss of customer goodwill (*MCA Records, Inc. v. Newton-John*, 90 Cal. App. 3d 18, 23  
8 (1979)), and loss of profits (*id.*).

9 Plaintiffs face irreparable harm from Defendants’ illegal conduct on several levels. First  
10 and foremost, if Defendants’ prior videos are a guide, the release of the illegally-recorded video  
11 of the May 22 confidential conversation will come in the form a misleadingly-edited video  
12 designed to provoke a hostile reaction. It will be distributed broadly, especially considering how  
13 much attention CMP’s campaign has already garnered from the news media, social media,  
14 legislators, and now law enforcement. Jones Decl. ¶ 11, Ex. 24 (summarizing Twitter activity).  
15 Given the permanence of information posted on the internet, that moment can never be undone.  
16 In other words, there is no way to “unring the bell” if Defendants publish the video. The threat of  
17 Defendants committing this permanent act is – *by their own admission* – imminent, and possibly  
18 as soon as Tuesday, July 28, at 8:00 a.m. ET. *Id.* ¶ 3, Exs. 14-16. The fundamental purpose of  
19 the Invasion of Privacy Act is to protect the privacy interests of its citizens by outlawing the  
20 surreptitious recording of private conversations. The Act expressly grants victims the right to  
21 obtain injunctive relief to minimize and remedy violations of the statute. Pen. Code. § 637.2(c).  
22 Defendants’ release of the illegally-recorded video supplies the irreparable harm necessary to  
23 justify a temporary restraining order prohibiting Defendants from publishing the video.

24 Second, the Planned Parenthood video that inaccurately portrays the relationship with  
25 StemExpress and Defendants’ publication of StemExpress’ confidential documents has already  
26 caused harm. First, the publication of StemExpress’s confidential documents that identify the  
27 names and orders of its medical research clients could jeopardize its contractual relationships with  
28 those clients. Dyer Decl. ¶ 48. Second, at least one procurement facility has suspended its

1 collection activities out of caution and fear of CMP’s association with violent activist groups and  
2 harassment tactics – all of which CMP is proud to admit on its website and to its followers. *Id.*  
3 Third, one of StemExpress’s clients has also suspended work with StemExpress due to the  
4 national attention CMP has created with its malicious and harmful activities. *Id.* Fourth,  
5 StemExpress has lost blood and bone marrow donors that are crucial to its business. *Id.* Fifth,  
6 StemExpress has been the subject of several congressional inquiries concerning its procurement  
7 practices related to fetal tissue. *Id.* The congressional hearings are specifically related to  
8 misrepresented, false, and intentionally misleading videos that CMP has released. *Id.* These  
9 problems will only be exacerbated if Defendants proceed as planned. *Id.*

10 Third, StemExpress’s employees also face a genuine safety risk if the video is released.  
11 Dyer Decl. ¶¶ 46-47, 51. Indeed, even CMP’s limited exposure of StemExpress’s affiliation with  
12 Planned Parenthood over the past few weeks has led to multiple acts of harassment and several  
13 threats of death and other physical violence to Dyer, which has prompted its own criminal  
14 investigation and caused her to take personal security measures. *Id.* ¶ 47. And just this past  
15 Saturday night, Dyer’s security chased away a suspicious character photographing her home and  
16 found evidence of another stranger on her property. *Id.* The additional attention that a  
17 misleadingly-edited video will draw to StemExpress and its employees will undoubtedly amplify  
18 the risk that such harassment and threats will increase in both volume and intensity. *Id.* ¶ 51. Of  
19 particular concern is the fact that the video exposes the faces of the persons who participated in  
20 the meeting, making them recognizable in public and easier targets for harassment or even  
21 violence. *Id.* The legitimate threat posed by this increased safety risk alone constitutes sufficient  
22 irreparable harm to issue the requested injunctive relief.

23 Any or all of these irreparable injuries will occur unless Defendants are temporarily  
24 restrained from releasing the video and publishing StemExpress’s confidential documents.

25 **D. The Balance of Harms Weighs Significantly In Plaintiffs’ Favor**

26 As discussed above, Plaintiffs face serious, imminent, and irreparable harm. In contrast to  
27 the grave injury facing Plaintiffs, Defendants will suffer little, if any, harm if the requested relief  
28 is granted. An injunction will not have any impact on any of the Defendants. BioMax is a fake

1 company, and Daleiden and CMP have committed these illegal acts as a “citizen journalist.”  
2 Jones Decl. ¶ 3, Ex. 14, p. 1. Although Defendants will undoubtedly claim that the injunction  
3 represents a “suppression of free speech” (*see id.*, Ex. 15, p. 1), their First Amendment rights are  
4 not impinged here. Plaintiffs are free to engage in whatever lawful public speech they want  
5 concerning the topic of abortion or the procurement of fetal tissue for research purposes. But the  
6 First Amendment does not permit Defendants to make illegal recordings and take others’  
7 property. The balance of harms weighs significantly in Plaintiffs’ favor.

8 **E. The Court Should Allow Plaintiffs To Conduct Expedited Discovery**

9 For good cause, courts may allow parties to propound discovery before the expiration of  
10 the statutory “holds” triggered by the filing of an action and to shorten the default notice periods.  
11 *See* Civ. Proc. Code § 2025.201(b) (deposition notices before expiration of discovery hold), §  
12 2031.020(d) (document requests before expiration of discovery hold), § 2025.201(b) (shorten  
13 time to schedule deposition), § 2031.030(b)(2) (shorten time to respond to document request).

14 Regardless of whether the Court grants the requested temporary restraining order, the  
15 Court should issue an order permitting Plaintiffs to conduct limited discovery on an expedited  
16 basis for the purpose of identifying the following limited subjects: (i) all recordings of the May  
17 22 meeting; (ii) the extent to which any such recording has been disseminated, if at all; (iii) all  
18 StemExpress documents in Defendants’ possession; (iv) the manner in which Defendants came to  
19 possess such documents; and (v) the extent to which these documents have been disseminated, if  
20 at all. As demonstrated in this application, good cause exists for this expedited discovery.

21 **IV. CONCLUSION**

22 For the foregoing reasons, Plaintiffs respectfully request that the Court grant this *ex parte*  
23 application and enter the requested temporary restraining order, order to show cause re:  
24 preliminary injunction, and expedited discovery order.

25 Dated: July 27, 2015

**McDERMOTT WILL & EMERY LLP**

26  
27 By: \_\_\_\_\_  
CHARLES E. WEIR  
Attorneys for Plaintiffs