ALICE P. MEAD (State Bar No. 98423)
CALIFORNIA MEDICAL ASSOCIATION
221 Main Street
P.O. Box 7690
San Francisco, California 94120-7690
Telephone: (415) 541-0900

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.

AND RELATED ACTIONS.

No. C98-0085 CRB
C98-0086 CRB
C98-0087 CRB
C98-0088 CRB
C98-0245 CRB

***AMICUS CURIAE* CALIFORNIA MEDICAL ASSOCIATION'S REQUEST FOR JUDICIAL NOTICE**

Date: October 5, 1998
Time: 2:30 p.m.
Courtroom: 8
Hon. Charles R. Breyer

Amicus curiae California Medical Association hereby requests the Court to take judicial notice pursuant to Federal Rule of Evidence 201 of the following pleadings filed in Conant v. McCaffrey, Case No. C 97 0139 FMS (N.D. Cal.), true and correct copies of which are attached hereto as Exhibits A-F.

A. Protective Order, filed August 25, 1998

B. Plaintiffs' Letter Brief Re: Protective Order, filed August 7, 1998

C. Defendants' Letter Brief Re: Protective Order, filed August 7, 1998

D. Plaintiffs' Reply Letter Brief Re: Protective Order, filed August 14, 1998

E. Defendants' Reply Letter Brief Re: Protective Order, filed August 14, 1998

F. Declaration of Judith Cushner in Opposition to Defendants' Motion to Compel, filed November 21, 1997

DATE: October 5, 1998

Respectfully submitted,

California Medical Association
ALICE P. MEAD

By: Alice P. Mead
Alice P. Mead
Attorney for *Amicus Curiae*
California Medical Association

LOWELL FINLEY (State Bar #104414)
JONATHAN WEISSGLASS (State Bar #185008)
Altshuler, Berzon, Nussbaum, Berzon & Rubin
177 Post Street, Suite 300
San Francisco, California 94108
Telephone: (415) 421-7151

GRAHAM A. BOYD (State Bar #167727)
The Lindesmith Center
160 Foster Street
New Haven, Connecticut 06511
Telephone: (203) 787-4499

DANIEL N. ABRAHAMSON (State Bar #158668)
The Lindesmith Center
1095 Market Street, Suite 503
San Francisco, California 94103
Telephone: (415) 554-1900

ANN BRICK (State Bar #65296)
American Civil Liberties Union
Foundation of Northern California, Inc.
1663 Mission Street, Suite 460
San Francisco, California 94103
Telephone: (415) 621-2493

Attorneys for Plaintiffs

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

DR. MARCUS CONANT, et al. Plaintiffs, v. BARRY R. McCAFFREY, et al. Defendants.	CASE NO. C 97-0139 FMS ~~PLAINTIFFS' [PROPOSED]~~ **PROTECTIVE ORDER**

For good cause, the Court hereby orders that a protective order be entered in this action pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, as follows:

1. This Protective Order shall govern all documents, writings and testimony in this action designated as "COVERED BY PROTECTIVE ORDER" together with all information contained therein or derived therefrom, and all copies, portions, excerpts, abstracts or summaries thereof (hereinafter collectively referred to as "Information") arising from individual patient medical care (including but not limited to patient medical records or charts; physician status reports; notes made by physicians, nurses, physician assistants or other medical staff; letters or reports from physicians, nurses, physician assistants or other medical staff; reports of physical exams; and reports of medical tests).

2. Information "COVERED BY PROTECTIVE ORDER" shall be used solely for conduct of this litigation, and not for any other purpose. Information "COVERED BY PROTECTIVE ORDER" shall not be disclosed to anyone except as provided in this Protective Order. In particular, Information "COVERED BY PROTECTIVE ORDER" shall not be disclosed to any employee or agent of the Drug Enforcement Administration, the Federal Bureau of Investigation, or any federal, state or local law enforcement agency unless specifically provided for in this Protective Order.

3. Notwithstanding paragraph 2, Information "COVERED BY PROTECTIVE ORDER" may be disclosed to the following persons who are participating in the conduct of this action on behalf of the defendants after they have signed and sent to plaintiffs' counsel the form attached hereto stating their agreement to be bound and abide by the provisions of this Protective Order:

Department of Health and Human Services
Richard Riseberg, Associate General Counsel for Public Health
Karen Wagner, Chief, Substance Abuse and Mental Health Administration

ATTORNEYS AT LAW
177 POST STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94108
(415) 433-6144

Susan Sherman, Senior Attorney, National Institutes of Health Branch, Office of the General Counsel
Jino Matthews, Staff Assistant

Office of National Drug Control Policy
Barry R. McCaffrey, Director
Janet Crist, Chief of Staff
Charles Blanchard, Director of Office of Legal Counsel
Edward Jurith, General Counsel
Timothy Cooney, Associate Counsel
Linda Wittenhagen, Office Manager

Drug Enforcement Agency
Mary Kate Whalen, Acting Associate Chief Counsel, Office of the Chief Counsel Diversion and Regulatory Litigation Section
Robin M. Lively, Paralegal Specialist, Office of the Chief Counsel, Discovery Processing Staff

Office of the Chief Counsel, Civil Litigation Section
Bettie E. Goldman, Acting Associate Chief Counsel
Ellen Harrison, Senior Attorney
Desiree Milstead, Legal Technician

Office of the Chief Counsel, Diversion and Regulatory Policy Section
Elizabeth K. Murphy, Associate Chief Counsel
Daniel Dormont, Senior Attorney

United States Department of Justice
Gary G. Grindler, Counsel to the Attorney General, Office of the Attorney General
Jonathan D. Schwartz, Associate Deputy Attorney General, Office of the Deputy Attorney General
Helena Muse, Staff Assistant, Office of the Deputy Attorney General
Fay Kaulfuss, Staff Assistant, Office of the Deputy Attorney General

Civil Division, Federal Programs Branch
David J. Anderson, Director
Arthur R. Goldberg, Assistant Director
Jeffrey S. Markowitz, Trial Attorney
Gail F. Levine, Trial Attorney
Barbara Gilchrist, Staff Assistant

Criminal Division
Mary Lee Warren, Deputy Assistant Attorney General
Theresa M.B. Van Vliet, Chief, Narcotic and Dangerous Drug Section
Margaret A. Grove, Deputy Chief for Policy, Narcotic and Dangerous Drug Section, Policy Unit

ATTORNEYS AT LAW
177 POST STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94108
(415) 433-1144

James Alsup, Senior Trial Attorney, Narcotic and Dangerous Drug Section, Policy Unit

Wayne Raabe, Trial Attorney, Narcotic and Dangerous Drug Section, Policy Unit

Information "COVERED BY PROTECTIVE ORDER" may also be disclosed, to the extent reasonably necessary in conducting this litigation, to the secretaries, paralegal assistants, and legal assistants of the above-named persons after they have signed and sent to plaintiffs' counsel the form attached hereto stating their agreement to be bound and abide by the provisions of this Protective Order; and to Court officials involved in this litigation (including court reporters, persons operating video recording equipment at depositions, and any special master appointed by the Court). Provided that the individual to whom disclosure is made has signed and sent to plaintiffs' counsel the form attached hereto stating his or her agreement to be bound and abide by the provisions of the Protective Order, such Information may also be disclosed to persons noticed for depositions or designated as trial or deposition witnesses to the extent reasonably necessary in preparing to testify; to such other persons agreed to by plaintiffs' counsel in writing in advance of disclosure (such agreement shall not be unreasonably withheld); and to such other persons designated by the Court in the interest of justice.

4. Subject to the Federal Rules of Evidence, defendants may offer Information "COVERED BY PROTECTIVE ORDER" in evidence at trial or any Court hearing in this matter, provided that defendants give twenty-one days' advance notice to counsel for plaintiffs. Any party may move the Court for an order that the evidence be received in camera, under seal, or under other conditions to prevent unnecessary disclosure. The Court will then determine whether the proffered evidence should continue to be treated as covered by this Protective Order and, if so, what protection, if any, may be afforded to such information.

5. Regarding deposition testimony, plaintiffs may designate pages of the transcript (and exhibits attached thereto) as "COVERED BY PROTECTIVE ORDER" within thirty (30) days

ATTORNEYS AT LAW
177 POST STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94108
(415) 433-6144

of receipt of a deposition transcript, and until the end of thirty (30) days following receipt of the transcript, the entire deposition shall be treated as "COVERED BY PROTECTIVE ORDER."

6. In the event that defendants and/or their counsel or other individuals who have obtained Information "COVERED BY PROTECTIVE ORDER" receive a subpoena, other process or order in another action, or a request under the Freedom of Information Act to produce or disclose Information "COVERED BY PROTECTIVE ORDER," the recipient shall promptly provide plaintiffs' counsel with written notice thereof (including a copy of the subpoena, other process or order, or Freedom of Information Act request) to enable plaintiffs to take whatever action they deem appropriate, including seeking a protective order in the other action or filing suit to prevent disclosure.

7. Entering into, agreeing to and/or complying with the terms of this Protective Order shall not:

(a) affect in any way the right of any party pursuant to the Federal Rules of Civil Procedure and the Court's March 16, 1998 Order to object to the production of documents or information it considers not subject to discovery and/or privileged against disclosure or to seek from the Court a determination of whether particular designated material should be produced, or to raise any arguments in opposition including waiver; or

(b) affect in any way the right of any party to apply to the Court to rescind or modify the terms of this Protective Order, or to move the Court for a further Protective Order.

8. The inadvertent or unintentional disclosure to defendants or their counsel by plaintiffs or their counsel of Information "COVERED BY PROTECTIVE ORDER," regardless of whether the Information was so designated at the time of disclosure, shall not be deemed a

ATTORNEYS AT LAW
177 POST STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94108
(415) 433-1144

waiver in whole or in part of plaintiffs' claim that such Information is covered by this Protective Order. In the event of inadvertent or unintentional disclosure of Information "COVERED BY PROTECTIVE ORDER," plaintiffs shall give prompt notification to defendants after learning of an inadvertent or unintentional disclosure, and shall provide defendants with new copies of the inadvertently or unintentionally produced documents, re-marked as "COVERED BY PROTECTIVE ORDER." The documents inadvertently or unintentionally produced without such designation shall then be returned promptly to plaintiffs.

9. In the event that counsel for defendants believe in good faith that information designated "COVERED BY PROTECTIVE ORDER" by plaintiffs does not merit such designation pursuant to the terms of this Protective Order and the Court's March 16, 1998 Order, defendants' counsel shall provide plaintiffs' counsel with written notice specifying the basis for such belief. Counsel for plaintiffs shall, not more than ten (10) days after receipt of such notice, respond in writing and either agree to withdraw the designation or specify the basis for the designation. Thereafter, counsel for the respective parties may meet and confer, but if agreement cannot be reached the information shall be treated as protected from disclosure pursuant to the terms of this Protective Order unless defendants bring the matter before the Court and the Court orders that the information be treated as not subject to this Protective Order. The provisions of this Protective Order are not intended to, nor do they, affect or alter any burden(s) of proof imposed by law regarding the designation of documents or other information.

///

///

///

///

ATTORNEYS AT LAW
177 POST STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94108
(415) 433-1144

10. Upon final judgment including exhaustion of all appeals, one complete set of the materials covered by this Protective Order shall be returned to plaintiffs' counsel. Any other copies shall be destroyed or returned to plaintiffs' counsel.

IT IS SO ORDERED.

Dated: Aug. 25, 1998

United States District Judge

ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
ATTORNEYS AT LAW
177 POST STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94108
(415) 421-7151

APPENDIX TO PROTECTIVE ORDER

AGREEMENT TO ABIDE BY TERMS OF PROTECTIVE ORDER

I have received and read a copy of the foregoing Protective Order. I hereby agree to be bound and abide by the terms of the Protective Order and will not disclose any Information designated as "COVERED BY PROTECTIVE ORDER" as defined in the Protective Order entered into between the parties to any other person, except under the terms specified in the Protective Order.

Dated: _____, 199__.

_____
[NAME]

E:\PROP215\DISCOVER\PROTORD.DF4

ATTORNEYS AT LAW
177 POST STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94108
(415) 433-1144

ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
ATTORNEYS AT LAW
177 POST STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94108
(415) 421-7151
FAX (415) 362-8064

FRED H ALTSHULER
MARSHA S BERZON
STEPHEN P BERZON
PETER D NUSSBAUM
MICHAEL RUBIN
LOWELL FINLEY
JEFFREY B DEMAIN
INDIRA TALWANI
DANIEL T PURTELL
SCOTT A KRONLAND
MARY LYNNE WERLWAS
JONATHAN WEISSGLASS
CHRISTOPHER H PEDERSON

MICHAEL W GRAF
FELLOW

August 7, 1998

VIA MESSENGER

Honorable Fern M. Smith
United States District Court Judge
for the Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102

RE: Conant v. McCaffrey, Case No. C 97-0139 FMS;
Plaintiffs' Letter Brief Re: Protective Order

Dear Judge Smith:

Pursuant to the Court's July 30, 1998 Order, plaintiffs submit this letter brief in support of their request that the Court enter a protective order prohibiting defendants from using documents produced by plaintiffs and testimony given by plaintiffs for purposes other than this case.

I. INTRODUCTION

By Order of March 16, 1998, the Court required plaintiffs to produce to defendants certain medical records containing highly confidential, potentially incriminating communications between (i) plaintiff physicians and their patients and (ii) plaintiff patients and their physicians, regarding medical use of marijuana. Plaintiffs argued strenuously that disclosure of these records exposed physicians and patients (including non-parties) to potential embarassment, harassment, and even prosecution. The Court rejected plaintiffs' arguments concerning the privacy and constitutional rights of plaintiffs and non-parties after defendants pledged to enter into a protective order, described as follows:

> As a practical matter, the information will be produced to a handful of government attorneys. . . . If a protective order is in effect, that information will not be disseminated beyond that group.

Reply in Support of Defendants' Objections to Magistrate Judge's Order Re: Discovery Motions, filed February 13, 1998, at 9 (emphasis added).

This statement was a baseline for plaintiffs' understanding of how any records ordered produced would be treated. The Court, too, specifically relied on "the government's offer to place these records under a protective order" in rejecting plaintiffs' privacy concerns (March 16,

1998 Order, at 11), and presumably as a general understanding of what was at stake. Indeed, defendants proposed a protective order in the first instance, yet in their representations to the Court and discussions with plaintiffs, defendants never suggested that their envisioned protective order would allow disclosure of potentially incriminating medical records to drug prosecutors.

Unfortunately, defendants now maintain that they must breach their earlier commitment that they "will not" disclose the information. During negotiations over the protective order, defendants' counsel revealed for the first time that they will disseminate to drug prosecutors medical records that might constitute evidence of a crime. Although defendants' counsel stated a perceived requirement to disseminate the records, they admitted that they did not know the precise policy. Plaintiffs' counsel requested disclosure of the content of this newly revealed rule, but as of yet defendants' counsel has not cited a particular statute, regulation, or policy, while still insisting on their need to distribute potentially incriminating medical records (i.e., the information most sensitive to patients and physicians) to law enforcement agencies. Plaintiffs are thus forced to argue against a vague, undisclosed policy -- one that does not appear to ever have been invoked in any reported decision -- that threatens the use of civil discovery as a tool for criminal investigation. Rather than honoring its commitment to enter into a sufficient protective order, the government is returning to the intimidating tactics that led to the filing of this lawsuit in the first place.

Plaintiffs and defendants have agreed to a protective order regarding medical records and possible deposition testimony, subject to the Court's approval, with the critical exception of defendants' insistence on being permitted to turn over documents to law enforcement agencies.[1] The proposed language from each party regarding dissemination of information is contained in paragraph 2 of their respective proposed protective orders. Plaintiffs demonstrate below that entry of defendants' non-protective order would be contrary to the purpose of Rule 26(c). Accordingly, plaintiffs respectfully request that the Court enter plaintiffs' proposed protective order.

II. THE COURT SHOULD NOT PERMIT DEFENDANTS TO USE CONFIDENTIAL INFORMATION PROVIDED BY PLAINTIFFS FOR PURPOSES OTHER THAN THIS CASE.

A. The Government Improperly Seeks To Use Discovery For Purposes Unrelated To The Litigation.

It is a basic principle that "[a] party generally cannot use discovery for purposes unrelated to the lawsuit," and that a "common 'unrelated' purpose is to gain information for use in a different action against the same party." 6 Moore's Federal Practice, § 26.101[1][b], at 26-241 (1998). The Supreme Court has made clear, therefore, that "[l]iberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984) (emphasis added).

---

[1] There can be no question that, because the medical records and possible testimony involve private medical information and conduct that is potentially criminally sanctionable, the requisite good cause for entering a protective order under Rule 26(c) is present.

Hence, a protective order concerning the confidential and potentially incriminatory medical information at issue in this case must prevent the government from using discovery in this case for the purpose of a different action, i.e., criminal prosecutions of physicians or patients. Every sample protective order concerning confidential information that plaintiffs have found in treatises and form books prohibits information from being used for purposes other than the litigation at hand. E.g., 6 Bender's Federal Practice Forms, Form No. 26:125 ("Stipulated Protective Order--General Form"), at 26-148 (1997) (information "shall be treated as confidential and used only for the purposes of this litigation"); 8 Federal Forms, Lawyers Edition (1994), at 260 ("Documents stamped 'confidential' may be given, communicated, or shown only to those persons to whom it is necessary that the material be shown for purposes of this litigation."); William Schwarzer, et al., Federal Civil Procedure Before Trial, Form 11:A:2, at 11-180 ("Material designated as confidential . . . shall be used only for the purpose of the prosecution, defense, or settlement of this action, and for no other purpose.").

Against this backdrop of normal practice and Supreme Court precedent, defendants seek to renege on their offer to agree to the standard form of a protective order proposed by plaintiffs. Defendants instead insist that where a medical record "constitutes evidence of a criminal violation, nothing . . . shall prevent counsel for defendants from disclosing such [record] to the agency or agencies responsible for enforcing the relevant criminal statute(s)." In other words, the government improperly seeks to be permitted to use information obtained through civil discovery for purposes unrelated to this litigation. This request is all the more objectionable given the history and context of this litigation. For defendants to withdraw their offer and insist on their non-protective order, raises the specter of selective enforcement of a "policy" that was apparently unknown to the government's attorneys until very recently.

B. Plaintiffs Face Severe Harm If The Court Does Not Enter Their Proposed Protective Order.

The government's proposal presents potentially dire consequences. Plaintiffs will be put at risk of criminal investigation and prosecution, and even more disturbing, non-party physicians who happen to provide honest medical advice to plaintiff patients, become the potential targets of investigation and prosecution. These non-party physicians are at risk because defendants may hand over to prosecutors their chart notations regarding marijuana. Given the government's actions and its understanding of the law, it is reasonable to believe that prosecutors would use civil discovery in this case to punish physicians whom the government currently has no reason to suspect of any criminal wrongdoing.

First, defendants have taken the position that mere recommendations of medical marijuana are criminal violations. Although defendants are currently enjoined from prosecuting solely on the basis of such conduct, if they ultimately prevail in this case, records of medical marijuana recommendations would, in the government's view, be evidence of a crime to be turned over to prosecutors. Second, even within the terms of the preliminary injunction, which requires the government to show criminal intent, nothing prevents defendants from using records obtained through discovery in this case as evidence to establish intent. Further, federal investigators could use information obtained through discovery to support subpoenas, search warrants, or other investigative measures against physicians or patients (including non-parties). One can scarcely imagine a greater abuse of civil discovery than such trawling for incriminating information about individuals who are not currently even suspected of a crime.

Plaintiffs seek to vindicate their First Amendment rights to discuss the risks and benefits of medical marijuana. In bringing this lawsuit, plaintiffs understood that they would open themselves up to attack and scrutiny. However, they did not bargain that in order to protect their rights, they would be forced by liberal civil discovery rules to turn over to defendants' counsel potentially incriminating documents that would then be turned over to criminal prosecutors. The government should have no interest in using civil litigation brought to vindicate constitutional rights as an investigative tool for possible criminal charges. Indeed, plaintiffs are not aware of any civil rights suit against the government in which the government has been permitted to retaliate by turning that lawsuit into an opportunity to build a criminal case against the plaintiffs.

Finally, plaintiffs stress that by seeking a normal protective order for confidential information plaintiffs do not seek to relitigate the Court's ruling that medical records must be produced because plaintiffs' First Amendment, privacy, and Fifth Amendment rights do not overcome the liberal rules of civil discovery. Rather, plaintiffs seek to limit dissemination of the medical records (and similar testimony that may be given in the future) that the Court ordered produced after defendants promised to enter into a protective order, which can only be understood to mean an adequate protective order. Plaintiffs are uneasy about turning over confidential and potentially incriminating records to the Department of Justice (including its Criminal Division) no matter how they are used. Having lost that argument, plaintiffs now seek only to have their disclosures protected under generally applicable discovery principles. Put simply: the Court should not allow discovery to proceed against plaintiffs until the original understanding of how confidential information would be treated is enforced by protective order.

C. The Court Has Broad Discretion To Fashion A Protective Order To Prevent Abuse Of Discovery Procedures.

Both the Supreme Court and the Ninth Circuit have concluded that trial courts have the authority to issue protective orders to safeguard parties from abuse. See Seattle Times, 467 U.S. at 35-36 ("The prevention of the abuse that can attend the coerced production of information . . . is sufficient justification for the authorization of protective orders."); United States v. CBS, 666 F.2d 364, 368-69 (9th Cir. 1982) ("Rule 26(c), setting forth grounds for protective orders, was enacted as a safeguard for the protection of parties and witnesses in view of the broad discovery rights authorized in Rule 26(b)."). The use of highly sensitive information for purposes other than the litigation is a perfect example of abuse of discovery. See Seattle Times, 467 U.S. at 34-35 & n.21. Absent a protection from such abuse, potential litigants may well decide not to pursue a lawsuit, thereby frustrating an important right. See id. at 36 n.22.

The discretion district courts have in fashioning protective orders is extremely broad. Rule 26(c) provides that the Court "may make any order which justice requires." The Rule "confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." Seattle Times, 467 U.S. at 36; see also id. ("The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders."); CBS, 666 F.2d at 369 (noting "extensive control that district courts have over the discovery process"). Thus, in Seattle Times, the Supreme Court affirmed an order prohibiting dissemination of certain discovery information except as necessary for the case.[2]

---

[2] Although Seattle Times involved a state rule of civil procedure governing protective orders, the rule is "virtually identical" to F.R.C.P. 26(c). 469 U.S. at 29 n.14.

D. The Court's Discretion Includes Preventing The Disclosure Of Civil Discovery To Prosecutors.

The Court should use its broad authority under Rule 26(c) to prevent defendants from abusing the discovery process. In civil cases between non-governmental parties where discovery involves information that may be used in a criminal prosecution, courts have forbidden disclosure to law enforcement agencies to preserve a potential criminal defendant's "right to have any criminal charges prosecuted pursuant to the Federal Rules of Criminal Procedure, without the broad scope of discovery allowed under the Federal Rules of Civil Procedure." Fidelity Nat'l Title v. National Title Resources, 980 F. Supp. 1022, 1025 (D. Minn. 1997) (entering protective order forbidding disclosure of matters pertaining to criminal investigation; citing additional cases granting such protective orders). Plaintiffs simply request that the Court enter a similar order in this case. Where, as here, plaintiffs have brought a civil lawsuit to challenge the constitutionality of threatened criminal prosecutions, the reasons for entering such an order are heightened.

Notably, the government's position is in some tension with its position in cases where a criminal defendant attempts to use civil discovery to support a defense in a criminal matter. See, e.g., Degen v. U.S., 517 U.S. 820, 826 (1996) ("The Government contends Degen might use the rules of civil discovery in the forfeiture suit to gain an improper advantage in the criminal matter."). But, in such a situation, "the District Court has its usual authority to manage discovery in a civil suit, including the power to enter protective orders limiting discovery." Id. What is appropriate in a protective order cannot depend on whose ox is gored. Defendants cannot contend that it is appropriate to limit discovery in civil forfeiture actions it brings against a defendant in order not to jeopardize a criminal prosecution and at the same time argue that the government is allowed to gather material for potential criminal charges through a civil action.

III. CONCLUSION

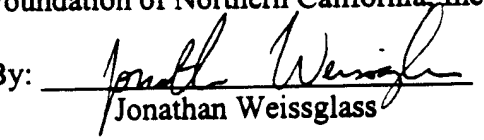
For the reasons stated above, plaintiffs respectfully request that the Court enter plaintiffs' proposed protective order.

Respectfully submitted,

LOWELL FINLEY
JONATHAN WEISSGLASS
Altshuler, Berzon, Nussbaum, Berzon, & Rubin

GRAHAM A. BOYD
DANIEL N. ABRAHAMSON
The Lindesmith Center

ANN BRICK
American Civil Liberties Union
Foundation of Northern California, Inc.

By: 
Jonathan Weissglass

Attorneys for Plaintiffs

U.S. Department of Justice
Civil Division

Washington, D.C. 20530

August 7, 1998

Via Hand Delivery
Hon. Fern M. Smith
United States District Judge
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102-3487

Re: Conant v McCaffrey, No. C 97-0139 FMS (N.D. Cal.)

Pursuant to the Court's July 29, 1998 Order Setting Briefing Schedule for Protective Order, defendants submit the following letter brief.

INTRODUCTION

On March 16, 1998, this Court entered an Order requiring plaintiffs to produce certain portions of medical records to defendants. March 16, 1998 Order Affirming in Part and Reversing in Part Magistrate Judge's Order Denying Defendants' Motion to Compel Discovery ("Discovery Order"). Subsequently, the parties began negotiating a protective order covering those records. After several productive meet and confer sessions, the parties were able to agree on almost all of the terms of a comprehensive protective order. The sole remaining area of disagreement concerns whether the protective order can include a provision requiring defendants to withhold evidence of a crime from the appropriate law enforcement authorities.

Specifically, defendants believe that public policy and the public interest prohibit federal employees from concealing evidence of a crime they received in the course of their official duties. This Court recognized that defendants have a responsibility to enforce the criminal laws against those who, among other things, aid or abet the unlawful possession of marijuana. See Conant v. McCaffrey, 172 F.R.D. 681, 700-701 (N.D. Cal. 1997). Therefore, defendants assert that the protective order should include the following:

> Information "COVERED BY PROTECTIVE ORDER" shall be used solely for the conduct of this litigation, and not for any other purpose. Information "COVERED BY PROTECTIVE ORDER" shall not be disclosed to anyone except as provided in this Protective Order. However, where Information "COVERED BY PROTECTIVE ORDER" constitutes evidence of a criminal violation, nothing in this Protective Order shall prevent counsel for defendants from disclosing such Information to the agency or agencies responsible for enforcing the relevant criminal statute(s). Before any such disclosure is made, the person or persons to whom the disclosure is made must sign a copy of the

form attached hereto, thereby agreeing to abide by the terms of this Protective Order and agreeing to use the Information solely for law enforcement purposes.

Defendants' Proposed Protective Order ("Defendants' Proposed Order"), Attach. A, ¶ 2. Plaintiffs, however, believe defendants should conceal any criminal evidence they receive. Thus, plaintiffs seek to replace the final two sentences of the above provision with the following:

> In particular, Information "COVERED BY PROTECTIVE ORDER" shall not be disclosed to any employee or agent of the Drug Enforcement Administration, the Federal Bureau of Investigation, or any federal, state or local law enforcement agency unless specifically provided for in this Protective Order.

Plaintiffs' Proposed Protective Order ("Plaintiffs' Proposed Order") ¶ 2. For the reasons discussed below, this Court should enter Defendants' Proposed Order.[1]

ARGUMENT

Several important public interests weigh heavily against ordering federal employees to conceal evidence of a crime. Those interests outweigh plaintiffs' interest in concealing such evidence which, under the Discovery Order, is minimal at best. Accordingly, the Court should enter Defendants' Proposed Order.

I. Ordering Federal Employees to Conceal Evidence of a Crime Violates the Public Interest.

Several important public interests counsel against Plaintiffs' Proposed Order. First and foremost, such an order directly violates the strong public policy against concealing evidence of a crime. As the Supreme Court warned:

> it is obvious that agreements to conceal information relevant to the commission of a crime have very little to recommend them from the standpoint of public policy. Historically, the common law recognized a duty to raise the "hue and cry" and report felonies to the authorities. . . . [C]oncealment of crime and agreements to do so are not looked upon with favor.

Branzburg v. Hayes, 408 U.S. 665, 696-97 (1972) (internal citations and footnotes omitted). See also Kansas City Operating Corp. v. Durwood, 278 F.2d 354, 361 (8th Cir. 1960) (it is a

---

[1] The parties are each attaching their proposed protective order to their opening brief. Defendants respectfully request that the Court expedite resolution of this dispute by entering one of the two orders at the close of briefing and, if necessary, any hearing.

"'principle of universal application that 'an agreement to suppress evidence, compound an offense, or conceal a crime which has been committed is void because it is contrary to public policy'") (quoting Fidelity Deposit Comp. of Maryland v. Grand National Bank of St. Louis, 69 F.2d 177, 180 (8th Cir. 1934) (and numerous cases cited therein)). See also 18 U.S.C.A. § 4 (West Supp. 1998) (making it a crime to conceal knowledge of the actual commission of a felony and failing to convey that knowledge to a court or other official); Lancey v. United States, 356 F.2d 407, 411 (9th Cir. 1966) (interpreting 18 U.S.C. § 4).

Ordering federal employees to conceal evidence of a crime also would violate the related "paramount public interest, which courts must protect, in the free flow of information to law enforcement officials." United States v. Chimurenga, 609 F. Supp. 1066, 1068 (S.D.N.Y. 1985) (citing United States v. Tucker, 380 F.2d 206, 213 (2d Cir. 1967)). See also Roviaro v. United States, 353 U.S. 53, 59 (1957) (discussing the "obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials"). The Supreme Court found this interest strong enough to justify recognizing the law enforcement privilege, despite the Court's reluctance to recognize testimonial privileges. See id.; Branzburg, 408 U.S. at 690 n.29.

Plaintiffs' Proposed Order also would violate the "public's strong interest in the enforcement of the criminal laws." McNally v. Pulitzer Pub. Co., 532 F.2d 69, 78 n.13 (8th Cir. 1976); see also Roviaro, 353 U.S. at 59; People of the Territory of Guam v. Teixeira, 859 F.2d 120, 123 (9th Cir. 1988). More specifically, concealing the evidence at issue would harm the compelling interest in preventing the illegal possession and use of marijuana and the aiding and abetting of such conduct. See Olsen v. DEA, 878 F.2d 1458, 1462-63 (D.C. Cir. 1989); United States v. Middleton, 690 F.2d 820, 824 (11th Cir. 1982). See also United States v. One 1971 BMW 4-Door Sedan, 652 F.2d 817, 821 (9th Cir. 1981).

Consistent with these public interests, the Ninth Circuit found that a grand jury's criminal investigation needs override any existing protective order. In In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes ("Meserve"), a grand jury subpoenaed documents covered by a protective order entered in a civil lawsuit. 62 F.3d 1222, 1223 (9th Cir. 1995). The Ninth Circuit addressed, as a matter of first impression, the "question of whether a grand jury subpoena trumps a district court's protective order." Id. Relying on the Fourth Circuit's decision in In re Grand Jury Subpoena, 836 F.2d 1468 (4th Cir. 1988), and the 11th Circuit's decision in In re Grand Jury ("Williams"), 995 F.2d 1013 (11th Cir. 1993), the Ninth Circuit adopted a *per se* rule, pursuant to which, a protective order invariably must yield to a grand jury subpoena. Meserve, 62 F.3d at 1224, 1226-27.

The factors upon which the Ninth Circuit, and the other courts, relied in adopting the *per se* rule support entry of Defendants' Protective Order. First, the courts found that "'protective orders, if enforced at the expense of grand jury subpoenas, would be 'significant impediment[s]' to grand jury investigations." Id. at 1224 (citation omitted). Second, while a party seeking to uphold a protective order may have a legitimate fear that the information

released would be incriminating, the courts found that protective orders could not be used to protect Fifth Amendment rights. See id., 992 F.2d at 1224 (citing In re Grand Jury Subpoena, 836 F.2d at 1471) ("a party's fifth amendment right does not require, nor may it depend on, the shield of a protective order"). Third, the courts found that allowing a protective order to shield evidence from a grand jury amounts to a judicial grant of immunity. Because only the executive branch, not the judicial branch, can grant immunity, such action is beyond the authority of the courts. Meserve, 62 F.3d at 1224 and 1226-27 (citing, *inter alia*, Pillsbury Co. v. Conboy, 459 U.S. 248, 261 (1983)).

These same concerns counsel against a protective order that requires defendants to conceal criminal evidence. First, the Department of Justice ("DOJ"), including the Drug Enforcement Administration, has a statutory responsibility to the public to investigate and enforce the criminal laws, including those laws related to controlled substances. See 21 U.S.C. §§ 801, *et seq.* That duty requires the Department to investigate violations of the law, not to conceal evidence of such violations. See id. generally. Indeed, under this Court's Preliminary Injunction Order, the Department is still responsible for investigating and prosecuting physicians for aiding and abetting the unlawful purchase or possession of marijuana or for engaging in a conspiracy to distribute or possess marijuana. See Conant, 172 F.R.D. at 700-701. Second, Plaintiffs' Proposed Order is primarily motivated by a fear of facing prosecution for criminal violations. To the extent this is based on a fear of self-incrimination, the courts have made clear that a protective order cannot protect Fifth Amendment rights. (In any event, as discussed more fully below, this Court has already rejected plaintiffs' Fifth Amendment claim.) To the extent this is simply a fear of prosecution, rather than of self-incrimination, according such fear the Court's protection would turn criminal law enforcement on its head. See Branzburg, 408 U.S. at 691.

Third, ordering defendants to conceal evidence could amount to granting plaintiffs immunity for any crimes they already have committed. Moreover, both proposed orders cover certain deposition testimony. See Defendants' Proposed Order ¶ 5. If defendants are required to conceal evidence of wrongdoing, then plaintiffs may be shielded from prosecution for perjury committed during their depositions. See Meserve, 62 F.2d at 1224 ("Protective orders also can 'absurd[ly] shield deponents from perjury charges.'") (quoting In re Grand Jury Subpoena, 836 F.2d at 1475) (alteration in original).

Finally, Plaintiffs' Proposed Order is unenforceable under Meserve. If a grand jury subpoenaed the documents, the subpoena would "trump" the portion of the protective order requiring defendants to conceal evidence. 62 F.3d at 1226-27. This Court would be forced to "go[] back on [its] word (thus breeding disrespect for the law in the eyes of the . . . public . .) by honoring the grand jury subpoena." Williams, 995 F.2d at 1019-20.

II. Plaintiffs' Interests Are Unaffected by Defendants' Proposed Order.

At this stage of the proceedings, the only interests plaintiffs may assert in support of

their Proposed Order are those they raised in their Opposition to Defendants' Motion to Compel Discovery ("Opposition"): Fifth Amendment interests, First Amendment interests, and privacy interests. See Discovery Order at 3. None of those interests supports a provision requiring defendants to conceal evidence of a crime.

In their Opposition, plaintiffs argued that the medical records are protected by the First Amendment freedom of association. Id. at 6. Finding that doctor/patient communications are not protected by freedom of association, the Court rejected this argument. Id. at 7-9. Plaintiffs also argued that the documents are protected from disclosure by the Fifth Amendment. Id. at 12. Finding that the documents at issue fall within the required records exception to the Fifth Amendment, the Court rejected this argument as well. Id. at 14. See also In re Grand Jury Subpoena, 836 F.2d at 1471. The issue or scope of a protective order was irrelevant to both of these determinations. Thus, neither the First nor Fifth Amendment can support entry of Plaintiffs' Proposed Order.

In their Opposition, plaintiffs also argued that providing the medical records would harm the privacy interests of plaintiff and non-plaintiff patients. Discovery Order at 9. The Court held that the plaintiff-patients had waived any privacy interests with respect to the portions of the medical records at issue. See Discovery Order at 12. Again, the issue or scope of a protective order was irrelevant to this decision. In sum, under the Discovery Order, Defendants' Proposed Order does not affect any of plaintiffs' interests.

The only interest that even arguably supports requiring defendants to conceal criminal evidence is the impact of disclosure on non-plaintiff patients' privacy interests. With respect to this group, the Court held that defendants' interest in the information outweighed the "very limited intrusion" on privacy interests. Id. at 11. In so deciding, the Court found that defendants' suggestions that plaintiffs redact any identifying information and provide only information regarding marijuana-related communications "adequately safeguard the privacy rights of the non-patient plaintiffs." Id. at 11. Thereafter, the Court noted that the "risk of subsequent non-disclosure will be further minimized if plaintiffs accept the government's offer to place these records under a protective order." Id. at 11.

Defendants' Proposed Order will have little or no impact on non-plaintiff patients' privacy interests. As the Court found, the redactions will adequately safeguard those interests. Moreover, the documents will be covered by a comprehensive protective order. Under that order, plaintiffs will have notice of each person with access to the documents and each will sign an agreement prohibiting them from using the documents for any purpose other than for this litigation. Defendants' Proposed Order ¶¶ 2-3. At the end of the litigation, all documents covered by the protective order will be returned to plaintiffs' counsel or destroyed. Id. ¶ 10. The only limit on the scope of this protective order is that, should any of the information constitute evidence of a crime, that information will be turned over to the appropriate law enforcement officials. However, under Defendants' Proposed Order, those officials must agree to use the information solely for law enforcement purposes. Id. ¶ 2.

CONCLUSION

Defendants Proposed Order has no impact on plaintiffs' interests and little or no impact on non-plaintiff patients' interests. In contrast, ordering defendants to conceal criminal evidence would harm several important public interests. Accordingly, the Court should enter Defendants' Proposed Order.

Respectfully submitted,

DAVID I. ANDERSON
JEFFREY S. MARKOWITZ

Counsel for Defendants

cc: Daniel Abrahamson (via first-class mail)
Anna Brick (via first-class mail)
Graham Boyd (via first-class mail)
Jonathan Weissglass (via telefax and first-class mail)

ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
ATTORNEYS AT LAW
177 POST STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94108
(415) 421-7151
FAX (415) 362-8064

FRED H. ALTSHULER
MARSHA S. BERZON
STEPHEN P. BERZON
PETER D. NUSSBAUM
MICHAEL RUBIN
LOWELL FINLEY
JEFFREY B. DEMAIN
INDIRA TALWANI
DANIEL T. PURTELL
SCOTT A. KRONLAND
MARY LYNNE WERLWAS
JONATHAN WEISSGLASS
CHRISTOPHER H. PEDERSON

MICHAEL W. GRAF
FELLOW

August 14, 1998

VIA MESSENGER

Honorable Fern M. Smith
United States District Court Judge
for the Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102

RE: Conant v. McCaffrey, Case No. C 97-0139 FMS;
Plaintiffs' Reply Letter Brief Re: Protective Order

Dear Judge Smith:

Plaintiffs respectfully submit this reply letter brief in support of their request that the Court enter their proposed protective order.

I. INTRODUCTION

Defendants' opening brief is most notable for what it does not say: Nowhere have defendants cited a rule or policy forbidding the government from voluntarily entering into the protective order proposed by plaintiffs; nor have defendants cited any instance in which they have refused to enter into a similar protective order. Relying instead on general principles of "public policy" and the "public interest" regarding law enforcement to argue against the form of protective order that they originally proposed, defendants ignore the general rule that discovery obtained in civil litigation is not to be used for unrelated purposes. This Court previously entered a preliminary injunction to prevent the government from threatening physicians with sanctions for medical speech. Defendants now attempt to use civil discovery in a way that will once again chill physicians by the threat of criminal prosecution. This attempt should be rejected.

II. THE COURT SHOULD ENTER A NORMAL PROTECTIVE ORDER

As plaintiffs discussed in their opening letter brief, the government, after first offering to enter into a protective order that would prevent information from being disseminated beyond the attorneys involved in this case, withdrew that offer. Plaintiffs expected defendants to justify their action by reference to a blanket policy forbidding government attorneys from voluntarily agreeing not to disclose information that might constitute evidence of a crime. Instead, defendants cite no such policy and rely on general appeals to "public policy" and the "public interest." These appeals are unsupported by any citation to authority (even a Justice Department policy manual) that prevents the government from entering into a normal protective order

forbidding the use of civil discovery outside of this case. The absence of such authority suggests that what defendants characterize as "public policy" and the "public interest" is just another attempt to silence physicians who seek to discuss or recommend medical marijuana.

Defendants rely heavily on cases outside of the context of protective orders that frown on agreements to conceal a crime, encourage provision of information to law enforcement agencies, and support enforcement of criminal laws. Defs' Br. at 2-3.[1] All of these interests, however, apply to private citizens as much as to government officials; yet none of these interests prevented district courts from entering protective orders prohibiting civil litigants from disclosing to law enforcement agencies information that may be used in a criminal prosecution. See, e.g., Fidelity Nat'l Title v. National Title Resources, 980 F. Supp. 1022, 1025 (D. Minn. 1997). This is because, as plaintiffs outlined in their opening letter brief, there is a strong countervailing interest against allowing parties to use discovery for purposes unrelated to the lawsuit. Although plaintiffs do not quarrel with the basic thrust of defendants' cases that enforcement of criminal laws is important, defendants miss the point. "[A]ll principles are fettered by other principles." GAF Corp. v. Eastman Kodak Co., 415 F. Supp. 129, 133 (S.D.N.Y. 1976) (ordering civil litigant not to turn over to government information obtained in civil discovery regarding antitrust violations despite principle that citizens must report violations of the law). In this case, the government's interest in building a possible criminal case on the basis of civil discovery is outweighed by the interest in preventing civil discovery from being used in unrelated cases and the corollary interests in prohibiting the use of civil discovery as a surrogate for a criminal investigation without attendant safeguards and preventing government overreaching in using the threat of criminal proceedings to prevent and deter civil litigation.

The government also discusses the possibility that a grand jury investigation would take precedence over a protective order. To plaintiffs' knowledge, the government has not yet impaneled a grand jury to investigate them. If it does take this step, the government can then argue about the protective order's effect. But nothing in the grand jury cases cited by defendants suggests that the government should be able to build a criminal case based on the use of civil discovery prior to the time that it may have evidence that merits presentation to a grand jury to obtain a subpoena.

The government nonetheless makes a weak attempt to analogize the role of an investigative grand jury to the role of civil litigators in the Department of Justice. In the primary case cited by defendants, however, the Ninth Circuit explicitly relied on the "important, independent constitutional status" of the grand jury, its "sweeping powers," and its "independent role," in finding that a protective order must yield to a grand jury subpoena. In re Grand Jury Subpoena, 62 F.3d 1222, 1224, 1225, 1226 (9th Cir. 1995). The grand jury operates in marked contrast to the role of defendants' counsel in this case. There is no suggestion in the grand jury

---

[1] In casting about for authority to justify their position, defendants rely on 18 U.S.C. § 4, which makes misprision of felony a crime. The Ninth Circuit, however, has made it clear that "'[m]ere silence, without some affirmative act, is insufficient evidence' of the crime of misprision of felony." United States v. Ciambrone, 750 F.2d 1416, 1418 (9th Cir. 1984) (quoting Lancey v. United States, 356 F.2d 407, 410 (9th Cir.), cert. denied, 385 U.S. 922 (1966)). Plaintiffs' proposed protective order neither requires nor condones an affirmative act to conceal a crime, and thus does not violate 18 U.S.C. § 4.

cases that the government, as a civil defendant, should be permitted to funnel information gleaned from civil discovery to criminal prosecutors any more than the ordinary civil litigant.

Defendants' reliance on the grand jury cases merely serves to demonstrate that if the government desires to ferret out evidence of criminal activity, it has more than ample tools to attempt to do so, including, potentially, by using a grand jury subpoena that may "trump" a protective order. It does not follow as defendants argue, however, that by entering a truly protective order, the Court sets itself up to go back on its word. Plaintiffs understand that the government takes the position that doctors who give patients honest medical advice and seek to protect their First Amendment right to do so are now subject to subpoenas, search warrants, and other intrusive investigative measures regardless of the Court's order. Plaintiffs at this point simply insist that the government not also add to its arsenal the powers of civil discovery. See GAF Corp., 415 F. Supp. at 132 ("The Government as investigator has awesome powers, not lightly to be enhanced or supplemented by implication.").[2]

In sum, the government has offered nothing that prevents this Court from using its broad discretion to enter a protective order that protects against the use of discovery for unrelated purposes, as is the case for civil litigants other than the government. Anything less than a normal protective order would create a serious disincentive to bringing civil actions, including those, such as this one, that seek to protect fundamental constitutional rights.

III. CONCLUSION

For the reasons stated above and in their opening letter brief, plaintiffs respectfully request that the Court enter plaintiffs' proposed protective order.

Respectfully submitted,

JONATHAN WEISSGLASS
Altshuler, Berzon, Nussbaum, Berzon, & Rubin

GRAHAM A. BOYD
DANIEL N. ABRAHAMSON
The Lindesmith Center

ANN BRICK
American Civil Liberties Union
Foundation of Northern California, Inc.

By: 
Jonathan Weissglass

Attorneys for Plaintiffs

---

[2] The government incorrectly suggests that plaintiffs' protective order would insulate plaintiffs from perjury. But the attorneys defending this case will have access to every document, and would be aware of any supposed perjury. If they are of the opinion that a plaintiff committed perjury, that would obviously be grounds for modifying the protective order.

U.S. Department of Justice

Civil Division

Washington, D.C. 20530

August 14, 1998

Via Hand Delivery
Hon. Fern M. Smith
United States District Judge
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102-3487

Re: Conant v McCaffrey, No. C 97-0139 FMS (N.D. Cal.)

The dispute before the Court involves balancing two sets of conflicting interests: 1) the public policies prohibiting defendants and their employees from concealing criminal evidence and 2) plaintiffs' collective desire to obtain the most comprehensive protective order they can. In their August 7, 1998 Letter Brief ("Pl. Ltr."), plaintiffs not only mischaracterize defendants' interests, but, more importantly, the only interest of their own they articulate is their fear of being investigated and prosecuted for actions this Court has found to constitute criminal violations. When defendants' true interests are weighed against plaintiffs' understandable -- but not legally cognizable -- fears, it is clear that Defendants' Proposed Protective Order should be entered.

I. This Dispute Is Not about Using Civil Discovery for Criminal Investigation Purposes; It Is about Federal Employees Attempting to Fulfill their Responsibilities.

As discussed in Defendants' August 7, 1998 Letter Brief ("Def. Ltr."), several important public interests counsel against ordering federal employees to withhold evidence of a crime. Those interests include the public policy against agreements to suppress evidence, the public interest in assuring the free flow of information to law enforcement officials, and the public's strong interest in the enforcement of the criminal laws. See Def. Ltr. at 2-3. These interests underlie and create the obligation of all federal employees, and particularly those of law enforcement agencies, to disclose rather than conceal criminal evidence.

Plaintiffs mischaracterize defendants' interests as involving an attempt to use civil discovery as a criminal investigatory tool. See Pl. Ltr. at 2-3. This is baseless and simply not the case. Defendants and their employees seek only to fulfill their responsibilities as federal employees. It is that responsibility and the interests underlying it which must be weighed against plaintiffs' alleged interests.

II. Plaintiffs' Have Not Articulated any Interests Deserving of this Court's Protection.

Defendants demonstrated in their Letter Brief that their Proposed Protective Order would have little or no impact on plaintiffs' interests, as defined by this Court's March 16, 1998 Order Affirming in Part and Reversing in Part Magistrate Judge's Order Denying Defendants' Motion to Compel Discovery ("Discovery Order"). See Def. Ltr. at 4-5. Plaintiffs' Letter Brief all but confirms the lack of any impact on their professed interests. The only "harm" plaintiffs articulate is the harm from being investigated and/or prosecuted for conduct this Court has found to be criminal. Such "harm" cannot justify any protection from this or any court.

Plaintiffs argue that two groups will be "severe[ly] harmed" if the protective order does not require defendants to conceal criminal evidence. Specifically, they assert that plaintiff doctors and non-plaintiff doctors "will be put at risk of criminal investigation and prosecution." Pl. Ltr. at 3. It is important to analyze this "harm" against the backdrop of the Court's preliminary injunction decision. This Court found that doctors who recommend marijuana with the specific intent to aid and abet a patients' unlawful purchase, cultivation or possession of marijuana or recommend with specific intent to conspire to cultivate, distribute or possess marijuana commit a crime. See Conant v. McCaffrey, 172 F.R.D. 681, 700-701 (N.D. Cal. 1997). Accordingly, the Court did not enjoin defendants from investigating and prosecuting, under certain circumstances, doctors who commit such acts. See id. As a result, the actual harm plaintiffs claim is that if Plaintiffs' Proposed Protective Order is not entered, plaintiffs will be put at risk of investigation and prosecution for conduct that this Court has recognized is criminal. Affording this "harm" any protection would turn criminal law on its head.

Plaintiffs next contend that:

> defendants have taken the position that mere recommendations of medical marijuana are criminal violations. Although defendants are currently enjoined from prosecuting solely on the basis of such conduct, if they ultimately prevail in this case, records of medical marijuana recommendations would, in the government's view, be evidence of a crime to be turned over to prosecutors.

Pl. Ltr. at 3. First, defendants do not contend, and have never contended in this litigation, that a "mere" recommendation of marijuana -- that is, a recommendation without any intent to facilitate the acquisition, possession, purchase, cultivation, or distribution of marijuana -- constitutes a crime. See e.g. Defendants' Motion to Dismiss at 16-18 and 22; Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction at 10-13 and 15; see also Conant, 172 F.R.D. at 700. Instead, because recommending a Schedule I substance may threaten the public health and safety, defendants contend that recommending marijuana without the above-referenced intent could be a statutory basis for an administrative action to revoke a doctor's controlled substances registration. See 21 U.S.C. § 823 (f) (5); 824 (a) (4). Thus, plaintiffs' statement is factually wrong.

Moreover, even assuming that defendants view of what might constitute criminal conduct is broader than the current injunction, plaintiffs' scenario assumes that defendants prevail in the case. If defendants do prevail, presumably their interpretation of criminal conduct would be the applicable law. Again, plaintiffs' alleged harm would be the harm that flows from being investigated and prosecuted for conduct this Court would view as criminal.

Independent of the harm they assert, plaintiffs also appear to claim that they somehow relied on the existence of a protective order as broad as the one they now propose and, therefore, are entitled to such an order. For example, plaintiffs refer to the "baseline for plaintiffs' understanding of how any records ordered produced would be treated." Pl. Ltr. at 1. This argument does not reflect the record in this case.

First, during the meet and confer sessions regarding Defendants' Motion to Compel Discovery, defendants suggested the parties negotiate a protective order to help address plaintiffs' concerns. Plaintiffs declined to negotiate such an order, preferring instead to litigate their objections to defendants' discovery requests. Similarly, in their papers filed in opposition to Defendants' Motion to Compel Discovery, plaintiffs all but ignored the issue of a protective order. The fact is, much to defendants' frustration at the time, throughout the entire discovery process plaintiffs ignored the question of a protective order and how it might address their concerns. Only now do plaintiffs state that they had a definitive concept of the scope of an appropriate protective order and had acted in (unrevealed) reliance on it.

Plaintiffs' claim to any "baseline assumption" or reliance is further refuted by their Fifth Amendment argument in opposition to Defendants' Motion to Compel Discovery. That argument was premised on the notion that documents produced would end up in the hands of criminal law enforcers. They now claim that their baseline assumption was that documents would not be turned over to law enforcement officials and would be used only for the purposes of this case. Plaintiffs cannot have it both ways. If their "baseline assumption" truly was that documents turned over would be used only for the purposes of this litigation, then plaintiffs' Fifth Amendment argument was entirely unnecessary.

Finally, in advancing their "reliance" argument, plaintiffs quote a portion of the Reply in Support of Defendants' Objections to the Magistrate Judge's Order Re: Discovery Motions ("Def. Reply") in which defendants stated that the discovery would not be disseminated beyond a "handful of government attorneys." Def. Reply at 9. That portion, however, comes from the discussion of the privacy concerns of non-plaintiff patients. Indeed, plaintiffs omit the sentence following the portion they quote, which reads "[t]his is hardly a privacy right intrusion." Id. Defendants have already discussed why their Proposed Protective Order does not alter the Court's conclusion regarding the privacy rights of non-plaintiff patients, the only context in which this Court discussed the protective order. See Def. Ltr. at 5. Defendants add only that they remain willing, as they have all along, to enter into a comprehensive protective order. See id.

CONCLUSION

For the reasons stated above and in Defendants' Letter Brief, the Court should enter Defendants' Proposed Protective Order.

Respectfully submitted,

ARTHUR R. GOLDBERG
JEFFREY S. MARKOWITZ

Counsel for Defendants

cc: Via Federal Express
Jonathan Weissglass

Via First Class Mail
Daniel Abrahamson
Ann Brick
Graham Boyd

LOWELL FINLEY (State Bar #104414)
GRAHAM A. BOYD (State Bar #167727)
JONATHAN WEISSGLASS (State Bar #185008)
ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
177 Post Street, Suite 300
San Francisco, California 94108
Telephone: (415) 421-7151

DANIEL N. ABRAHAMSON (State Bar #158668)
The Lindesmith Center
110 McAllister Street, Suite 350
San Francisco, CA 94102
Telephone: (415) 554-1900

ANN BRICK (State Bar #65296)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA, INC.
1663 Mission Street, Suite 460
San Francisco, California 94103
Telephone: (415) 621-2493

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DR. MARCUS CONANT, et al.,

Plaintiffs,

v.

BARRY R. McCAFFREY, et al.,

Defendants.

CASE NO. C 97-0139 FMS (WDB)

DECLARATION OF JUDITH CUSHNER IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL

ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
ATTORNEYS AT LAW
177 POST STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94108

DECLARATION OF JUDITH CUSHNER

I, Judith Cushner, declare as follows:

1. I am a long-time resident of San Francisco, the director of a pre-school program, the mother of two children, and an active member of Congregation Sherith Israel. I am also a plaintiff in this lawsuit.

2. I was diagnosed with breast cancer in 1990. I was immediately referred to a surgeon, who performed a biopsy and subsequent lumpectomy and lymph node removal. After a brief period of recovery from the surgeries, I was treated by an aggressive protocol of chemotherapy, which lasted for eight months, and by radiation. After other medications failed, I used medical marijuana to obtain relief from unrelenting nausea and other side effects caused by the chemotherapy and radiation. My cancer has been in remission now for almost two years.

3. I consider my relationship with my physician to be completely confidential and private. During my consultations with my physician, I discuss extremely private matters. Some of the things I tell my physician I would not tell any other person. I have always understood and expected that my conversations with my physician and my medical records would remain private and confidential, subject only to disclosures that I specifically permitted. The knowledge that some of my medical records could end up in the hands of third persons -- especially government officials -- would discourage me from holding an open discussion with my physician.

4. Disclosure of my medical records as part of this litigation would destroy my relationship with several of my physicians. Before I decided to be a plaintiff in this case, I discussed the parameters of the case with my physicians. One of my oncologists who had recommended medical marijuana to me expressed particular concern about his identity being

ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
ATTORNEYS AT LAW
177 POST STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94108

revealed. He pointed out that when we first discussed marijuana, there had been no threats from government officials and he had no idea that his advice to me could make him a target for federal investigation or punishment. I assured him that I would not reveal his identity, and I have not done so, even to my attorneys in this case. It is very clear to me that if I am forced to disclose the identity of my oncologist or to disclose information that may reveal his identity and specifics of his recommendation of medical marijuana, I will lose his trust and support. He will carefully monitor his conversations with me and tailor his advice to exclude anything that he would not want to broadcast to the general public. I believe that several other physicians who have treated me would be similarly upset if their identities and discussions of medical marijuana were revealed.

5. I would not have survived my cancer treatment and its devastating side effects without the full support of my physicians. The harm to me of disclosing information about physicians who have discussed marijuana with me, and thereby undercutting my physicians' support for me, is immeasurable. Although I do not currently have active cancer, I fear that I may have a relapse and that my life will depend on the same supportive care of my physicians. I fear that my physicians will become reluctant to discuss any alternatives that may have any legal implications for them, thus limiting my options for treatment, including any experimental treatments. My physicians will see me as trouble for them, and they will treat me strictly by the book and steer clear of any controversial treatment or information.

6. If I am forced to divulge my medical records, I am certain that some of my doctors will not record information in my charts about marijuana or anything else controversial. This will lower the quality of my medical care should I receive care from a new physician.

///

ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
ATTORNEYS AT LAW
177 POST STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94108
(415) 421-7144

7. I firmly believe that the federal government's request for my medical records is directly intended to discourage me and others like me from participating in litigation that challenges government policies. The government threats against physicians who recommend medical marijuana were meant to intimidate physicians and patients who disagree with the federal orthodoxy that marijuana can do no good as a medicine. Now, the government's demand to see my medical records seems like a new round of intimidation and harassment, meant to punish me for standing up for my rights. My disease already leaves me feeling vulnerable, but the government's intimidation and interference with my medical treatment makes me feel like my back is truly up against the wall, like I have even fewer options in dealing with a deadly disease.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct and that this declaration was executed this 19th day of November, 1997 at San Francisco, California.

Judith Cushner
JUDITH CUSHNER

E:\PROP215\DECLARS\CUSHNER.CMP