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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,)
11 Plaintiff,)
12 v.)
13 CANNABIS CULTIVATOR'S CLUB, et al.,)
14 Defendants.)

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

**BRIEF OF *AMICUS CURIAE*
CALIFORNIA MEDICAL
ASSOCIATION IN SUPPORT
OF PROTECTIVE ORDER**

15)
16 _____)
17 AND RELATED ACTIONS.)
18 _____)

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

1 INTRODUCTION

2 The California Medical Association ("CMA") files this brief *amicus curiae* in support of the
3 Motion for Protective Order by defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones.
4 A protective order is necessary to rectify the harm caused by the Cooperative's disclosure in the
5 Declaration of Dr. Michael Alcalay of the identities of certain physicians who, independently of the
6 Cooperative, provide medical care to individuals whom the Cooperative claims are its clients.

7 CMA's request to this Court is straightforward, compelling, and without counterargument:
8 remove from the public record confidential medical information that is not relevant to the issues in
9 this case and prevent the improper use of this information. No patient authorized the disclosure of
10 this confidential information. Even the defendants who disclosed the information do not require it in
11 order to make their case. Indeed, no good purpose could possibly be served by exposing physicians
12 to embarrassment, harassment or possible prosecution. Instead, removal of the names of physicians
13 from the public record will serve the vital purpose of protecting the trust and rapport between
14 physicians and their patients, while prejudicing no one.

15 Physicians' concerns about the disclosure of their identities in this case is not fanciful.
16 In the tumult of sorting out the relationship between federal and state law concerning the medical use
17 of marijuana, physicians find themselves in a difficult, often frightening position. Many physicians
18 believe that, in certain cases, their duty to patients demands a frank and honest discussion of
19 marijuana, yet federal law enforcement officials seem intent on pursuing physicians who
20 recommend marijuana to their patients. The climate among physicians is one of fear, calmed
21 somewhat by issuance of the preliminary injunction in Conant v. McCaffrey, 172 F.R.D. 681 (N.D.
22 Cal. 1997), but exacerbated by the strong-arm tactics used against at least one California physician
23 who recommended marijuana to a patient.¹ The federal government continues to contest the Conant
24

25 ¹ The ruling in the Conant litigation describes a widely publicized incident involving
26 intimidation of a physician who allegedly had recommended marijuana to a patient:

27 Dr. Mastroianni has been interrogated by DEA agents who questioned his medical education
28 and training, confronted a pharmacist regarding prescriptions he has dispensed, and informed
him that it was illegal to "recommend or prescribe" marijuana.

Conant, 172 F.R.D. at 690.

1 case vigorously, arguing for production of confidential medical records and insisting on the right to
2 turn these records over to the DEA or other law enforcement officials who might wish to investigate
3 patients or physicians. Only through entry of a strong protective order by Judge Fern Smith was this
4 threat averted. See Protective Order and Letter Briefs, attached as Exhibits A-E to the
5 accompanying Request for Judicial Notice.

6 The California Medical Association takes no position on the merits of the litigation before
7 this Court. But CMA believes ardently that resolution of this case does not require exposure of the
8 identities of physicians treating patients who are clients of the Cooperative. As we explain in detail
9 below, the disclosure of this information would punish physicians for exercising their recognized
10 right to discuss or recommend marijuana to patients, would violate patients' privacy rights, and
11 would jeopardize patient care. For these reasons, the Court should order the return of all copies of
12 documents containing the identities of physicians and should enter a protective order to prevent
13 improper use of such information.

14 **I. DISCLOSURE OF PHYSICIAN NAMES WILL INTERFERE WITH THE**
15 **PHYSICIAN-PATIENT RELATIONSHIP AND WILL UNDERMINE THE**
16 **QUALITY OF MEDICAL CARE AVAILABLE TO CRITICALLY ILL PATIENTS.**

17 Confidentiality is the essential foundation of an effective physician-patient relationship.
18 CMA has long defended the right of a physician and patient to discuss freely all medical treatment
19 options that may be appropriate to the patient's care. Without a reasonable assurance of
20 confidentiality, patients and physicians cannot candidly exchange information, and as a result, proper
21 medical care cannot take place. This premise was central to the decision in Conant. There, Judge
22 Smith concluded that physicians have a First Amendment right to share with their patients medical
23 information -- including diagnosis, prognosis, and treatment options -- that may affect the patient's
24 care. 172 F.R.D. at 694-98. Physicians should not be placed in jeopardy of investigation or
25 prosecution for having exercised this right. In the modern day, physicians must already face an array
26 of obstacles when attempting to provide proper health care to their patients. Gratuitously revealing
27 their identities in this litigation will further hamper those efforts.

28 A confidential relationship is particularly important in enabling a physician to obtain
information about sensitive subjects. If physicians and patients believe that physicians' identities

1 coupled with patients' diagnoses will be publicly revealed, information may be withheld, discussions
2 may be truncated, and even the completeness of medical records may be threatened. Even beyond
3 censoring of medical communications, the disclosure of physicians' identities in this case could
4 prompt physicians to sever all ties with patients who unknowingly caused their names to be revealed.

5 See Declaration of Donna Booker, ¶¶ 3, 6, attached hereto as Exhibit A.

6 Again, the ruling in the Conant litigation is instructive. In describing the harm that arose
7 from interference with the physician-patient relationship, Judge Smith wrote:

8 Because they fear prosecution or administrative sanction, plaintiff physicians contend they
9 have censored their medical advice to patients, refusing to provide guidance regarding the
10 risks and benefits of medical marijuana. . . . Plaintiff patients allege that as a result of the
11 government's policy, they no longer trust in their physicians' advice, and can no longer
12 comfortably communicate with their physicians about medical marijuana. Both patients and
13 physicians agree that patient care is threatened by this lack of confidence and
14 communications. Plaintiffs describe various results of the decrease in open communication:
15 patients are less likely to tell their physicians about marijuana use; physicians, in turn, are
16 unable to advise patients about safe use of marijuana or guide proper use of marijuana for
17 treatment; and physicians are discouraged from recording their patients' full medical histories
18 and progress on medical charts.

14 Conant, 172 F.R.D. at 690-91 (citations omitted).

15 During discovery following entry of the preliminary injunction in Conant, one of the patient
16 plaintiffs described the precise consequences from disclosing the identity of her treating physicians
17 (a harm that was averted by allowing redaction of identifying information):

18 Before I decided to be a plaintiff in this case, I discussed the parameters of the case with my
19 physicians. One of my oncologists who had recommended medical marijuana to me
20 expressed particular concern about his identity being revealed. He pointed out that when we
21 first discussed marijuana, there had been no threats from government officials and he had no
22 idea that his advice to me could make him a target for federal investigation or punishment. I
23 assured him that I would not reveal his identity, and I have not done so, even to my attorneys
24 in this case. It is very clear to me that if I am forced to disclose the identity of my oncologist
25 . . . I will lose his trust and support. He will carefully monitor his conversations with me and
26 tailor his advice to exclude anything that he would not want to broadcast to the general
27 public. . . . My physicians will see me as trouble for them, and they will treat me strictly by
28 the book and steer clear of any controversial treatment or information.

24 Declaration of Judith Cushner in Opposition to Defendants' Motion to Compel, ¶¶ 4-5, attached as
25 Exhibit F to the accompanying Request for Judicial Notice.

26 The disclosure of physician identities here threatens similar repercussions. Further, the
27 disclosure of names is exacerbated by defendants' mischaracterization of the physicians in question
28 as "referring physicians."

1 **II. UNAUTHORIZED DISCLOSURE OF MEDICAL INFORMATION VIOLATES**
2 **PATIENTS' PRIVACY RIGHTS.**

3 A patient's reasonable expectation of privacy in his or her medical records is well established.
4 California's Confidentiality of Medical Information Act prohibits health care providers from
5 disclosing patients' medical information without first obtaining authorization. Civ. Code § 56.10.
6 The statute equally prohibits entities like the Cooperative who receive confidential medical
7 information from making unauthorized disclosures. Civ. Code § 56.13.

8 The privacy right in U.S. and California constitutions likewise protects patients against
9 unauthorized disclosure of medical records. See Norman-Bloodsaw v. Lawrence Berkeley Lab., 135
10 F.3d 1260, 1269 (9th Cir. 1998); Hill v. National Collegiate Athletic Assn. 7 Cal.4th 1, 20 (1994). A
11 number of judicial decisions, in recognition of the right to privacy in one's medical information,
12 balance the competing interest of an opposing party in discovering relevant information versus a
13 patient's right to protect confidential information. See, e.g., Doe v. Attorney General, 941 F.2d 780,
14 796 (9th Cir. 1991); Pagano v. Oroville Hosp., 145 F.R.D. 683, 699 (E.D. Cal. 1993). Where, as
15 here, no discovery demand has been made, the balancing is simple: the right to privacy prevails. In
16 any event, the production of private medical information during discovery is routinely shielded
17 through a protective order. Pagano, 145 F.R.D. at 699; see also Whalen v. Roe, 429 U.S. 589, 601
18 (1977) (judicial supervision of evidentiary use of private medical information necessary to protect
19 patients' privacy interests).²

20 This Court should evaluate the request for this protective order in light of the serious,
21 foreseeable harms to physician-patient relations. Entering a protective order will pose no hardship or
22 prejudice to any party, while denial of the protective order will needlessly interfere with the privacy
23 interests of non-party patients and with the quality of professional services physicians are able to
24 provide critically ill patients.

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28 ² Thus, even if the government could articulate a reason why it needs the information
disclosed by the Cooperative, that information should be provided only if shielded from improper
use by entry of a protective order like that in the Conant case.

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CONCLUSION

For the reasons stated above, CMA respectfully requests that this Court grant defendants' Motion for a Protective Order or, in the alternative, take other steps sufficient to remove from the record in this case the identities of any physicians identified in the Declaration of Dr. Alcalay and to prevent the use of such information by federal officials for any purpose whatsoever.

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

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] Nos. C98-0085 CRB
] C98-0086 CRB
] C98-0087 CRB
] C98-0088 CRB
] C98-0245 CRB
]
] **DECLARATION OF DONNA**
] **BOOKER IN SUPPORT**
] **AMICUS BRIEF OF**
] **CALIFORNIA MEDICAL**
] **ASSOCIATION IN SUPPORT**
] **OF MOTION FOR**
] **PROTECTIVE ORDER**
] Date: October 5, 1998
] Time: 2:30 p.m.
] Courtroom: 8
] Hon. Charles R. Breyer

1 I, Donna Booker, declare:

2 1. I suffer from full-blown AIDS and debilitating,
3 life-threatening symptoms that accompany it. It is no
4 exaggeration to say that owe my life to my doctor. My doctor
5 brought me from a viral load of 650,000 to a current level of
6 20,000. My T Cells were as low as 8. Now they are up to 300.
7 I am extremely angry and afraid about the disclosure of my
8 doctor's name in this case. This disclosure of my
9 confidential medical information was done without my
10 permission, and I believe it could seriously jeopardize my
11 relationship with my doctor and interfere with my ability to
12 receive vital medical care and advice.

13
14 2. I never imagined that my buying medical cannabis at the
15 Oakland Cannabis Buyer's Cooperative would result in the
16 violation of my right to keep my medical condition and my
17 doctor's name private. When I started having a severe loss of
18 appetite and became dangerously thin about two years ago, my
19 doctor and I discussed the possible medical benefits of
20 marijuana. I decided to try medical marijuana to boost my
21 appetite, and I found it helped enormously. I have steadily
22 regained weight since I began using medical marijuana.

23
24 3. At every step, I openly discussed my decision to use medical
25 marijuana and its effects with my doctor. In fact, in my
26 effort to stay alive, I have raised with my doctor in the
27 privacy of my doctor's office any and all issues that could
28 affect my health and have shared any details that might be

1 relevant to treatment no matter how personal or embarrassing.
2 In return, I have received complete candor and commitment.
3 The recent disclosure of my physician's name threatens to
4 change all of this. How could my doctor feel free to give me
5 honest medical advice in the future, knowing it might pose a
6 danger? And how could I continue to confide in my doctor, not
7 wanting to further jeopardize my doctor's medical practice any
8 more than I already have? Because of the unauthorized actions
9 of the Cooperative and their lawyers, I fear I will become a
10 medical outcast, someone that no doctor will want to treat.
11

12 4. When I first purchased medical marijuana from the Cooperative,
13 I was required to provide certain information. It was always
14 my understanding that all of this information (including the
15 identity of my doctor) would be kept confidential. I now
16 understand that, as a result of my purchasing medical
17 marijuana on May 21, 1998, the name of my physician was
18 publicly disclosed, even though I never meant for my
19 physician's name, or anything about my medical condition to be
20 released to anyone beyond the confines of the Cooperative. I
21 am very upset that my confidential medical information has
22 been released.
23

24 5. I am also upset that the impression has been left that my
25 physician did anything other than give me honest medical
26 advice about medical marijuana. My doctor never told me to go
27 to the Cooperative or even to start using medical marijuana.
28 Rather, my doctor just explained the possible benefits and

1 drawbacks of marijuana for my medical condition. My decision
2 to use medical marijuana and to go to the Cooperative was mine
3 and mine alone. I never discussed with the Cooperative how I
4 came to seek its services.

5
6 6. I fear that the information about my medical condition, the
7 identity of my doctor, and in particular the way in which my
8 doctor's advice to me has been mischaracterized could lead to
9 my doctor being investigated, and eventually prosecuted or
10 sanctioned. My doctor is keeping me alive. I am thirty-five
11 years old, and I want to live. If my doctor has to stop
12 seeing me as a patient, because of the role I unknowingly
13 played in endangering my doctor, I am afraid of what will
14 happen to me. Without my doctor, I fear I will die.

15
16 7. Until today, I have not spoken publicly about my illness or my
17 use of medical marijuana. Indeed, I am concerned that my
18 speaking out will cause the federal government to target me in
19 some way. But the thought of losing my relationship with my
20 doctor and of driving my doctor away from scores of patients
21 like me compels me to do so.

22
23 8. I would like an opportunity to retain counsel to represent my
24 interest in these proceedings, but have not been able to do so
25 on short notice. A well respected and prominent attorney has
26 agreed to represent me in arguing for a protective order if
27 the Court can delay the hearing on this issue for at least one
28 week.

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

3 Executed this 3 day of October, 1998, at ~~LAOAKLAND~~ Oakland
4 California.

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7 Donna Booker

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