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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed August 19, 2022]

No. 21-15953
D.C. No. 3:15-cv-03522-WHO

NATIONAL ABORTION FEDERATION,
Plaintiff-Appellee,

v.

CENTER FOR MEDICAL PROGRESS; BIOMAX PROCUREMENT SERVICES, LLC; DAVID DALEIDEN, AKA Robert Daoud Sarkis,
Defendants-Appellants,

and

TROY NEWMAN,
Defendant.

No. 21-15955
D.C. No. 3:15-cv-03522-WHO

NATIONAL ABORTION FEDERATION,
Plaintiff-Appellee,

v.

STEVEN COOLEY; BRENTFORD J. FERREIRA,
Appellants,

CENTER FOR MEDICAL PROGRESS; BIOMAX PROCUREMENT SERVICES, LLC; DAVID DALEIDEN, AKA Robert Daoud Sarkis; TROY NEWMAN,
Defendants.

MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick, District Judge, Presiding

Argued and Submitted August 9, 2022
Anchorage, Alaska

Before: S.R. THOMAS, McKEOWN, and CLIFTON, Circuit Judges.

The Center for Medical Progress ("CMP"), Biomax Procurement Services, LLC ("Biomax"), and David Daleiden (aka "Robert Sarkis") (collectively "Defendants") appeal from the district court's final judgment granting summary judgment to the National Abortion Federation ("NAF") and entering a permanent injunction in favor of NAF. CMP and Daleiden, along

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

with appellants Steven Cooley and Brentford J. Ferreira, who represent Daleiden in a related state criminal case, also appeal from the district court's orders holding them in civil contempt for violation of the preliminary injunction and setting the civil contempt sanctions amount. We have jurisdiction pursuant to 28 U.S.C. § 1291. Because the parties are familiar with the factual and procedural history of the case, we need not recount it here. We affirm.[1]

1. There is subject matter jurisdiction over NAF's state law claims under 28 U.S.C. § 1332. A prior panel has already considered and rejected Appellants' argument that NAF lacks complete diversity. *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 793 F. App'x 482, 484 n.1 (9th Cir. 2019) (noting that it had "considered the issue and conclude[d] that diversity jurisdiction properly existed"). This determination is the law of the case. *See Hanna Boys Ctr. v. Miller*, 853 F.2d 682, 686 (9th Cir. 1988).

2. NAF's breach of contract claim is not barred by claim preclusion because NAF is not in privity with the plaintiffs in *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 214 F. Supp. 3d 808 (N.D. Cal. 2016), *aff'd*, 890 F.3d 828 (9th Cir. 2018), *amended*, 897 F.3d 1224 (9th Cir. 2018), *and aff'd*, 735 F. App'x 241 (9th Cir. 2018), for purposes of res judicata.[2] *See United*

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[1] Defendants' motion to supplement the record and motion for judicial notice are granted (Case No. 21-15953, Docket No. 21).

[2] By failing to specifically and distinctly argue that the district court incorrectly applied issue preclusion, Defendants forfeited this argument. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994).

States v. Schimmels (*In re* Schimmels), 127 F.3d 875, 881 (9th Cir. 1997).

3. The district court did not err in entering a permanent injunction in favor of NAF.[3]

> a. The Supreme Court has held that First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary, and intelligent. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps. Council 31*, 138 S. Ct. 2448, 2486 (2018); *see also Leonard v. Clark*, 12 F.3d 885, 889–90 (9th Cir. 1993), *as amended* (Mar. 8, 1994). Defendants knowingly, voluntarily, and intelligently waived any First Amendment rights in disclosing the information they obtained at the NAF conferences by signing the agreements with NAF. Daleiden voluntarily signed the agreements, and testified that he was familiar with the contents. The agreements unambiguously prohibited him from making records, disclosing recordings, and from disclosing any information he received from NAF. His waiver of First Amendment rights was demonstrated by clear and convincing evidence.

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[3] Defendants forfeited any argument that the district court abused its discretion in entering an unjustified permanent injunction in favor of NAF. "We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review." *Greenwood*, 28 F.3d at 977.

b. The permanent injunction does not interfere with Daleiden's Sixth Amendment rights. The district court repeatedly stated that the federal court would not interfere with the state court's determinations regarding what information will become publicly available or disclosed in connection with the criminal proceedings.

c. Daleiden's breach of contract claim and the resulting permanent injunction are not preempted by the Copyright Act. *See Grosso v. Miramax Film Corp.*, 383 F.3d 965, 968 (9th Cir. 2004), *amended on denial of reh'g*, 400 F.3d 658 (9th Cir. 2005). The injunction does not conflict with any part of the statute.

4. The district court did not abuse its discretion by denying Defendants' motion to disqualify the district judge. Defendants failed to demonstrate that a reasonable person would believe that the district judge's impartiality could be questioned. *See United States v. Hernandez*, 109 F.3d 1450, 1453–54 (9th Cir. 1997) (per curiam) (setting forth standard of review and discussing standard for recusal under 28 U.S.C. §§ 144 and 455).

5. The district court did not abuse its discretion by holding Daleiden and CMP in contempt of the preliminary injunction. To do so, a court must find "by clear and convincing evidence that the contemnors violated a specific and definite order of the court." *FTC v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999) (citation omitted). The district court did not err in finding that Daleiden created a video containing the

enjoined footage and uploaded that video to CMP's YouTube channel.

6. The district court did not err in holding Cooley and Ferreira in contempt.

a. Cooley and Ferreira were bound by the preliminary injunction, as Daleiden's attorneys, agents, and as parties in active concert or participation with Daleiden. Fed. R. Civ. P. 65(d)(2)(A)–(C).

b. Cooley and Ferreira received adequate notice. *See Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1110 (9th Cir. 2005). They were apprised of the possibility of civil sanctions in late May, and the contempt hearing was held in mid-July. They had approximately six weeks to prepare. Shortly before the hearing, they were informed that the district judge was only considering civil sanctions.

c. Cooley and Ferreira were subject to civil sanctions—not criminal ones. A prior panel determined that the contempt sanctions entered against Cooley and Ferreira were civil contempt sanctions, and that determination is the law of the case. *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 926 F.3d 534, 538 (9th Cir. 2019). Thus, they were not entitled to procedural safeguards beyond notice and an opportunity to be heard. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994).

d. *Younger* abstention is not applicable to this case. The district court's contempt order has

neither the actual nor the practical effect of enjoining the state court prosecution of Daleiden. *See ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 758 (9th Cir. 2014); *Gilbertson v. Albright*, 381 F.3d 965, 977–78 (9th Cir. 2004) (en banc).

e. Cooley and Ferreira do not fall within the "narrow circumstances" that would permit them to contest the legality of the underlying injunction by disobeying it. *Irwin v. Mascott*, 370 F.3d 924, 931 (9th Cir. 2004).

f. The district court did not err in concluding that Cooley and Ferreira did not have an objectively reasonable basis for believing that the injunction did not apply to them. *See Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801–02 (2019).

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 15-cv-03522-WHO

[Filed April 7, 2021]

NATIONAL ABORTION FEDERATION,
Plaintiff,

v.

CENTER FOR MEDICAL PROGRESS, et al.,
Defendants.

ORDER ON MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTIVE RELIEF

Re: Dkt. Nos. 665, 669, 707

Plaintiff National Arbitration Federation (NAF) moves for entry of summary judgment on its claim of breach of contract against defendants Center for Medical Progress (CMP), BioMax Procurement Services (BioMax) and David Daleiden. NAF argues that given the claims pursued, evidence adduced, and judgments entered in a related case against defendants – *Planned Parenthood Federal of America, et al. v. Center for Medical Progress et al.*, Case No. 16-cv-236 (*PPFA*

case)[1] – summary judgment in its favor is appropriate as a matter of issue preclusion because the breaches of the same NAF contracts at issue here were determined against defendants in the *PPFA* case. As a remedy for those breaches, NAF seeks to convert the existing preliminary injunction into a permanent injunction that broadly prevents defendants from publishing or disclosing any recordings or other information learned at any NAF meeting, disclosing the dates or locations of any future NAF meeting, publishing or otherwise disclosing the names or addresses of any NAF members learned at any NAF meeting, and entering any NAF office, NAF meeting, or other NAF event by misrepresenting their true identity. Defendants respond that issue preclusion cannot prevent them from relitigating the issue of whether they breached NAF's contracts. They also argue that NAF's proposed permanent injunction is illegal and inappropriate under the Copyright Act and is otherwise not merited.

As discussed below, issue preclusion is appropriate: The contract issues concerning these parties were decided in the *PPFA* case. Defendants' Copyright Act defense is insubstantial. NAF is entitled to a permanent injunction whose scope is cabined by the breach of contract claim. It may not enjoin conduct based on the broader set of claims that were proved in the *PPFA* case.

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[1] The remaining defendants in this case – Daleiden, CMP, and BioMax, herein referred to as "defendants" – were defendants in the *PPFA* case along with others who worked for CMP and/or conspired with Daleiden and CMP.

BACKGROUND

The parties are intimately familiar with the factual and procedural background of this case. In brief, there is no dispute that Daleiden and others working for CMP secured entrance to the 2014 and 2015 NAF Annual Meetings using aliases and purporting to be exhibitors from a front company, defendant BioMax. While at those Annual Meetings, Daleiden and others surreptitiously recorded hundreds of hours of footage of NAF staff, presenters, exhibitors, and attendees. These recordings were secured and portions of them were released as part of defendants' Human Capital Project (HCP), whose goal was to expose abortion providers that allegedly sold aborted fetal tissue for profit in violation of state and federal laws or who altered abortion procedures in violation of state and federal laws to procure specimens to be sold to researchers.

After NAF learned that defendants had secured access to its meetings, it sued defendants in this court, secured a temporary restraining order (Dkt. Nos. 15, 27),[2] and then sought and secured a preliminary

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[2] The TRO, entered initially on July 31, 2015, restrained and enjoined defendants and their officers, agents, servants, employees, and attorneys, and any other persons who are in active concert or participation with them from:

> (1) publishing or otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF annual meetings;
>
> (2) publishing or otherwise disclosing to any third party the dates or locations of any future NAF meetings; and

injunction (Preliminary Injunction). The Preliminary Injunction enjoined defendants from:

> (1) publishing or otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF annual meetings;
> (2) publishing or otherwise disclosing to any third party the dates or locations of any future NAF meetings; and
> (3) publishing or otherwise disclosing to any third party the names or addresses of any NAF members learned at any NAF annual meetings.

Dkt. No. 354 (Preliminary Injunction) at 42.[3]

At that juncture, NAF adequately demonstrated a likelihood of success on the merits of its breach of contract claim, showing that defendants agreed to and then violated NAF's Exhibitor Agreements (EA) and Confidentiality Agreements (CA) (collectively NAF

> (3) publishing or otherwise disclosing to any third party the names or addresses of any NAF members learned at any NAF annual meetings.

Dkt. No. 15. On August 3, 2015, after reviewing the arguments and additional evidence submitted by defendants, I issued an order keeping the TRO in place pending the hearing and ruling on NAF's motion for a preliminary injunction. Dkt. No. 27.

[3] The material covered by the first section of the Preliminary Injunction ("any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF annual meetings") is referred to herein as NAF Material.

Agreements) that were required for access to NAF's 2014 and 2015 Annual Meetings. NAF showed that defendants: (I) breached the EAs by misrepresenting BioMax and their own identities; (ii) breached the EAs and CAs by secretly recording during the Annual Meetings; and (iii) breached the EAs and CAs by disclosing and publishing NAF's confidential materials. Preliminary Injunction Order at 20-26.[4]

At various points during the pendency of this litigation, the contours of the Preliminary Injunction have been discussed and refined. In July 2017, when I held that Daleiden and his criminal defense counsel were in civil contempt for violating the terms of the Preliminary Injunction and releasing NAF Materials to the public, Dkt. No. 482, I ordered that CMP and Daleiden "turn over to counsel all materials covered by the PI Order and must not retain control over any of that material, absent further Order of this Court or the Superior Court handling the criminal matter. Absent an order from this Court or the Superior Court providing Daleiden with greater access to that material, Daleiden may only access the PI material onsite at the offices of [his criminal defense counsel] or his civil defense counsel." *Id*. at 23-24. With respect to

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[4] The Ninth Circuit affirmed the Order Granting the Preliminary Injunction at *Natl. Abortion Fedn., NAF v. Ctr. for Med. Progress*, 685 Fed. Appx. 623 (9th Cir. 2017) (unpublished). In July 2018, NAF voluntarily dismissed some of its claims. Dkt. No. 542. The remaining claims in the operative First Amended Complaint (FAC) are: (i) Third Cause of Action for Civil Conspiracy; (ii) Fourth Cause of Action for Promissory Fraud; (iii) Fifth Cause of Action for Fraudulent Misrepresentation; and (iv) Sixth Cause of Action for Breach of Contact(s).

the pending criminal proceedings against Daleiden, that Order emphasized:

> As the criminal case progresses, I will not interfere with Judge Hite's determinations concerning what information about the Does or what portion of the relevant recordings should become publicly accessible or disclosed in connection with the criminal pre-trial and trial proceedings. Those determinations are Judge Hite's, not Cooley's, Ferreira's or Daleiden's.

Id. at 20.

In November 2018, I again considered the Preliminary Injunction's scope when addressing defendants' motions to dismiss and strike and their request that the Preliminary Injunction be dissolved, modified, or clarified in light of Daleiden's argument that the injunction infringed on his constitutional rights to present his defense to the state criminal charges. Dkt. No. 572. I declined to modify or dissolve the injunction. I reiterated:

> [N]othing in the Preliminary Injunction interferes with [the criminal proceedings in Superior Court]. If Daleiden believes he needs to use Preliminary Injunction materials to support his defense, he can notify Judge Hite in advance of the specific portions of the materials he wants to use and seek leave from Judge Hite to file those materials under seal or in the public record or show those materials in open or closed court. If Judge Hite orders that some of the Preliminary Injunction materials may be

> released in some public manner to allow Daleiden to fully contest the criminal charges, Judge Hite may do so without my interference. That determination rests with Judge Hite, not with defendants.

Id. at 30-31; *see also id*. 30 n.26 (noting also, "[a]s Judge Hite is presiding over the criminal proceedings, he will have a better sense of what portion of the Preliminary Injunction materials Daleiden legitimately needs to use for his defense, whether any of those materials should be publicly disclosed in open court or unsealed filings, and if disclosed whether any further restrictions should be placed on the materials' use or dissemination."). I further emphasized that:

> If Judge Hite rules that specific portions of the Preliminary Injunction materials may be used in open court or in unsealed pleadings, then defendants may come to me on an expedited basis under Civil Local Rule 7-11 (governing motions for administrative relief) for a modification or clarification of the Preliminary Injunction Order with respect to the collateral use they would like to make of the materials.

Id. at 31.

After my order denying defendants' motions to dismiss and strike and to modify or dissolve the Preliminary Injunction were affirmed by the Ninth Circuit, and in light of the fact that the *PPFA* case had been tried and a final judgment would be entered, I agreed with NAF's proposal that its motion for summary judgment on the breach of contract claim and

request for permanent injunctive relief be determined separately from the rest of its remaining claims. NAF repeatedly committed that "in the event it secures summary judgment on its contract claim and a permanent injunction, NAF will dismiss all remaining claims with prejudice, ending this case." Dkt. Nos. 620 at 3; 538 at 3.

During the *PPFA* case, the issue of Daleiden, CMP, and BioMax's breach of the NAF Agreements was resolved against them. I found based on undisputed facts at summary judgment that in order to gain access to NAF's 2014 and 2015 Annual Meetings, Daleiden (acting on behalf of CMP and purporting to be an exhibitor from BioMax) signed and then breached provisions of both NAF's Exhibitor Agreements (EAs) and Confidentiality Agreements (CAs). Dkt. No. 753 (*PPFA* Order on Summary Judgment) at 43; *see also id.* at 45-49 (rejecting defendants' arguments that the NAF Agreements were void for lack of consideration or vagueness).[5] During trial, I granted plaintiffs' Rule 50 motion regarding the NAF contracts, concluding that the undisputed evidence showed:

> that Plaintiffs' Rule 50 motion should be granted as to the breach of the NAF Agreements, specifically as to defendants Merritt, Daleiden, BioMax, and CMP in 2014 and defendants Daleiden, Lopez, BioMax, and CMP in 2015

[5] In connection with these motions, exemplars of the CA and EAs signed by defendants are attached as Exhibits 11-13 in connection with NAF's Motion for Summary Judgment and Permanent Injunction. Dkt. Nos. 666-11 through 666-13.

> concerning the first term of the 2014 and 2015 Confidentiality Agreements prohibiting "Videotaping or Other Recording" and as to defendants Daleiden, BioMax, and CMP with respect to the NAF Exhibitor Agreements in 2014 and 2015 concerning the requirement to provide "truthful, accurate, complete, and not misleading" information. I reject defendants' arguments as to ambiguity, the liability of CMP and BioMax through their agents (Daleiden, Lopez, Merritt), and lack of consideration. A reasonable jury would not have a legally sufficient basis to find otherwise.

PPFA Rule 50 Order, Dkt. No. 994, at 1-2.[6]

The jury subsequently found that defendants' breach of the 2014 and 2015 NAF Agreements caused PPFA $49,360 in damages. *PPFA* Verdict, Dkt. No. 1016 at 7. In April 2020, I entered judgment following the Rule 50 Order, the jury's Verdict, and my findings and conclusions on plaintiffs' Unfair Competition Law Claim (UCL). *PPFA* UCL Order, Dkt. No. 1974. I also granted plaintiffs' request for a permanent injunction based on their success on their illegal recording, fraud, trespass, and UCL claims,

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[6] The trial testimony and evidence PPFA cited to support the Rule 50 motion on breach of the NAF Confidentiality and Exhibitor Agreements included: Trial Exs. 228, 248, 352, 370, 568, 1012, 6064; Trial Tr. 413:20-415:23, 426:1-6, 445:22-446:24, 447:6-10, 487:25, 611:23-615:17, 2088:1-15, 2172:22-2173:5, 2173:10-23; 2112:12-16, 2198:10-12, 2209:6-2211:6, 2212:21-2213:5, 2233:21-2235:15, 2468:9-13, 2469:13-15, 3588:23-3589:13. *See PPFA* Dkt. No. 979 at 2-3.

entering an injunction that was narrower than plaintiffs sought.[7] *PPFA* Judgment, Dkt. No. 1074. I

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[7] The *PPFA* permanent injunction provides:

> A. Upon service of this Order, all Defendants (except Lopez, unless he is acting in concert or participation with another Defendant) and their officers, agents, servants, employees, owners, and representatives, and all others persons who are in active concert or participation with them are permanently enjoined from doing any of the following, with respect to PPFA, PPNorCal, PPPSW, PPOSBC, PPCCC, PPPSGV, PPRM, and PPGC/PPCFC:
>
> (1) Entering or attempting to enter a PPFA conference, or an office or health center of any plaintiff identified above, by misrepresenting their true identity, their purpose for seeking entrance, and/or whether they intend to take any video, audio, photographic, or other recordings once inside; and
>
> (2) recording, without the consent of all persons being recorded (where all party consent is required under the laws of the state where the recording is intended):
>
> (a) any meeting or conversation with staff of a plaintiff identified above that Defendants know or should know is private; or
>
> (b) in a restricted area at a PPFA conference or restricted area of an office or health center of any plaintiff identified above. "Restricted area" is defined as areas not open to the general public at the time of the recording, for example areas requiring registration or an appointment to access.
>
> B. In addition, Defendants shall serve a copy of this injunction on any person who, in active concert or participation with Defendants, either has or intends to enter a restricted area at a PPFA conference or property of any plaintiff identified above or to record the staff of any plaintiff identified above without securing consent of all persons being recorded (where that consent is required under the laws of the state where the recording is intended), and provide Plaintiffs with proof of service thereof.

Id. at 9-10.

denied defendants' post-trial motions in August 2020. *PPFA* Order on Post-Trial Motions, Dkt. No. 1116.

Returning to this case, I agreed for purposes of efficiency to resolve the narrow issue of the preclusive effect of the *PPFA* Verdict and Judgment on NAF's breach of contract claim and the permanent injunctive relief to which NAF might be entitled under that claim here on the evidence presented in the *PPFA* trial and in this case. This motion followed.

DISCUSSION

I. SUMMARY JUDGMENT BASED ON PRECLUSION

NAF moves for entry of summary judgment on its breach of contract claim. It argues that principles of issue preclusion prevent defendants from relitigating their breaches of the NAF EAs and CAs.

A. Legal Standard

Issue preclusion, or collateral estoppel, is appropriate when: "(1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated in that action; (3) the issue was lost as a result of a final judgment in that action; and (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action." *In re Palmer*, 207 F.3d 566, 568 (9th Cir. 2000).

B. Factors

Defendants do not dispute NAF's showing – and my independent conclusion having presided over the *PPFA* case – that defendants had a full and fair opportunity to litigate the issue of defendants' breaches of the NAF Agreements. That issue was actually litigated and determined against defendants, and the defendants here were defendants there.

Instead, defendants argue that collateral estoppel is not appropriate because the NAF breach of contract claim in the *PFFA* case was not identical to the alleged breach of the NAF Agreements here. *See, e.g.*, *Grimes v. Ayerdis*, 16-CV-06870-WHO, 2018 WL 3730314, at *5 (N.D. Cal. Aug. 6, 2018) ("For collateral estoppel to apply, defendants must show that the estopped issue is identical to an issue already litigated and that the issue was decided in the first case."). Defendants point out that the breach claim that supported the Preliminary Injunction in this case was based on three portions of the NAF EAs and CAs: (I) misrepresentation prohibitions (EA, ¶ 15), (ii) taping/recording prohibitions (CA, ¶ 1), and (iii) non-disclosure provisions (CA ¶ 17, CA ¶ 3).[8] Defendants contrast that with the *PPFA* case, where

[8] The EAs required exhibitors to affirm they (1) have a legitimate business interest in reaching reproductive health care professionals (*id*. ¶ 1); (2) will "truthfully [and] accurately" represent their business at the meetings (*id*. ¶¶ 15, 19); and (3) will keep all information learned at the meetings in confidence and not disclose that information to third parties without NAF's consent. *Id*. ¶ 17. The *PPFA* Verdict and Judgment were based on violation of (1) and (2) only and did not reach (3).

the breach of the NAF Agreements Judgment and Verdict was based only on the (I) misrepresentation prohibitions (EA, ¶ 15) and the (ii) taping/recording prohibitions (CA, ¶ 1). That is a distinction without a difference: the identical issue – breach of the NAF EAs and CAs – was established in the *PPFA* case[9]

Defendants also argue that there is a material dispute over whether NAF suffered "actionable harm." Oppo. at 12-13. Not so. The NAF EAs provide that "monetary damages would not be a sufficient remedy for any breach" of the EAs and that "NAF [would] be entitled to specific performance and injunctive relief as remedies" for any breach. EA ¶ 18. Defendants do not separately challenge that provision of the EAs except with respect to the scope of appropriate relief.[10]

Defendants maintain that NAF failed to show a knowing and voluntary waiver of their First Amendment rights when defendants signed the EAs and CAs to attend the 2014 and 2015 Annual Meetings.

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[9] Defendants' arguments in their Opposition identifying "issues of material fact" regarding breach of the non-disclosure provisions in the EAs or CAs are irrelevant, as those provisions are not relied on by NAF as bases for preclusion here. Reply at 2-3. But, defendants' arguments regarding the non-disclosure *and* the other provisions of the NAF Agreements (as void for lack of mutual assent, as adhesive, and as unconscionable) were rejected in this case at the Preliminary Injunction stage. Oppo. at 8-12; *see also* Preliminary Injunction Order, Dkt. No. 354 at 23-26, 28-29.

[10] Moreover, actionable harm is readily established given that, "nominal damages [] are presumed as a matter of law to stem merely from the breach of a contract." *Sweet v. Johnson*, 169 Cal. App. 2d 630, 632 (Cal. App. 3d Dist. 1959).

Oppo. at 13-14. That does not prevent application of issue preclusion or undermine NAF's "success on the merits" showing. I rejected that argument at the Preliminary Injunction stage and defendants had a full opportunity to raise it in the *PPFA* case. *See, e.g., Paulo v. Holder*, 669 F.3d 911, 918 (9th Cir. 2011) ("If a party could avoid issue preclusion by finding some argument it failed to raise in the previous litigation, the bar on successive litigation would be seriously undermined."). The defendants' First Amendment arguments do not defeat preclusion or otherwise weigh against entry of judgment on the breach of contract claim.[11]

Summary judgment is GRANTED and entered in NAF's favor on the breach of contract claim.

II. PERMANENT INJUNCTION

A. Legal Standard

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that,

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[11] Contrary to defendants' characterization, just because NAF seeks injunctive relief and cites evidence from the *PPFA* trial and the record in this case to address the relevant injunction factors (*i.e.*, irreparable injury, balance of hardships, public interest), that does not mean that NAF is seeking to remedy a "reputational injury" through its breach of contract claim. Oppo. at 12-13.

> considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). In addition, to establish standing plaintiffs must demonstrate a "real and immediate" threat of future injury without an injunction to justify injunctive relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

B. NAF's Proposed Injunction

NAF asks me to enter the following permanent injunction based solely on its breach of contract claim:

> All Defendants and their officers, agents, servants, employees, owners, and representatives, and all other persons, firms, or corporations acting in concert or participation with them, are hereby permanently restrained and enjoined from:
>
> > 1) Publishing or otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF meeting;
> >
> > 2) Publishing or otherwise disclosing to any third party the dates or locations of any future NAF meeting;

> 3) Publishing or otherwise disclosing to any third party the names or addresses of any NAF members learned at any NAF meeting;
>
> 4) Entering or attempting to enter a NAF office, NAF meeting, or other NAF event by misrepresenting their true identity, their purpose for seeking entrance, and/or whether they intend to take any video, audio, photographic, or other recordings once inside;
>
> 5) Retaining possession of any materials covered by this permanent injunction. Any and all such materials covered by this permanent injunction must be turned over to counsel of record in this matter, the identity of whom shall be disclosed to this Court. Access to any and all such materials by individuals covered by this permanent injunction shall occur only onsite at the offices of said counsel and subject to the supervision of said counsel, absent further order of this Court or the court in People v. Daleiden, No. 2502505 (S.F. Super. Ct.).
>
> Nothing in this permanent injunction shall prevent the court in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.) from making orders about how materials covered by this injunction can be used in those proceedings.

Dkt. No. 665-4.

The scope of the requested permanent injunction is broader than the Preliminary Injunction. It effects a permanent dispossession of the recordings and NAF

Materials from defendants and adds a provision barring defendants and their agents from entering or attempting to enter NAF offices or events by misrepresenting their identity or with the intent to take video or audio recordings.

C. Defendants' General Arguments on the Remedy

Defendants make threshold arguments over whether an injunction is an appropriate remedy in the first place. They contend that injunctive relief is not an appropriate form of relief for NAF's breach of contract claim because NAF is seeking to protect itself from "reputational harm." I disagree; the relief granted below is directly related to and stems from defendants' breach of specific provisions in the NAF Agreements. Relatedly, defendants assert that any permanent injunction would impermissibly trample on their First Amendment rights to disclose what they learned and recorded at the NAF Annual Meetings. But to repeat what I wrote earlier, the EAs, specifically provide that exhibitors agree that "monetary damages would not be a sufficient remedy for any breach" of the EAs, and that "NAF [would] be entitled to specific performance and injunctive relief as remedies" for any breach. EA ¶ 18.

As noted, I rejected defendants' argument at the Preliminary Injunction stage that NAF has not shown that defendants knowingly and intelligently signed the EAs, such that they voluntarily waived their First Amendment rights. Defendants also had a full and fair

opportunity to litigate that defense in the *PPFA* case.[12] The evidence at the *PPFA* trial established that Daleiden *knew* what he was signing when he signed the two EAs and signed at least one CA for the 2014 NAF conference given his own, personal experience with NDAs. His testimony that he had a different, subjective understanding of what the NAF CA covered or what the NAF EAs meant was not reasonable nor relevant to enforceability. *See, e.g.*, Trial Tr., 2487:5-25, 2489:4-2490:4, 2491:1-22, 2509:10-22, 2510:15-2511:13, 2660:3-6, 2722:7-14. Defendants' general arguments against permanent injunctive relief fail.

D. Irreparable Injury and Inadequate Remedies at Law

NAF argues that evidence in the *PPFA* trial and the declarations submitted and depositions taken in this case demonstrate the emotional harm that defendants' prior release of NAF Materials inflicted on NAF's own staff and NAF members; it caused NAF's staff worry and concern over their own and their colleagues' safety and their ability to have full and frank conversations and to share information at future NAF meetings.[13]

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[12] Defendants raised a host or arguments as to why the NAF Agreements were otherwise void or unenforceable on summary judgment in the *PPFA* case. Those arguments were rejected. *PPFA* Summary Judgment Order, Dkt. No. 753, at 43, 45-49. As noted above, similar arguments were rejected at the Preliminary Injunction stage in this case.

[13] Declaration of Melissa Fowler, Dkt. No. 665-1, ¶¶ 6-8, 10; Declaration of Michelle Davidson, Dkt. No. 665-2, ¶¶ 3-5; *see also PPFA* Trial Tr. 993:10-994:14, 1378:10-1379:6, 1490:13-22, 1513:14-20, 1558:13-21,1978:6-7.

NAF also points to evidence that its members suffered a "significant" increase in harassment, threats, and violent incidents following defendants' 2015 and 2017 releases of the NAF Materials and argues that these results are more than likely to recur if defendants are not enjoined from future disclosures.[14] It explains that following the 2015 and 2017 releases, it had to divert significant resources that otherwise would have been used to provide support for NAF members and their services to investigating, responding to, and providing additional security resources in response.[15] NAF contends these are irreparable injuries that are not adequately addressed through remedies at law and that justify permanent injunctive relief. I agree.

Defendants attempt to dispute some of NAF's evidence by relying on their security expert, Jonathan Perkins. Dkt. No. 707-6, ("Expert Report of Jonathan Perkins"). He attacks the opinions of NAF's Security Director Michelle Davidson concerning the increase in threats and incidents of violence following the 2015 and 2017 release of recordings because: (I) Davidson lacked formal "training" in security and NAF did not adhere to the FBI's standard for categorizing criminal incidents, meaning that NAF and Davidson are not able to "properly evaluate and classify security incidents," *id*. ¶¶ 15-18, 26; (ii) NAF lacked a form for recording

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[14] *See* Davidson Decl., ¶¶ 10-13, 15-16, 18, 21-22; *see also* Pl. Ex. 9 Deposition of Vicki Saporta at 39:13-20; *PPFA* Trial Tr. 1516:6-1517:7, 1675:24-1676:19.

[15] *See* Fowler Decl. ¶¶ 11-12; Davidson Decl., ¶¶ 14, 17, 19-21, 23-24, 26.

security incidents and Davidson took member reports at their word and conducted no further investigation, *id*. ¶¶ 15, 17; and (iii) NAF's reporting system did not allow for an "accurate assessment" of what security resources are necessary to address the purported harm or threat. *Id*. ¶¶ 15, 17, 20.

According to Perkins, these deficiencies result in a "faulty data set" that does not consistently or accurately distinguish between "true threats" and incidents that pose no "real risk." *Id*. ¶ 20. He also points to data tracking serious incidents taking place directly "at" health centers in California as reflected in the California's Department of Justice's data tracking "Anti-Reproductive Rights Crimes (ARRC)," which showed a lack of "significant" criminal activity during the two-year period prior to and after the CMP videos containing NAF Materials were released in 2015. According to Perkins, the California DOJ data shows a decrease in property damage and no violent crimes occurring "at health centers in California" during those timeframes. *Id*. ¶¶ 29-31, 33.

These arguments do not undermine NAF's showing. The California DOJ data is not persuasive because the incidents of threats and harassment on which NAF relies are primarily "threats" and "harassment" directed at the individuals highlighted in the CMP videos (and not necessarily towards the property of the health centers where they worked), as well as incidents outside of California. Perkins does not show that those types of incidents would be tracked by the California DOJ. *See* Davidson Decl. ¶ 16 ("In total, during the last half of 2015, NAF reported 69 threats we had

uncovered through our monitoring to the [federal] DOJ for investigation. This number far exceeded any other time period during my time at NAF up to that point."). More significantly, Perkins disputes only whether *some* of the incidents experienced by NAF members following the 2015 and 2017 releases of the CMP videos containing NAF Materials were "true threats" or mere protests or angry responses to the activities of NAF members. Perkins Report ¶¶ 27-28. Perkins does not dispute that following the 2015 and 2017 releases, NAF members received significant, actual threats, some of which directly referenced the content of the CMP videos. Instead, he simply disputes the number by arguing that some did not rise to the level of true criminal threats or criminal harassment.

Having presided over the *PPFA* trial, which included testimony of NAF staff and NAF members, and having reviewed all of the evidence identified by NAF on this motion, I find that NAF has adequately alleged irreparable injury as well as the likelihood of future irreparable injury if defendants are not permanently enjoined from releasing the NAF Materials. These injuries are not adequately addressed at law. This significant showing of irreparable and unredressable injury – disputed by defendants only to its extent but not fully to its existence – is sufficient. *See also* UCL Order, Dkt. No. 1073 in *PPFA* case, 16-236 at 21-22. My conclusion is only strengthened by the provision in the EAs, discussed above, where defendants agreed that "monetary damages would not be a sufficient remedy for any breach" of the EAs, and that "NAF [would] be entitled to specific performance and injunctive relief as remedies" for any breach.

EA ¶ 18. NAF has satisfied these factors in support of permanent injunctive relief.[16]

E. Balance of Hardships

The balance of hardships weighs in favor of permanent injunctive relief preventing defendants from disclosing the NAF Materials. As noted above, ample evidence exists supporting NAF's claim of irreparable injuries following the 2015 and 2017 CMP video releases. Similar injuries would likely occur again if there were future releases of NAF Material.

Defendants contend that the balance of hardship tips in their favor because they have a First Amendment right to publish the recordings and any permanent injunction would constitute an impermissible prior restraint. Oppo. at 25-26. But as the Ninth Circuit recognized in affirming the Preliminary Injunction, "[e]ven assuming arguendo that the matters recorded are of public interest, however, the district court did not clearly err in finding that the defendants waived any First Amendment rights to disclose that information publicly by knowingly signing the agreements with NAF." *Natl. Abortion Fedn., NAF v. Ctr. for Med. Progress*, 685

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[16] Defendants argue that there is no "causal relationship" between the 2015 release and the alleged instances of harm and threats because any such incidents are – according to defendants – attributable to the "negative sentiment surrounding the abortion industry" and that NAF failed to identify which specific portions of the CMP videos led to specific threats or violence to NAF's members. Oppo. at 24. Defendants provide no support for requiring that granular level (and likely unproveable) showing to support permanent injunctive relief.

Fed. Appx. 623, 626 (9th Cir. 2017) (unpublished). Defendants point to no *new* evidence to support a theory that Daleiden's signing of the EAs and CAs was not voluntary and knowing and that it did not effectuate a full waiver of any First Amendment rights he might otherwise have possessed. Indeed, the *PPFA* trial testimony demonstrated Daleiden's intimate familiarity with and his own frequent use of NDAs. His attempt to downplay that experience by claiming that he had a subjective belief that the NAF CAs were not as broad as they were expressly drafted was unreasonable and unpersuasive.

In terms of hardship and the public interest (addressed in more depth below), it bears emphasizing that there is no evidence that the Preliminary Injunction – which has been in place since 2015 – has ever stood in the way of law enforcement or governmental investigations or that it has hindered any part of the criminal prosecution of Daleiden in California state court. I have repeatedly offered to make and made myself available on an expedited basis to hear the defendants' or investigatory requests for access to the NAF Materials and to address any concerns with the scope of the Preliminary Injunction. *See, e.g.*, Dkt. Nos. 374, 378, 382, 572; *see also* Dkt. No. 155 at 3:12-14. Likewise, I have repeatedly confirmed Judge Hite's authority to make decisions about how the NAF Materials should be treated in his court, including regarding defendants' access to the

Materials and for their use in court. *See, e.g.,* Dkt. Nos. 572, 594.[17]

Finally, in considering the Unfair Competition Law claim (Cal. Bus. & Prof. Code § 17200 *et seq*.) and granting injunctive relief in the *PPFA* case, I identified numerous facts that supported injunctive relief in that case and that likewise support injunctive relief here. Those facts include: the steps defendants took to effectuate their fraudulent scheme of misrepresentation and surreptitious recordings at the NAF Annual Meetings; their goal to create "maximum negative impact – legal, political, professional, public – on [Planned Parenthood]" and others in the "abortion industry;" their "ability to continue the activities found to be illegal by the jury; and Daleiden and CMP's intent to release more videos through CMP from their surreptitious recordings. *PPFA* UCL Order, Findings of Fact 3, 56, 58-60; *id.* at 22-25 (finding balance of hardships tips sharply in favor of injunctive relief); *see also* PPFA Trial Tr. 2294:20-22 (expressing intent to release more recordings); Fowler Decl. ¶ 14.

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[17] Daleiden nonetheless argues that the Preliminary Injunction has harmed his ability to prepare his defense. *See* Declaration of David Daleiden (Dkt. No. [707-9]) ¶¶ 106-108. But Judge Hite has determined what is necessary and relevant for Daleiden to prepare and present his defense with respect to the NAF Materials. Daleiden is free to seek further relief from Judge Hite as his criminal defense counsel see fit.

The balance of hardships here tips sharply in favor of injunctive relief, albeit not as broadly as sought by NAF.[18]

F. Public Interest

The public interest also weighs in favor of permanent, injunctive relief. Defendants argue to the contrary by pointing to the various federal, state, and local investigations that their HCP videos prompted, resulting in investigations, prosecutions, and regulatory terminations and guidance.[19] Defendants do

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[18] Defendants' First Amendment arguments are not irrelevant. As discussed below, they weigh against restricting the future conduct of defendants beyond that expressly covered by the NAF Agreements at issue.

[19] On the federal level, the investigations included an investigation by the House of Representatives' Select Investigative Panel (within the Energy and Commerce Committee), and an investigation by the Senate Judiciary Committee that led to "criminal and regulatory referrals to federal, state, and local law enforcement entities," including an investigation by the federal Department of Justice. Oppo. at 3-4. Defendants note that the U.S. Department of Health & Human Services terminated the FDA's contract with NAF-member Advanced Bioscience Resources because ABR had not assured HHS that it was not selling fetal tissue for valuable consideration. The National Institutes of Health published "new considerations for researchers to make sure they understand their duty to comply with the prohibition on selling fetal tissue." *Id.* at 4-5. At the state level, defendants add that the Texas Health and Human Services Division ("Texas HHS") terminated the enrollment of various NAF-member Planned Parenthood franchises in the Texas Medicaid Program, a decision affirmed by the Fifth Circuit in *Planned Parenthood of Greater Texas Family Planning & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347 (5th Cir. 2020). At the local level, defendants state that the

not, however, identify any NAF Materials specifically identified by or relied on by those entities that led directly to any of the prosecutions or regulatory actions.[20] Defendants also neglect to mention that my personal review of the NAF recordings (those identified by defendants that, in their view, showed NAF members willing to engage in or admitting to illegal conduct) and other information defendants secured at the 2014 and 2015 NAF Annual Meetings, disclosed no criminal activity. Defendants do not identify any overlooked or unidentified-before-now NAF recordings to support their repeated claims about the contents of those recordings.[21] Simply put, while some *part* of the

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Orange County, California, District Attorney prosecuted two companies for illegally re-selling fetal tissue and that the Arizona Attorney General prosecuted a NAF-member Camelback Family Planning for illegally transferring fetal tissue to a NAF-member company and NAF tradeshow sponsor StemExpress, LLC. *Id*. at 4.

[20] For example, the Texas proceedings and Fifth Circuit opinion focused on recordings made and information secured in Texas and the prosecutions in Orange and Maricopa Counties presumably relied on recordings of StemExpress staff, all of which fall outside the enjoined NAF Materials.

[21] The "expert report" of Dr. Forrest Smith does not alter that conclusion. Dkt. No. 707-7. I had excluded it from the *PPFA* trial as irrelevant, but he amended it and submitted it here to support defendants' public interest argument The Smith Report is mentioned only in passing in defendants' opposition brief as supporting defendants' arguments that the NAF recordings show "information concerning violations of law, willingness to violate the laws, public health and safety, and matters of great public importance." Oppo. at 13-14. As defendants do not themselves rely on specific portions of the Smith Report, it is not appropriately considered on this motion.

HCP resulted in government investigations, criminal prosecutions, and regulatory activity, there is at most a weak connection between those activities and the specific NAF Materials covered by the Preliminary Injunction.

As I recognized in the *PPFA* case when entering the permanent injunction there and in issuing the Preliminary Injunction here, future release of additional NAF Materials creates a significant risk of future threats and harassment with the irreparable and unredressable consequences identified above. While enjoining the release of the recordings from the 2014 and 2015 Meetings will not ensure that the next NAF Annual Meeting will be a safe and secure space for participants to discuss their work and concerns, release of the past recordings will continue to harm that aim. The public interest will be served by enforcing the NAF Agreements, including EA provision allowing for injunctive relief.

G. Copyright Defense

Defendants also claim that Daleiden's copyright in the recordings taken at the 2014 and 2015 NAF Annual Meetings bars any permanent injunction that would prevent his use of the recordings, dispossess him of those recordings, or prevents him from registering his works with the Copyright Office under 17 U.S.C. § 407(a)(1) to fully benefit from the protections of the Copyright Act. They have not raised this issue before. Daleiden argues that under Section 201(e) of the Copyright Act, his rights to the recordings and his ability to make derivative works therefrom are

protected and cannot be infringed by the requested injunction.[22]

NAF does not dispute that the audio recordings Daleiden took could theoretically possess the minimal degree of creativity required to be copyrightable or that Daleiden could theoretically be considered the "author" of the recordings.[23] Instead, it argues that its contract rights trump potential Copyright Act rights. *See* 17 U.S.C. § 301 ("(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to . . . (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106"); *see also Altera Corp. v. Clear Logic, Inc*., 424 F.3d 1079, 1089 (9th Cir. 2005) ("Most courts have held that the Copyright Act does not preempt the enforcement of contractual rights."). The relevant contract rights are the CAs and EAs that defendants have violated, which were entered into as a condition of Daleiden gaining

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[22] 17 U.S.C. § 201(e) provides: "Involuntary Transfer.--When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11."

[23] NAF does reserve its right to contest Daleiden's ownership of copyrights in the NAF Materials, if any, in a future proceeding. Reply at 10 n.5.

access to the Annual Meetings and that he signed before he made any of the recordings at issue.

Defendants cite no authority that recordings made in violation of a contract can be copyrighted when but-for the breach (established here) the recordings would not have been made. The cases defendants rely on – dealing with content that the law might consider illegal, *e.g.,* obscene materials or gambling games (Oppo. at 19-20) – do not establish that content *can* be copyrighted if it was illegally procured and the other contracting-party has a right to enjoin or restrict its distribution.[24]

NAF also argues that Section 201(e) of the Copyright Act cannot apply to these recordings for two independent reasons. First, the section only precludes *involuntary* transfers. Here, Daleiden voluntarily gave up his right to record and disseminate information by signing the EAs and CAs. *See, e.g., Hendricks & Lewis PLLC v. Clinton*, 766 F.3d 991, 997 (9th Cir. 2014) (noting section 201(e) is concerned with involuntary transfers of works owned by the author). Second, the recordings must be vested in an "individual author" who cannot be a corporate entity. NAF contends that Daleiden repeatedly testified in this and the *PPFA* case that CMP owns the "recordings." *Intl. Code Council, Inc. v. UpCodes, Inc.*, 17 CIV. 6261 (VM), 2020 WL

[24] Defendants' made-in-passing argument – that I am without power to enjoin defendants from submitting illegally obtained materials to the Copyright Office because registering copyrights is an act in furtherance of a person's constitutionally protected right to petition under California's anti-SLAPP law (Cal. Code of Civ. Proc. § 425.16) – is wholly without support.

2750636, at *14 (S.D.N.Y. May 27, 2020) ("Claims regarding the Copyright Act are equally inapposite, as 17 U.S.C. Section 201(e) applies only to copyrights held by individual rather than corporate authors and more fundamentally 'addresses government actions avowedly intended to coerce a copyright holder to part with his copyright, so that the government itself may exercise ownership of the rights.'").

On the second issue, at oral argument Daleiden contended that while the CMP possesses the copyrights to the HCP videos (the produced videos released as part of the HCP), he still owned the rough footage. That dispute is not material. The point remains that a permanent injunction covering recordings that were only created in violation of an express contract does not effectuate the sort of involuntary transfer prohibited by Section 201(e).

Finally, defendants' attempt to draw distinctions between the "confidential" material that in their view might be covered by the EAs and CAs and other material captured on the recordings (*e.g.*, conversations between Daleiden or his co-conspirators pretending to be exhibitors for BioMax and individuals who voluntarily approached their exhibitor table) does not assist defendants. All conversations in the Exhibitor Hall – restricted space that was part of the NAF Annual Meetings – were covered by the EA and CA and only occurred as a result of the defendants' violations of the EA and CA.

In short, the Copyright Act does not bar a permanent injunction restricting the dissemination of and access to the NAF Materials, even if that

injunction restricts the ability of Daleiden to submit the NAF Materials to the Copyright Office.

H. Scope

Considering all of the relevant factors, and the evidence in support, I agree that NAF is entitled to permanent injunctive relief that precludes defendants and their agents from publishing or otherwise releasing the recordings they took at NAF's 2014 and 2015 Annual Meetings. That the injunction might benefit Planned Parenthood affiliates who did not attempt to enjoin distribution of recordings taken at the NAF Meetings through the *PPFA* case does not mean that the requested injunction is overbroad or that NAF is precluded from seeking it. NAF is asserting its own rights that also benefit its members as third-party beneficiaries to the NAF Agreements, as noted throughout this case and the related *PPFA* case. This includes the Planned Parenthood affiliates who litigated the *PPFA* case and hundreds of other NAF members who were not involved in the *PPFA* litigation. In the end, the benefit to third-party beneficiaries does not mean that separate relief cannot be sought by NAF as the first-party beneficiary, especially considering that the EA provides specifically for equitable relief. NAF has its own significant interests in preventing disclosure of the NAF Materials.[25]

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[25] The posture of this case with respect to the *PPFA* case, as well as the nature of the relationship between NAF and PPFA and the Planned Parenthood affiliates who litigated the *PPFA* case are significantly different from the situation the Ninth Circuit addressed in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regl. Plan. Agency*, 322 F.3d 1064 (9th Cir. 2003). There, the Ninth

That said, the permanent injunction must be based solely on NAF's breach of contract claim and must be supported by the evidence in this case (submitted at the Preliminary Injunction stage, depositions taken in this case, and declarations submitted in connection with this motion) and by the relevant evidence from the *PPFA* case. The scope of the *PPFA* Permanent Injunction is not directly relevant to the scope of an appropriate injunction here because the Judgment in the *PPFA* case was based on RICO, fraud, trespass, recording statute, conspiracy, and UCL claims not litigated here. I note defendants' uncontested position that they are committed to their mission of opposing abortion and intend to continue their use of surreptitious recordings in circumstances where they believe one-party recording is legal. While defendants' First Amendment rights do not defeat a permanent injunction restricting their access to and use of the NAF Materials they secured only because of the breach

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Circuit applied *res judicata* in light of a previous lawsuit by an association to bar a subsequent suit brought on the same facts by members of the association. The court noted where "there is no conflict between the organization and its members, and if the organization provides adequate representation on its members' behalf, individual members not named in a lawsuit may be bound by the judgment won or lost by their organization. A finding of privity in such circumstances is particularly appropriate in cases involving interests in real property. . . ." *Id.* at 1082. Here NAF is seeking injunctive relief based on the breach of its own contracts on its own behalf and also to benefit members who were not represented in the PPFA case. There are no apposite similarities with the *Tahoe-Sierra* case to support defendants' apparent request to find that *res judicata* precludes the relief NAF seeks here.

of the NAF Agreements, those rights do require a significant narrowing of the scope of relief.

The persons and entities NAF seeks to enjoin ("All Defendants and their officers, agents, servants, employees, owners, and representatives, and all other persons, firms, or corporations acting in concert or participation with them, are hereby permanently restrained and enjoined from") are appropriately tailored. NAF's request to prevent these persons and entities from "[p]ublishing or otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF meeting" is appropriate if limited to the 2014 and 2015 Annual Meetings that defendants only gained access to and from which they secured information and recordings due to their breaches of the NAF Agreements.

The request to cover "any" NAF meeting no matter where or when held or how defendants may access them is overbroad, unsupported, and not appropriate. Similarly, NAF's request to prevent these persons and entities from "[p]ublishing or otherwise disclosing to any third party the dates or locations of any future NAF meeting" irrespective of how or where that information is learned is likewise overbroad, unsupported, and not appropriate.[26] Likewise, a prohibition on "[p]ublishing or otherwise disclosing to

[26] This and other prohibitions were appropriate with respect to the Preliminary Injunction because the scope of defendants' activities, including how they accessed the NAF Meetings, was not fully known. At this juncture, and based only on the breach of contract claim, such broad relief is no longer warranted.

any third party the names or addresses of any NAF members learned at any NAF meeting" is similarly deficient where that request is not tied to the 2014 and 2015 NAF Meetings. Even if it were, it would arguably cover "publishing" names or addresses of NAF members that have since been voluntarily and publicly disclosed.

The prohibition of "[e]ntering or attempting to enter a NAF office, NAF meeting, or other NAF event by misrepresenting their true identity, their purpose for seeking entrance, and/or whether they intend to take any video, audio, photographic, or other recordings once inside," suffers from numerous deficiencies. There is no evidence in the record that defendants attempted to access any NAF office or any NAF event *other* than the 2014 and 2015 NAF Annual Meetings. There is no evidence regarding how access to those facilities or events is or will be controlled. In addition, unlike in the *PPFA* case, here there are no fraud-based or conspiracy-based claims that have been litigated that could conceivably cover and extend to future misrepresentations. The appropriate relief here is constricted by the breach of contract claim and there is no information about the provisions of any current or future NAF EAs and CAs. This future prohibition is not justified.

Finally, NAF asks me to prevent these persons and entities from "[r]etaining possession of any materials covered by this permanent injunction. Any and all such materials covered by this permanent injunction must be turned over to counsel of record in this matter, the identity of whom shall be disclosed to this Court.

Access to any and all such materials by individuals covered by this permanent injunction shall occur only onsite at the offices of said counsel and subject to the supervision of said counsel, absent further order of this Court or the court in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.)." NAF further proposes that "[n]othing in this permanent injunction shall prevent the court in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.) from making orders about how materials covered by this injunction can be used in those proceedings."

Under the Preliminary Injunction as modified by the Civil Contempt Order, defendants are already required to turn over the NAF Materials to their counsel and may access those materials only at counsel's office, absent further order from this court or the Superior Court. *See* Dkt. No. 482 at 23-24. NAF's proposal would *further* restrict defendants' access to the NAF Materials by (apparently) eliminating the provision allowing access at Daleiden's criminal defense counsel's offices. That restriction is not justified considering the pending criminal proceedings.

Considering all of the above, the following permanent injunctive relief is appropriate:

> All Defendants and their officers, agents, servants, employees, owners, and representatives, and all other persons, firms, or corporations acting in concert or participation with them, are hereby permanently restrained and enjoined from:
>
> 1) Publishing or otherwise disclosing to any third party any video, audio,

> photographic, or other recordings taken, or any confidential information learned at the 2014 and 2015 NAF Annual Meetings;
>
> 2) Retaining possession of any materials covered by this permanent injunction. Any and all such materials covered by this permanent injunction must be turned over to counsel of record in this matter or counsel of record in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.), the identity of whom shall be disclosed to this Court. Access to any and all such materials by individuals covered by this permanent injunction shall occur only onsite at the offices of said counsel and subject to the supervision of said counsel, absent further order of this Court or the court in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.).
>
> Nothing in this permanent injunction shall prevent the court in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.) from making orders about how materials covered by this injunction can be used in those proceedings.

III. FORM OF JUDGMENT

In its motion, NAF asked me to enter judgment on its breach claim and its requested injunctive relief under Federal Rule of Civil Procedure 54(b), so that any appeal of the core issues would be expedited. Mot. at 24. It proposed to stay its other claims, and if the breach claim and permanent injunction were preserved

on appeal, it would then dismiss the remaining claims. *Id*.[27]

Following the hearing on this motion, NAF withdrew "its request for entry of partial final judgment pursuant to Rule 54(b)" and confirmed that it "would not seek to stay the remainder of this action if the Court grants its motion. Instead, should the Court grant NAF's motion, NAF would seek to stipulate with Defendants to dismiss NAF's three other claims prior to entry of judgment. This would allow the Court to enter complete final judgment in this case and for a single appeal to proceed to the Ninth Circuit." Dkt. No. 716.

Having withdrawn its request for partial judgment, within twenty (20) days of the date of this Order NAF shall file a stipulation dismissing its other claims (or a motion to voluntarily dismiss, if not stipulated) as well as a proposed form of final Judgment.

IV. MOTIONS TO SEAL

NAF filed portions of its motion for summary judgment and many exhibits in support conditionally under seal because that information and those exhibits were either covered by the Preliminary Injunction or had been designated as confidential or attorney's eyes only under the protective order in this or the related *Planned Parenthood* case. Dkt. No. 669. In opposition, defendants likewise filed a substantial amount of

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[27] Other than the breach claim considered in this Order, NAF's remaining claims are for civil conspiracy, promissory fraud, and fraudulent misrepresentation.

material under seal, likewise covered by the Preliminary Injunction or designated as confidential in this or the related case. Dkt. No. 707.

Having reviewed NAF's motion and defendants' opposition brief, nothing contained in the text of those documents should remain sealed. The redacted information is identical or materially similar to information disclosed to the public in the *PPFA* trial. The Clerk shall unseal Dkt. Nos. 669-3, 707-4.

The materials covered by the Preliminary Injunction and the Permanent Injunction outlined above **shall remain under seal**, including but not limited to the video and audio recordings submitted in connection with this motion by NAF and defendants (Dkt. No. 707, Ex. 59), as well as the indices of those recordings. Dkts. Nos. 669-11, 669-12 (Exs. 37 & 38).

With respect to the other information (mainly deposition testimony, deposition exhibits, and expert reports from this and the related *PPFA* case), the parties shall meet and confer and within thirty (30) days of the date of this Order and shall submit one joint chart, supported by references to existing or newly filed declarations, designating the information by ECF Docket No. and by Exhibit or Appendix number the parties (i) agree may be unsealed, (ii) agree may remain sealed, or (iii) have a dispute about sealing. Two principles should guide the parties in conducting that review. First, information disclosed to the public in the *PPFA* trial should generally not remain under seal. Second, *only* information that was cited by the parties in the briefing on this motion, referred to during the February 17, 2021 argument, or cited in this

Order needs to be reviewed. Because of concerns that more-than-necessary information designated as confidential was submitted to the court in connection with this motion, and that much of that information was *not* referred to by the parties nor considered by me, requiring the parties to review that information through this process is neither necessary nor efficient. This irrelevant or unconsidered evidence may remain under seal.

CONCLUSION

Plaintiff's motion for summary judgment on its breach of contract claim is GRANTED. Plaintiff's request for permanent injunctive relief flowing from that judgment is GRANTED, as narrowed and amended in this Order. Plaintiff shall file a proposed final form of Judgment within twenty (20) days of the date of this Order.

IT IS SO ORDERED.

Dated: April 7, 2021

/s/ William H. Orrick
William H. Orrick
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 3:15-cv-3522-WHO
Judge William H. Orrick, III

[Filed May 4, 2021]

NATIONAL ABORTION FEDERATION (NAF),
Plaintiff,

v.

THE CENTER FOR MEDICAL PROGRESS, BIOMAX PROCUREMENT SERVICES LLC, DAVID DALEIDEN (aka "ROBERT SARKIS"), and TROY NEWMAN,
Defendants.

~~[PROPOSED]~~ JUDGMENT AND PERMANENT INJUNCTION

Pursuant to Federal Rules of Civil Procedure 54 and 58(a), the Court enters judgment as follows.

I. DEFINITIONS

The following terms are defined as follows:

A. NAF: Plaintiff National Abortion Federation.

B. CMP: Defendant Center for Medical Progress.

C. BioMax: Defendant BioMax Procurement Services, LLC.

D. Daleiden: Defendant David Daleiden.

E. All Defendants: CMP, BioMax, and Daleiden.

II. CLAIM

The Court enters judgment on NAF's Sixth Cause of Action (Breach of Contract) in favor of NAF and against All Defendants. The Court enters the permanent injunction specified in Section IV as a remedy for this claim.

III. COSTS AND ATTORNEYS' FEES

NAF is the prevailing party for purposes of taxable costs. The amount of taxable costs to be awarded, and the entitlement of any party to non-taxable costs and attorneys' fees, shall be determined in accordance with Federal Rule of Civil Procedure 54 and Local Rule 54.

IV. PERMANENT INJUNCTION

For the reasons stated in the Court's order on NAF's motion for summary judgment and entry of a permanent injunction (ECF No. 720), the Court enters the following permanent injunction:

All Defendants and their officers, agents, servants, employees, owners, and representatives, and all other persons, firms, or corporations acting in concert or

participation with them, are hereby permanently restrained and enjoined from:

1) Publishing or otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned at the 2014 and 2015 NAF Annual Meetings;

2) Retaining possession of any materials covered by this permanent injunction. Any and all such materials covered by this permanent injunction must be turned over to counsel of record in this matter or counsel of record in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.), the identity of whom shall be disclosed to this Court. Access to any and all such materials by individuals covered by this permanent injunction shall occur only onsite at the offices of said counsel and subject to the supervision of said counsel, absent further order of this Court or the court in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.).

Nothing in this permanent injunction shall prevent the court in *People v. Daleiden*, No. 2502505 (S.F. Super. Ct.) from making orders about how materials covered by this injunction can be used in those proceedings.

IT IS SO ORDERED.

Dated: May 4, 2021

/s/ William H. Orrick
Hon. WILLIAM H. ORRICK
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-15953
D.C. No. 3:15-cv-03522-WHO
Northern District of California, San Francisco

[Filed December 19, 2022]

NATIONAL ABORTION FEDERATION, Plaintiff-Appellee,	)
v.	)
CENTER FOR MEDICAL PROGRESS; BIOMAX PROCUREMENT SERVICES, LLC; and DAVID DALEIDEN, AKA Robert Daoud Sarkis, Defendants-Appellants.	)

ORDER

Before: S.R. THOMAS, McKEOWN, and CLIFTON, Circuit Judges.

The panel has voted to deny the petition for rehearing.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has

requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are denied.

APPENDIX E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. 15-cv-03522-WHO

[Filed February 5, 2016]

NATIONAL ABORTION FEDERATION, et al.,

Plaintiffs,

v.

CENTER FOR MEDICAL PROGRESS, et al.,

Defendants.

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

Re: Dkt. Nos. 3, 109, 222, 225, 287, 298, 310, 320, 322, 346, 352

On July 31, 2015, plaintiff National Abortion Federation (NAF) filed this lawsuit and sought a Temporary Restraining Order to prohibit defendants David Daleiden, Troy Newman, and the Center for Medical Progress from publishing recordings taken at

NAF Annual Meetings. NAF alleged, and it has turned out to be true, that defendants secured false identification and set up a phony corporation to obtain surreptitious recordings in violation of agreements they had signed that acknowledge that the NAF information is confidential and agreed that they could be enjoined in the event of a breach. In light of those facts, because the subjects of videos that defendants had released in the previous two weeks had become victims of death threats and severe harassment, and in light of the well-documented history of violence against abortion providers, I issued the TRO.

The defendants' principal arguments against injunctive relief rest on their rights under the First Amendment, a keystone of our Constitution and our democracy. It ensures that the government may not – without compelling reasons in rare circumstances – restrict the free flow of information to the public. It provides that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). But Constitutional rights are not absolute. In rare circumstances, freedom of speech must be balanced against and give way to the protection of other compelling Constitutional rights, such as the First Amendment's right to freedom of association, the Fifth and Fourteenth Amendments' protection of liberty interests, and the right to privacy. After fully considering the record before me, I conclude that NAF has made such a showing here.

Discovery has proven that defendants and their agents created a fake company and lied to gain access

to NAF's Annual Meetings in order to secretly record NAF members for their Human Capital Project. In furtherance of that Project, defendants released confidential information gathered at NAF's meetings and intend to release more in contravention of the confidentiality agreements required by NAF. Critical to my decision are that the defendants agreed to injunctive relief if they breached the agreements and that, after the release of defendants' first set of Human Capital Project videos and related information in July 2015, there has been a documented, dramatic increase in the volume and extent of threats to and harassment of NAF and its members.

Balanced against these facts are defendants' allegations that their video and audio recordings show criminal activity by NAF members in profiteering from the sale of fetal tissue. I have reviewed the recordings relied on by defendants and find no evidence of criminal activity. And I am skeptical that exposing criminal activity was really defendants' purpose, since they did not provide recordings to law enforcement following the NAF 2014 Annual Meeting and only provided a bit of information to law enforcement beginning in May, 2015. But I have not interfered with the Congressional committee's subpoena to obtain the recordings to make its own evaluation, nor with the subpoenas from the states of Arizona and Louisiana (although I have approved a process to insure that only subpoenaed material is turned over).

Defendants also claim that the injunction is an unconstitutional prior restraint. They ignore that they agreed to keep the information secret and agreed to the

remedy of an injunction if they breached the agreement. Confidentiality agreements are common to protect trade secrets and other sensitive information, and individuals who sign such agreements are not free to ignore them because they think the public would be interested in the protected information.

There is no doubt that members of the public have a serious and passionate interest in the debate over abortion rights and the right to life, and thus in the contents of defendants' recordings. It should be said that the majority of the recordings lack much public interest, and despite the misleading contentions of defendants, there is little that is new in the remainder of the recordings. Weighed against that public interest are NAF's and its members' legitimate interests in their rights to privacy, security, and association by maintaining the confidentiality of their presentations and conversations at NAF Annual Meetings. The balance is strongly in NAF's favor.

Having fully reviewed the record before me, I GRANT NAF's motion for a preliminary injunction to protect the confidentiality of the information at issue pending a final judgment in this case.

BACKGROUND

I. THE CENTER FOR MEDICAL PROGRESS AND THE HUMAN CAPITAL PROJECT

In 2013, defendant David Daleiden founded the Center for Medical Progress ("CMP") for the purpose of monitoring and reporting on medical ethics, with a focus on bioethical issues related to induced abortions and fetal tissue harvesting. Declaration of David

Daleiden (Dkt. No. 265-3, "Daleiden PI Decl.") ¶ 2. CMP is incorporated in California as a nonprofit public benefit corporation, with a stated purpose "to monitor and report on medical ethics and advances." NAF Appendix of Exhibits in Support of Motion for Preliminary Injunction ("Pl. Ex.") 9 (at NAF0000533).[1] In order to obtain CMP's tax-exempt status, in its registration with the California Attorney General and in its application with the Internal Revenue Service Daleiden certified, among other things, that "[n]o substantial part of the activities of this corporation shall consist of carrying on propaganda, or otherwise attempting to influence legislation, and this corporation shall not participate or intervene in any political campaign." Pl. Ex. 9 (at NAF0000535); Pl. Ex. 10 (at NAF0001789).

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[1] Defendants raise a number of objections to NAF's evidence. *See* Dkt. No. 265-7. These evidentiary objections were submitted as a separate document in violation of this Court's Local Rules. Civ. L. R. 7-3(a). Recognizing that error, defendants filed a motion asking for leave to file an amended Opposition or for relief therefrom. Dkt. No. 298. That motion is GRANTED and I will consider defendants' evidentiary objections. *See also* Dkt. No. 301. To the extent I rely on evidence to which defendants object, I will address the specific objection, bearing in mind that on a motion for preliminary injunction evidence is not subject to the same formal procedures as on a motion for summary judgment or at trial and that a court may consider hearsay evidence. *See, e.g.*, *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). To the extent I do not rely on specific pieces of evidence, defendants' objections to that evidence are overruled as moot. These evidentiary rulings apply only to the admissibility of evidence for purposes of determining the motion for a preliminary injunction.

As part of CMP's work, Daleiden created the "Human Capital Project" ("Project") to "investigate, document, and report on the procurement, transfer, and sale of fetal tissue." Daleiden PI Decl. ¶ 3. The Project's goal is to uncover evidence regarding violations of state and/or federal law due to the sale of fetal tissue, the alteration of abortion procedures to obtain fetal tissue for research, and the commission of partial birth abortions. *Id*. Putting the Project into action, Daleiden created a fake front company that purportedly supplies researchers with human biological specimens and specifically secured funding from supporters in order to infiltrate NAF's 2014 Annual Meeting. Pl. Ex. 26. The express aim of that infiltration was to: "1) network with the upper echelons of the abortion industry to identify the best targets for further investigation and ultimate prosecution, and 2) gather video and documentary evidence of the fetal body parts trade and other shocking activities in the abortion industry." *Id*.

Defendant Troy Newman was, until January 2016, a board member and the secretary of CMP. He counseled Daleiden on the efforts to set up the fake company, to infiltrate meetings, and to secure recordings in support of the Project. Pl. Ex. 14 (at NAF0004475-76); Pl. Ex. 16 (at NAF0004493-94); *see also* Dkt. No. 344.[2] The result of the Project, Newman hoped, would be prosecution of abortion providers,

[2] Defendants object to Exhibits 14 and 16 for lack of foundation and authentication. Defendants do not contend these transcripts do not accurately represent the contents of the recordings attached as Exhibits 15 and 17. Defendants' objections are overruled.

state and Congressional investigations, the defunding of Planned Parenthood by the government, and the closure of abortion clinics. Pl. Ex. 16 (at NAF0004494, 4496); Pl. Ex. 136 at 16.[3] Defendant Newman is President of Operation Rescue, an anti-abortion group that posts the names and work addresses of abortion providers on its website and manages another website that lists every abortion facility and all known abortion providers. Pl. Exs. 18, 20, 21, 22.[4]

II. THE CREATION OF BIOMAX AND INFILTRATION OF NAF'S 2014 AND 2015 ANNUAL MEETINGS

In September 2013, Daleiden directed "investigators" on the Project (known by the aliases Susan Tennebaum and Brianna Allen) to attend a conference of the Association of Reproductive Health Professionals (ARHP) as a representative of a fake business, BioMax Procurement Services. That business did not exist, other than to be a "front" for the Project. Daleiden PI Decl. ¶ 8; Pl. Ex. 26. Daleiden's associates spoke with representatives from NAF, and BioMax was

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[3] Defendants object to Exhibit 136 on the grounds of relevance, lack of foundation, and lack of authentication. Defendants to not contend the transcript does not accurately represent the contents of the recording identified. Defendants' objections are overruled.

[4] After the public launch of the Project on July 15, 2015, counsel for CMP and Daleiden, Life Legal Defense Foundation, explained that it had also been involved in the Project as a legal advisor "since its inception" and were committed to defunding "contract killer" Planned Parenthood. Pl. Ex. 24. Defendants object to Exhibits 18, 20, 21 and 22 as irrelevant and inadmissible hearsay. Those objections are overruled.

invited to apply to attend the NAF Annual Meeting in San Francisco, California the following April. Daleiden PI Decl. ¶ 10.

In February 2014, defendant CMP received a grant to fund the "infiltration of the . . . NAF Annual Meeting." Pl. Exs. 26, 36; Deposition Transcript of David Daleiden (Dkt. No. 187-3) 213:14-214:6. To that end, Daleiden followed up with the NAF representatives – posing as Brianna Allen on behalf Tennenbaum and BioMax – and received a copy of the 2014 NAF Annual Meeting Exhibitor Prospectus and Exhibitor Application for the upcoming meeting. Daleiden PI Decl. ¶ 11; Pl. Ex. 43. Daleiden filled out the Exhibitor Application packet – comprised of the "Exhibit Rules and Regulations" ("Exhibit Agreement" or "EA"), the "Application and Agreement for Exhibit Space," and the "Annual Meeting Registration Form." Daleiden signed Susan Tennenbaum's name to the EA, and returned the Application packet. Daleiden PI Decl. ¶ 11; PL. Ex. 3; Daleiden Depo. at 160:8-18.

In February 2015, Daleiden contacted NAF seeking information about BioMax exhibiting at NAF's 2015 Annual Meeting in Baltimore, Maryland. Pl. Ex. 47. Daleiden again filled out the "Application Agreement for Exhibit Space," "Exhibit Rules and Regulations," and "Registration Form," signing Susan Tennenbaum's name to the EA. Pl. Exs. 4, 47; Daleiden Depo. at 287:5-22.[5]

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[5] On the 2014 EA, Daleiden listed the "exhibitor representatives" as Brianna Allen a Procurement Assistant, Susan Tennenbaum the C.E.O., and Robert Sarkis a V.P. Operations. Pl. Ex. 3. On the

Both the 2014 and 2015 EAs contain confidentiality clauses:

> In connection with NAF's Annual Meeting, Exhibitor understands that any information NAF may furnish is confidential and not available to the public. Exhibitor agrees that all written information provided by NAF, or any information which is disclosed orally or visually to Exhibitor, or any other exhibitor or attendee, will be used solely in conjunction with Exhibitor's business and will be made available only to Exhibitor's officers, employees, and agents. Unless authorized in writing by NAF, all information is confidential and should not be disclosed to any other individual or third parties.

Pl. Exs. 3 & 4 at ¶ 17. Above the signature line, the EAs provide: "*I also agree to hold in trust and confidence any confidential information received in the course of exhibiting at the NAF Annual Meeting and agree not to reproduce or disclose confidential information without express permission from NAF.*" Pl. Exs. 3, 4 (emphasis in originals).

The EAs required Exhibitor representatives to "be registered" for the NAF Annual Meeting and wear badges in order to gain entry into exhibit halls and meeting rooms. *Id.* ¶ 8. The EAs also provide that "[p]hotography of exhibits by anyone other than NAF or the assigned Exhibitor of the space being

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2015 EA, Daleiden listed the exhibitor representatives as Susan Tennenbaum the C.E.O., Robert Sarkis the Procurement Manager, and Adrian Lopez the Procurement Technician. Pl. Ex. 4.

photographed is strictly prohibited." *Id*. ¶ 13. The EAs required an affirmation: "[b]y signing this Agreement, the Exhibitor affirms that all information contained herein, contained in any past and future correspondence with either NAF and/or in any publication, advertisements, and/or exhibits displayed at, or in connection with, NAF's Annual Meeting, is truthful, accurate, complete, and not misleading." *Id*. ¶ 19. Finally, the EAs provide that breach of the EA can be enforced by "specific performance and injunctive relief" in addition to all other remedies available at law or equity. *Id*. ¶ 18.

In order to gain access to the NAF Annual Meetings, Exhibitor representatives also had to show identification and sign a "Confidentiality Agreement" ("CA"). Declaration of Mark Mellor (Dkt. No. 3-33) ¶ 11.[6] For the 2014, Annual Meeting Daleiden (as

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[6] NAF has identified copies of two drivers licenses it claims were used by Daleiden and Tennenbaum to access the NAF meetings. Pl. Exs. 49-50. During his deposition, Daleiden asserted his Fifth Amendment rights and refused to testify about the licenses. Foran PI Decl. ¶¶ 31-32. Defendants object to Exhibits 49 and 50 for lack of personal knowledge. Those objections are overruled.

Relatedly, NAF filed a motion to supplement the Preliminary Injunction record, to include a press release from the Harris County District Attorney's office in Houston Texas. Dkt. No. 346. That motion is GRANTED. In the press release, the District Attorney explained that a grand jury had cleared a local Planned Parenthood affiliate of wrongdoing, but indicted Daleiden and the person posing as Susan Tennenbaum for tampering with governmental records, presumably related to their use of false identification to gain access to meetings in Texas. *Id*.

In his deposition, Daleiden testified that he created false business cards to use at the ARHP meeting and the NAF Meetings

Sarkis) and the individuals pretending to be Tennenbaum and Allen, each signed a CA. Pl. Exs. 5, 6; Daleiden PI Decl. ¶ 13. For the 2015 Annual Meeting, the individual pretending to be Adrian Lopez, signed the CA. Pl. Ex. 8.[7] Daleiden (as Sarkis), Tennenbaum, and Allen did not sign the 2015 CAs. When Daleiden, Tennenbaum, and Allen were at the registration table, they were met by a NAF representative. A NAF representative asked Daleiden to confirm that the sign-in staff had checked their identifications and that they had signed the confidentiality forms. Daleiden responded "Yeah yeah yeah. Excellent. Thank you so much . . . ." Declaration of Derek Foran in Support of Preliminary Injunction (Dkt. No. 228-6) ¶ 79C[8]; Daleiden Decl. ¶ 17; Daleiden Depo. 290:2 -291:14. Daleiden testified that it was his

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for Susan Tennenbaum, Robert Daoud Sarkis, and Brianna Allen. Pl. Ex. 51; Daleiden Depo. at 200:2 – 201:6 (business cards used at the 2014 Meeting); *see also* Pl. Exs. 51, 52 & Daleiden Depo. at 315:23 – 316:19 (business cards for Adrian Lopez and Susan Wagner used at the 2015 Annual Meeting); Declaration of Megan Barr (Dkt. No. 226-27) ¶¶ 4-5 (use of business card at 2015 Meeting).

[7] Daleiden testified that all of the "investigators" involved in the Project were CMP "contractors" acting under Daleiden's specific direction. Daleiden Depo. Trans. at 131:7-24, 135:21-136:11, 194:1, 194:10-195:6; *see also* Daleiden Supp. Resp. to NAF Interrogatories (Dkt. No. 227-18) Nos. 2, 6.

[8] ¶ 79(C) refers to a specific excerpt of a recording taken by Daleiden. Sub-Bates 15-062; Time stamp: 14:56:02-14:56:50. The Court has reviewed all recording excerpts or transcripts of recording excerpts cited in this Order.

"preference" to avoid signing the 2015 CA. Daleiden Depo. at 291:15-25. The CAs provide:

> It is NAF policy that all people attending its conferences (Attendees) sign this confidentiality agreement. The terms of attendance are as follows:
>
> 1. **Videotaping or Other Recording Prohibited**: Attendees are prohibited from making video, audio, photographic, or other recordings of the meetings or discussions at this conference.
> 2. **Use of NAF Conference Information**: NAF Conference Information includes all information distributed or otherwise made available at this conference by NAF or any conference participants through all written materials, discussions, workshops, or other means. . . .
> 3. **Disclosure of NAF Materials to Third Parties**: Attendees may not disclose any NAF Conference Information to third parties without first obtaining NAF's express written consent . . . .

Pl. Exs. 5-8.

At the 2014 and 2015 Annual Meetings, Daleiden and his associates wore and carried a variety of recording devices that they did not disclose to NAF or any of the meeting attendees. Daleiden Depo. at 118-121; 255; 292-93. Daleiden and his associates did not limit their recording to presentations or conversations regarding fetal tissue, but instead turned on their

recording devices before entering the meetings each day and only turned them off at the end of the day. Daleiden Depo. at 121:24-122:22, 124:1-15. In the end, they recorded approximately 257 hours and 49 minutes at NAF's 2014 Annual Meeting and 246 hours and 3 minutes at NAF's 2015 Annual Meeting. They recorded conversations with attendees at the BioMax Exhibitor booths, the formal sessions at the Meetings, and interactions with attendees during breaks. Foran PI Decl. ¶ 2 & Pl. Ex. 1[9]; Daleiden PI Decl. ¶ 18; Daleiden Depo. at 122:18-123:25; 293:4-25. The interactions with individuals were recorded in exhibit halls, hallways, and reception areas where Daleiden contends hotel staff were "regularly" present. Daleiden PI Decl. ¶ 18. Hotel staff were also present in the rooms during presentations and talks, but hotel staff did not sign confidentiality agreements. *Id*. ¶ 19; Deposition of Vicki Saporta (Defendants' Ex. 7) at 33:10-23. Broadly speaking, the majority of the recordings lack any sort of public interest and consist of communications that are tangential to the ones discussed in this Order.

During the Annual Meetings, Daleiden and his associates would meet to "discuss our . . . strategy for . . . the project and for the meeting," including "specific strategies for specific individuals." Daleiden Depo. at 134:15-135:6. The associates were given a "mark list" to identify their targets. Foran PI Decl. ¶ 79D (Sub-Bates: 15-145; Time stamp: 14:56:02-14:56:50). The

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[9] Plaintiff's Exhibit 1 is a copy of the hard drive produced by defendants containing the audio and video recordings made by Daleiden and his associates at the 2014 and 2015 NAF Annual Meetings.

group also picked targets based on circumstance: in one instance, Daleiden tells "Tennenbaum" that it "would be really good to talk tonight" with a particular doctor "now that she's been drinking." *Id.* ¶ 79E (Sub-Bates: 15-225; Time stamp 15:33:00 - 15:34:00).

In approaching these individuals, the group used "pitches" in their efforts to capture NAF members agreeing to suggestions and proposals made by the group about the "sale" of fetal tissue or other conduct that might suggest a violation of state or federal law. Daleiden told his associates that their "goal" was to trap people into "saying something really like messed up, like yeah, like, I'll give them, like, live everything for you. You know. If they say something like that it would be cool." *Id.* ¶ 79G (Sub-Bates: 15-021; Time Stamp: 5:13-5:49). Daleiden also instructed his group to attempt to get attendees to say the words "fully intact baby" on tape. *Id.* ¶ 79H (Sub-Bates: 15-152; Time Stamp: 16:06:50-16:07:00). As part of their efforts, "Tennenbaum" would explain to providers that she "can make [fetal tissue donation] extremely financially profitable for you" and that BioMax has "money that is available" and is "sitting on a goldmine" as long as you're "willing to be a little creative with [your] technique." Foran PI Decl. ¶ 79J (Sub-bates: 15-152 Time Stamp: 15:48:00 - 15:52:00). She asked NAF attendees: "what would make it profitable for you? Give me a ballpark figure . . . ." *Id.* Or "[i]f it was financially very profitable for you to perhaps be a little creative in your method, would you be open to" providing patients with reimbursements for tissue donations. *Id.* ¶ 79K (Sub-bates: 15-203; Time Stamp: 12:09:00 - 12:10:21).

The parties dispute whether these goals were met and if defendants' traps worked.[10] Defendants argue that they captured NAF attendees agreeing to explore, or at least expressing interest in exploring, being compensated for the sale of fetal tissue at a profit, which defendants contend is illegal under state and federal laws. Defendants' Opposition to Motion for Preliminary Injunction (Dkt. No. 262-4) at 10-14. However, they tend to misstate the conversations that occurred or omit the context of those statements. For example, defendants rely on a conversation with a clinic owner where Daleiden suggests BioMax could pay $60 per sample instead of $50 per sample. Defs. Ex. 8. The clinic owner doesn't respond to that suggestion, or give any indication about the actual

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[10] NAF argues that defendants cannot rely on any portion of the recordings to oppose NAF's motion for a preliminary injunction. NAF Reply Br. at 29-30. NAF is correct that under California and Maryland law, recordings taken in violation of state laws prohibiting recordings of confidential communications are not admissible in judicial proceedings, except as proof of an act or violation of the state statutes. *See* Cal. Penal Code § 632(d); *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 667 (9th Cir. 2003) (concluding that § 632(d) is a substantive law, applicable in federal court on state law claims); *see also* Md. Code Ann., Cts. & Jud. Proc. § 10-405; *Standiford v. Standiford*, 89 Md. App. 326, 346 (1991). Because the accuracy of defendants' allegations of criminal conduct are central to this decision, however, I discuss the portions of the recordings relied upon by plaintiff and defendants in some detail in this section. To place this discussion under seal would undermine my responsibility to the public as a court of public record to explain my decision. Consistent with the TRO and the reasoning of this Order, in describing the protected conversations I balance the interests of the providers' privacy, safety and association by omitting names, places, and other identifying information.

costs to the clinic of facilitating outside companies to come in and collect fetal tissue. *Id*. Instead, the clinic owner responds that providing tissue to outside companies "is a nice way to get extra income in a very difficult time, and you know patients like it." *Id*.[11] Defendants point to another conversation where a provider asks what the "reimbursement rate" is for the clinic, and was told "it varies" by Tennenbaum. Defs. Ex. 9 (Dkt. No. 266-4) at p. 18. Then, in response to Tennenbaum's suggestion about whether she'd "be open to maybe being a little creative in the procedure," the provider responds that she was not sure and would have to discuss it and run it by the doctors. Defs. Ex. 9 (Dkt. No. 266-4) at p. 18. Tennenbaum explains that specimens "go for" anywhere from "500 up to 2,000" and so "you can see how profitable" it would be for clinics, to which the provider says "Yeah, absolutely" and a different provider says "that would be great" in response to comments about having further discussions. *Id*. at p. 19.

Another provider responded to defendants' suggestion of financial incentives by indicating that the clinic would be "very happy about it," but admitted others would have to approve it and it wasn't up to her. *Id*., Dkt. No. 266-4 at p.8. Defendants point to a conversation with a provider who discusses the "fine line" between an illegal partial birth abortion and the types of abortion that they perform, and the techniques

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[11] Defendants do not suggest the "patients like it" is a suggestion that patients are being paid for the fetal tissue. Instead, in the context of that conversation, it refers to patients that like providing fetal tissue for research purposes.

that they employ to ensure that they do not cross that line. Defs. Ex. 10, Dkt. No. 266-5 at p. 4. That conversation, however, does not indicate that any illegal activity was occurring. Similarly, defendants contend that a provider stated that he ordinarily minimizes dilation, since that is what is safest for the women, but that if he had a reason to dilate more (such as tissue procurement), he might perform abortions differently. Oppo. Br. at 11. But that is not what the provider said. After acknowledging tissue donation was not allowed in his state, he stated that "I could mop up my technique if you wanted something more intact. But right now my only concern is the safety of the woman" and there was no reason to further dilate a woman. Defs. Ex. 11, Dkt. No. 266-6 at p. 5.

Defendants rely on another conversation where an abortion provider explains that how intact aborted fetuses are depends on the procedure used and that she does not ordinarily use digoxin to terminate the fetus before performing 15-week abortions. Defs. Ex. 12, Dkt. No. 266-7, pgs. 1-8. She goes on to say that if there was a possibility of donating the tissue to research, women may choose that, and with the consent of the woman she would be open to attempting to obtain intact organs for procurement. *Id*. Again, this is not evidence of any wrongdoing.

In another conversation, a provider states that his/her clinic has postponed the stage at which digoxin is used and that as a result they can secure more and bigger organs for research so the tissue "does not go to waste," to which the vast majority of women using their

facility consent. Defs. Ex. 13, Dkt. No. 266-8 pgs. 1-8.[12] Defendants contend that a provider commented that he/she may be willing to be "creative" on a case-by-case basis, but the provider was responding to a question about doctors using digoxin in general. Defs. Ex. 9, Dkt. No. 266-4 pg. 13. And while defendants characterize that provider as assenting to being "creative," so that BioMax could "keep them happy financially" (Oppo. Br. at 11-12), the actual discussion was about off-setting the disruption that third-party technicians can have on clinic operations and keeping those disruptions to a minimum. *Id*. at p. 14.

In a different conversation, defendants characterize a provider as agreeing to discuss ways in which a financial transaction would be structured to make it look like a clinic was not selling tissue. Oppo. Br. at 12. The unidentified female (there is no indication of where she works or what role she plays) simply responds to Tennenbaum's suggestions that in response to payment for tissue from BioMax the clinic could offer its services for less money or provide transportation for the patients, with an interested but non-committal response and clarified "that's something we'd have to figure out how to do that." Defs. Ex. 14, Dkt. No. 266-9 pgs. 1-4. Another provider admits that doing intact D&Es for research purposes would "be challenging" and explained that there are layers of people and approvals at the clinic before any agreements to work with a bioprocurement lab could be reached. Defs. Ex. 9, Dkt. No. 266-4 pgs. 8-9.

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[12] There is no evidence that a desire to secure more fetal tissue samples caused the clinic to alter its procedures.

Defendants state that a provider responded to Tennenbaum's comment that with the right vision an arrangement can be "extremely financially profitable," with "we certainly do" have that vision. Oppo. Br. at 12. But defendants omit that the context of the conversation was the "waste" of fetal tissue that could otherwise be going to research. Defs. Ex. 9, Dkt. No. 266-4 pgs. 2-3. In the excerpt relied on by defendants, after Tennenbaum mentioned the profit she went onto describe tissue donation working for those that have the "vision and the passion for research." The provider responded, "Which we certainly do." *Id*. p. 2. Similarly, while defendants are correct that a provider did say, "if guys it looks like you'd pay me for [fetal tissue], that would be awesome," but omit that the provider preceded that comment with "I would love to have it [the fetal tissue] go somewhere" and that the provider was excited about the possibility of the tissue going to be used in research to be "doing something." Defs. Ex. 15, Dkt. No. 266-10. pgs. 1-2.

Defendants cite a handful of similar discussions – where "profit" "sale" or "top dollar" are terms used by Daleiden or Tennenbaum and then providers at some point following that lead in the conversation express general interest in exploring receiving payment for tissue – but those conversations do not show that any clinic is making a profit off of tissue donations or that the providers are agreeing to a profit-making arrangement.[13] Defendants are correct that one

[13] Some of defendants' citations are to comments about providers performing abortions differently, not in terms of gestational timing, but in terms of attempting to keep tissue samples more

provider indicates it received $6,000 a quarter from a bioprocurement lab, but there is no discussion showing that amount is profit (in excess of the costs of having third-party technicians on site and providing access and storage for their work). Defs. Ex. 21, Dkt. No. 267-2 p.2. An employee of a bioprocurement lab also agrees in response to statements from Tennenbaum that the clinics know it is "financially profitable" for them to work with bioprocurement labs and that arrangement helps the clinics "significantly." Defs. Ex. 23, Dkt. No. 267-4 p. 2.

Having reviewed the records or transcripts in full and in context, I find that no NAF attendee admitted to engaging in, agreed to engage in, or expressed interest in engaging in potentially illegal sale of fetal tissue for profit. The recordings tend to show an express rejection of Daleiden's and his associates' proposals or, at most, discussions of interest in being paid to recoup the costs incurred by clinics to facilitate collection of fetal tissue for scientific research, which NAF argues is legal. *See, e.g.,* Foran PI Decl. ¶ 79(I) (Sub-bates: 14-147; Time Stamp 05:56:00 - 05:57:00 (Dr. Nucatola identifying an

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intact during the procedure if those samples might be of use for research. Oppo. Br. at 12-13. There is no argument that taking those steps violates any law. Defendants also cite provider comments – for example, an abortion provider engaging in conduct "under the table" to get around restrictions – which do not show up in the transcript excerpts they refer to. Oppo. Br. at 13. Finally, defendants rely on comments – from panel presentations and individual conversations – where providers express the personal and societal difficulties they face in performing abortions. There is no indication in those comments of any illegal conduct. Oppo. Br. at 12, 14-15.

"ethical problem" with Daleiden's payment proposal: "We just really want the affiliates to be compensated in a way that is proportionate to the amount of work that's required on their end to do it. In other words, we don't see it as a money making opportunity. That's not what it should be about."); Foran PI Decl. ¶ 79(K) (Sub-bates: 15-203; Time Stamp: 12:09:00 - 12:10:21) (NAF attendee responding to Tennenbaum's proposal" "Do the patients get any reimbursement? No, you can't pay for tissue, right. You can't pay for tissue."); Foran PI Decl. ¶ 79(M) (Sub-bates: 15-010; Time Stamp: 24:29 - 25:43) (NAF attendee responds that "we cannot have that conversation with you about being creative," because it "crosses the line."); Foran PI Decl. ¶ 79(N) (Sub-Bates: 15-010; Time Stamp: 59:18-1:04:32) (NAF attendee responding to Tennenbaum with, "No profiteering or appearance of profiteering . . . we need it to be a donation program rather than a business opportunity.").

Defendants also gathered confidential NAF and NAF-member materials at the Annual Meetings, including lists and biographies of NAF faculty and contact information for NAF members. Foran PI Decl. ¶ 3; Pl. Ex. 56 at 3; Pl. Ex. 58.

Following the 2014 Annual Meeting, Daleiden followed up with the "targets" he met at the Meeting, in part to set up meetings with abortion providers, including Dr. Deborah Nucatola.[14] Pl. Exs. 26 (list of

[14] Dr. Nucatola was identified by defendants as a key target and the Senior Director of Medical Services for Planned Parenthood. Pl. Ex. 26.

"targets"), 36, 59-61, 64-65, 67-69; Daleiden Depo. 257-259, 265-269. As he explained to his supporters and funders in a report prepared following the 2014 Meeting – in which he shared some of the confidential NAF information that had been collected at that meeting – he was able to secure the follow up meetings because, following its attendance at the 2014 Annual Meeting, "BioMax is now a known and trusted entity to many key individuals in the upper echelons of the abortion industry." Pl. Ex. 26; *see also* Pl. Exs. 59-63 (emails to targets referencing their meeting at NAF); Pl. Ex. 64 (email to Dr. Nucatola); Daleiden Depo. at 253-259 (Daleiden's follow up with Dr. Nucatola); Pl. Ex. 67 ¶¶ 3-4 (StemExpress representative explaining her initial meeting with Daleiden at the NAF 2014 Annual Meeting, as the reason a subsequent meeting was arranged); Daleiden Tr. at 271-274 (discussing his follow up communications with StemExpress representatives). In a recording following Daleiden and Tennenbaum's meeting with StemExpress representatives, Daleiden credited the ability to secure that meeting to "because like we've been at NAF. Like, we're so vetted and so like." Foran PI Decl. ¶ 12; Pl. Ex. 70 at FNPB029820150522190849.avi at 19:13:00-19:15:00).

III. DEFENDANTS RELEASE HUMAN CAPITAL PROJECT VIDEOS

On July 14, 2015, CMP released two videos of a lunch meeting that Daleiden had with Dr. Nucatola, a "key" target from the 2014 NAF Annual Meeting. Daleiden PI Decl. ¶ 25; Pl. Ex. 26. Daleiden testified that one of the videos "contained the entire

conversation with Nucatola" and the other was "a shorter summary version of the highlights from the conversation." *Id*. CMP issued a press release in conjunction with the release of these videos entitled "Planned Parenthood's Top Doctor, Praised by CEO, Uses Partial-Birth Abortion to Sell Baby Parts." Pl. Ex. 66. NAF counters that the "highlights" video was misleadingly edited and omits Dr. Nucatola's comments that "nobody should be selling tissue. That's just not the goal here," and her repeated comments that Planned Parenthood would not sell tissue or profit in any way from tissue donations. Foran TRO Decl. Ex. 18 at 7, 21-22, 25-26, 34, 48, 52-54.

On July 21, 2015, CMP released two more videos: a 73-minute video and a shorter "highlights summary" from Daleiden's lunch meeting with Planned Parenthood "staff member" Dr. Mary Gatter. Daleiden PI Decl. ¶ 26. CMP issued a press release in conjunction with the release of these videos entitled "Second Planned Parenthood Senior Executive Haggles Over Baby Parts Prices, Changes Abortion Methods." Pl. Ex. 71. NAF again contends the "highlight" video was misleadingly edited, including the omission of Dr. Gatter's comments that tissue donation was not about profit, but "about people wanting to see something good come out" of their situations, "they want to see a silver lining . . . ." Pl. Ex. 82 at NAF0001395.

CMP has continued to release other videos as part of the Project, including one featuring a site visit to Planned Parenthood Rocky Mountains, where Savita Ginde is Medical Director. Daleiden PI Decl. ¶ 27. On July 30, 2015, CMP issued a press release in

conjunction with the release of this video entitled "Planned Parenthood VP Says Fetuses May Come Out Intact, Agrees Payments Specific to the Specimen." Pl. Ex. 74.[15]

Daleiden asserts that when CMP released the "highlight" or summary videos, CMP also released "full" copies of the underlying recordings. Daleiden PI Decl. ¶¶ 25-27. NAF has submitted a report by Fusion GPS, completed at the request of counsel for Planned Parenthood, analyzing the videos released by CMP and concluding that there is evidence that CMP edited content out of the "full" videos and heavily edited the short videos "so as to misrepresent statements made by Planned Parenthood representatives." Pl. Ex. 77; *see also* Pl. Exs. 78-79.[16]

The day before the first set of videos was released, CMP put together a press kit with "messaging

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[15] *See also* Pl. Ex. 74 (CMP press release on fifth Project video; "'Intact Fetal Cadavers' at 20 Weeks 'Just a Matter of Line Items' at Planned Parenthood TX Mega-Center; Abortion Docs Can 'Make it Happen.'"); Pl. Ex. 69 (CMP press release on eighth Project video; "Planned Parenthood Baby Parts Buyer StemExpress Wants 'Another 50 Livers/Week,' Financial Benefits for Abortion Clinics."); Pl. Ex. 75 (CMP press release on ninth Project video; "Planned Parenthood Baby Parts Vendor ABR Pays Off Clinics, Intact Fetuses 'Just Fell Out.'"); Pl. Ex. 76 (CMP press release on tenth Project video; "Top Planned Parenthood Exec Agrees Baby Parts Sales 'A Valid Exchange,' Some Clinics 'Generate a Fair Amount of Income Doing This.'").

[16] Defendants object to Exhibits 78-79 as inadmissible hearsay, for lack of personal knowledge and authentication, and improper expert testimony. Those objections are overruled.

guidelines" that was circulated to supporters. Pl. Ex. 135; Deposition Transcript of Charles C. Johnson (Dkt. No. 255-11) 70:22-71:19. In those guidelines, defendants assert that their aim for the Project is to create "political pressure" on Planned Parenthood, focusing on "Congressional hearings/investigation and political consequences for" Planned Parenthood such as defunding and abortion limits. Pl. Ex. 135.

To be clear, the videos released by CMP as part of the Project to date do not contain information recorded during the NAF Annual Meetings.[17] With respect to the NAF material covered by the TRO and at issue on the motion for a preliminary injunction, Daleiden affirms that other than: (i) providing a StemExpress advertisement from the NAF 2014 Annual Meeting program to law enforcement in El Dorado County, California in May 2015; (ii) short clips of video to law enforcement in Texas in June or July 2015; (iii) providing the 504 hours of recordings in response to the Congressional subpoena; and (iv) providing a short written report to CMP donors in April 2014, "Daleiden and CMP have made no other disclosures of recordings or documents from NAF meetings." Daleiden PI Decl. ¶ 24. However, a portion of the NAF

[17] NAF contends that the meetings Daleiden had with Doctors Nucatola, Gatter, and Ginde that resulted in the CMP videos would not have been possible without BioMax having fraudulently gained access to NAF's Annual Meetings and, thereby, appearing to be a legitimate operation.

materials were leaked and posted on the internet on October 20 and 21, 2015.[18]

IV. IMPACT OF DISCLOSURES ON NAF AND ITS MEMBERS

NAF is a not-for-profit professional association of abortion providers, including private and non-profit clinics, Planned Parenthood affiliates, women's health centers, physicians' offices, and hospitals. Declaration of Vicki Saporta (Dkt. No. 3-34) ¶ 2. It sets standards for abortion care through Clinical Policy Guidelines (CPGs) and Ethical Principles for Abortion Care, and develops continuing medical education and training

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[18] This leak occurred after defendants produced NAF materials covered by the TRO to Congress. NAF argues – and moves for an Order to Show Cause asking me to sanction defendants – that defendants violated my order and the TRO by producing to Congress NAF audio and video recordings that were not directly responsive to the Congressional subpoena. *See* Dkt. Nos. 155, 222. NAF complains that as a result of this "over production," the subsequent leak included NAF Materials that had nothing to do with alleged criminal activity. I heard argument on this motion on December 18, 2015. Dkt. No. 310. Having considered the representations of defense counsel, I DENY the motion for an order to show cause. Defendants did produce materials that were not covered by the subpoena, but were covered by the TRO, contrary to my Order allowing a response to the subpoena. Dkt. No. 155. Defense counsel did so because in light of their conversations with Congressional staffers, they believed Congress wanted "unedited" recordings, which defense counsel interpreted to mean the whole batch of recordings, even those where fetal tissue was not being discussed. At the hearing I cautioned defense counsel that in the future, before they take it upon themselves to arguably violate an order from this Court – even if in good faith – they should seek clarification from me first.

programs and educational resources for abortion providers and other health care professionals. *Id*. ¶ 3. NAF also implemented a multi-faceted security program to help ensure the safety of abortion providers by putting in place reference, security, and confidentiality requirements for its membership and for attendance at its Meetings. *Id*. ¶¶ 10-14; Declaration of Mark Mellor (Dkt. No. 3-33) ¶ 5-12. NAF tracks security threats to abortion providers and clinics, and offers technical assistance, on-site security training, and assessments at facilities and homes of clinic staff, as well as 24/7 support to its members when they are "facing an emergency or are targeted. *Id*. ¶ 10, 15; *see also* Declaration of Derek Foran in Support of TRO (Dkt No. 3-2) ¶ 6 & Ex 2 (NAF statistics documenting more than 60,000 incidents of harassment, intimidation, and violence against abortion providers, including murder, shootings, arson, bombings, chemical and acid attacks, bioterrorism threats, kidnapping, death threats, and other forms of violence between 1997 and 2014).

Following the release of the videos in July 2015, the subjects of those videos (including Doctors Nucatola, Gatter, and Ginde), have received a large amount harassing communications (including death threats). Pl. Exs. 80-81 (internet articles and threats by commentators), 83-91; *see also* Saporta Decl. ¶ 19. Incidents of harassment and violence directed at abortion providers increased nine fold in July 2015, over similar incidents in June 2014. Pl. Ex. 92. The incidents continued to sharply rise in August 2015. Pl. Ex. 93. The FBI has also reported seeing an increase in attacks on reproductive health care facilities. Pl. Ex.

94.[19] Since July 2015, there have also been four incidents of arson at Planned Parenthood and NAF-member facilities. Saporta Depo. at 42:1-10; Pl. Exs. 96-99.[20] Most significantly, the clinic where Dr. Ginde is medical director – a fact that was listed on the AbortinDocs.org website operated by defendant Newman's Operation Rescue group – was attacked by a gunman, resulting in three deaths. Pl. Exs. 18, 20, 21, 22, 148.[21]

NAF's President and CEO testified that there "has been a dramatic increase" in harassment since July 14, 2015, and the "volume of hate speech and threats are nothing I have ever seen in 20 years." Pl. Ex. 95 (Deposition Transcript of Vicki Saporta) at 16:17-23, 39:13-20; *see also id*. at 43:15-18 ("We have uncovered many, many direct threats naming individual providers. Those providers have had to undergo extensive security precautions and believe they are in danger."). In response, NAF hired and committed

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[19] Defendants object to Exhibits 92 - 94 on the grounds that Foran lacks personal knowledge and cannot authenticate the exhibits, as hearsay, and on relevance. Those objections are overruled.

[20] Defendants object to Exhibits 96 - 99 as inadmissible hearsay, lack of personal knowledge, lack of authentication, irrelevant and prejudicial. Those objections are overruled. Defendants also filed a motion to supplement the Preliminary Injunction record with a news article indicating the individual arrested in connection with the fire at the Thousand Oaks Planned Parenthood office was not motivated by politics, but by a "domestic feud." Dkt. No. 322. That motion is GRANTED.

[21] Defendants object to Exhibit 148 as irrelevant and inadmissible hearsay. Those objections are overruled.

additional staff to monitoring the internet for harassment and threats. Saporta Depo. at 38:2-20. NAF's security team has also seen an increase in off-hour communications from members about security. Mellor Decl. ¶ 15. As a result, NAF has been forced to take increased security measures at increased cost, has cut back on its communications with members, and alerted hotel staff and security for its upcoming events that those meetings have been "compromised." *Id*. ¶ 15.

Two NAF members also submit declarations in support of NAF. Jennifer Dunn, a law professor, submits a declaration explaining her expectation that she was filmed during the 2014 Annual Meeting during a panel presentation and that following the release of the CMP videos, she took steps to protect the safety and privacy of her family. Declaration of Jennifer T. Dunn (Dkt. No. 3-31) ¶ 10.[22] She explains that she is fearful that CMP may release a misleading and highly edited video featuring some or all of her panel presentation that would open her up to the sort of public disparagement and intimidation she saw directed towards Doctors Nucatola and Gatter after the CMP videos were released. *Id*. ¶¶ 9-10.

Dr. Matthew Reeves, the medical director of NAF, submits a declaration explaining his understanding that Daleiden filmed conversations with him during the 2014 Annual Meeting. Declaration of Dr. Matthew

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[22] Defendants object to paragraph 10 of Dunn's declaration as lacking in personal knowledge, improper expert testimony, inadmissible hearsay, and improper opinion. Those objections are overruled.

Reeves (Dkt. No.) ¶¶ 12-16.[23] Dr. Reeves explains that he has witnessed "the terrible reaction towards the prior doctors" who were featured in CMP's videos and he expects he "will suffer similar levels of reputational harm should a heavily edited and misleading video of me be released." *Id.* ¶ 17. Because of his expectation that defendants could "target" him, since the release of the videos, he had his home inspected by NAF's security team and is installing a security system, but given the current atmosphere he remains fearful for his safety and that of his family. *Id.* ¶¶ 19, 21.

V. TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

On July 31, 2015, based on an application from NAF and after reviewing the preliminary evidentiary record, I granted NAF's request and entered a Temporary Restraining Order that restrained and enjoined defendants and their officers, agents, servants, employees, and attorneys, and any other persons who are in active concert or participation with them from:

(1) publishing or otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF annual meetings;

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[23] Defendants object to paragraph 12 of Dr. Reeves declaration as speculative, improper expert testimony, improper opinion testimony, and for lack of personal knowledge. Those objections are overruled.

(2) publishing or otherwise disclosing to any third party the dates or locations of any future NAF meetings; and

(3) publishing or otherwise disclosing to any third party the names or addresses of any NAF members learned at any NAF annual meetings.

Dkt. No. 15. On August 3, 2015, after reviewing the arguments and additional evidence submitted by defendants, I issued an order keeping the TRO in place pending the hearing and ruling on NAF's motion for a preliminary injunction. Dkt. No. 27. On August 26, 2015, I entered a stipulated Protective Order, which provided that before responding to any subpoenas from law enforcement entities for information designated as confidential under the Protective Order, the party receiving the subpoena must notify the party whose materials are at issue and inform the entity that issued the subpoena that the materials requested are covered by the TRO. Dkt. No. 92 ¶ 9. The purpose of the notice provision is to allow the party whose confidential materials are sought the opportunity to meet and confer and, if necessary, seek relief from the subpoena in the court or tribunal from which the subpoena issued. *Id*.

In NAF's motion for preliminary injunction, NAF asks me to continue in effect the injunction provided in the TRO, but also to expand the scope to include the following:

(4) enjoin the publication or disclosure of any video, audio, photographic, or other

recordings taken of members or attendees Defendants first made contact with at NAF meetings; and publishing or otherwise disclosing to any third party the dates or locations of any future NAF meetings; and

(5) enjoin the defendants from attempting to gain access to any future NAF meetings.

Motion (Dkt. No. 228-4) at i.

LEGAL STANDARD

"'A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008)). Where an injunction restrains speech, a showing of "exceptional" circumstances may be required, as the Reporters Committee for Freedom of the Press pointed out.[24] *See, e.g., Bank Julius Baer & Co. Ltd v. Wikileaks*, 535 F. Supp. 2d 980, 985 (N.D. Cal. 2008). On this record, I conclude that exceptional circumstances exist, meriting the continuation of injunctive relief pending final resolution of this case.

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[24] The Reporters Committee for Freedom of the Press resubmitted their motion asking the Court to consider their *amici curiae* letter brief. Dkt. No. 287. I GRANT that motion and consider the Reporters Committee letter, as well as NAF's response, and the Reporters Committee's reply. Dkt. Nos. 109, 111, 114, 287.

DISCUSSION

I. LIKELIHOOD OF SUCCESS

NAF's Amended Complaint asserts eleven different causes of action against the three defendants. Dkt. No. 131. In moving for a preliminary injunction, NAF rests on only two – breach of contract and violation of California Penal Code section 632 – to argue its likelihood of success on the merits.

A. Breach of Contract

Under California law, to succeed on a breach of contract claim, a plaintiff must prove: (1) the existence of a contract, (2) plaintiff performed or is excused for nonperformance, (3) defendant's breach, and (4) resulting damages to plaintiff. *See, e.g., Reichert v. Gen. Ins. Co. of Am.*, 68 Cal. 2d 822, 830 (1968). NAF argues that defendants' conduct: (i) breached the EAs, by misrepresenting BioMax and their own identities; (ii) breached the EAs and CAs by secretly recording during the Annual Meetings; and (iii) breached the EAs and CAs by disclosing and publishing NAF's confidential materials.

1. Existence of a Contract; Consideration for the Confidentiality Agreements

Defendants argue that NAF cannot enforce the CA because that particular agreement was not supported by consideration for the 2014 or 2015 Meetings. *See Chicago Title Ins. Co. v. AMZ Ins. Servs., Inc.*, 188 Cal. App. 4th 401, 423 (2010) ("Every executory contract requires consideration, which may be an act,

forbearance, change in legal relations, or a promise.").[25] They contend that the only document that needed to be signed to gain access to the NAF Meetings was the EA. Therefore, according to defendants, there was no separate consideration given with respect to the CAs that were signed by or sought from the attendees at the NAF registration tables because NAF already had a legal obligation to permit them access to the meetings. Oppo. Br. at 19-20.

Defendants' argument is not supported by the facts. The EAs on their face provided access to the exhibition area ("Exhibit Rules and Regulations") *and also* required that any exhibitor's representatives be registered for the NAF Annual Meetings. Pl. Exs. 3,4. The CAs were required as part of the registration for the NAF Annual Meeting, and NAF's evidence demonstrates that no one was supposed to be allowed into the Meetings unless their identification was checked and they signed a CA. Declaration of Mark Mellor (Dkt. No. 3-33) ¶ 11; Dunn Decl. ¶ 6; *see also* Foran PI Decl. ¶ 79(C) (Sub-Bates 15-062; Time stamp: 14:56:02-14:56:50) (NAF representative confirming that Daleiden and associates had their identification checked and signed confidentiality agreements). Nothing in the language of the EAs or CAs, or the other facts in the record, support defendants' argument that upon signing the EAs, NAF had the legal obligation to

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[25] Defendants make no argument that the EA was not supported by consideration. It plainly was; access to the exhibition hall in exchange for submission of the Application and payment of the exhibitor fee.

permit Daleiden's group access to the meetings without further requirement.

Other than lack of consideration, the only other argument defendants appear to make with respect to the CA is that the CA cannot be enforced against Daleiden and two of his associates (Tennenbaum and Allen) because they did not execute CAs for the 2015 NAF Annual Meeting. Oppo. Br. at 19-20 & fn. 7. As an initial matter, there is no dispute that everyone in Daleiden's group signed the CAs for the 2014 Meeting. There is also no dispute that the reason Daleiden and two of his associates did not sign the CAs for the 2015 Meeting is that Daleiden lied about it to a NAF representative. Foran PI Decl. ¶ 79(C) (Sub-Bates 15-062; Time stamp: 14:56:02-14:56:50). There is likewise no dispute that at least one of the CMP associates working at Daleiden's direction, "Lopez," signed the 2015 CA. Given these facts, on this record, the 2015 CA can be enforced against defendants for purposes of determining likelihood of success on NAF's breach of contract claim.

I find that NAF has shown a likelihood of success on their breach of contract claim based on the 2014 and 2015 CAs.

2. Whether Defendants' Conduct Breached the EA

Defendants argue that NAF cannot prevail on its claim that defendants misrepresented themselves in violation of the EA because Paragraph 15 of the EA only requires Exhibitors to "identify, display, and/or represent their business, products, and/or services

truthfully, accurately, and consistently with the information provided in the Application." Defendants contend that this requirement applies only to BioMax, not Daleiden and his associates "individually," and that NAF is attempting to base its breach claim on representations defendants made about BioMax and/or CMP outside of the NAF Annual Meetings. Oppo. Br. at 20-21.

By signing the EA on behalf of a fake company, defendants CMP and Daleiden necessarily violated paragraph 19 of the EA, which required the signatory's affirmation that the information in the Agreement, as well as any information displayed at the Meetings, was "truthful, accurate, complete, and not misleading." Pl. Exs. 3,4. Similarly, by signing the EA and then displaying and representing false and inaccurate information about BioMax at the Meetings, defendants CMP and Daleiden violated paragraph 15 as well.[26] Defendants' conduct with respect to the information they conveyed in the EA and their conduct at the NAF meeting is sufficient – on this record – to show a

[26] Defendants assert in their brief, without any citation to evidence, that BioMax's "business" was to "assess the market for clinics and abortion providers willing to partner with it in buying and selling fetal tissue." Oppo. Br. at 21. This post-hoc rationalization is contrary to the defendants' own contemporaneous statements and their statements on the EAs themselves which required the applicant to "5. List the products or services to be exhibited" and which Daleiden filled out as "biological specimen procurement, stem cell research" and "fetal tissue procurement, human biospecimen procurement." Pl. Exs. 3,4; *see also* Pl. Ex. 26 (describing BioMax as a "front organization.").

violation of that agreement, regardless of how defendants may have portrayed BioMax outside of the NAF Meetings.

Defendants' argument that paragraph 15 of the EA restricts the remedies NAF can seek for breach to cancellation of the EA and removal of exhibits at the Meetings, and excludes the injunctive relief sought in this motion is likewise without support. Defendants continue to ignore paragraphs 18 and 19, which provide that if there is a breach of the EA, NAF is entitled to seek specific performance, injunctive relief and "all other remedies available at law or equity." Pl. Exs. 3,4.

On the record before me, NAF has a strong likelihood of success on its argument that defendants breached the EA for the 2014 and 2015 NAF Annual Meetings.[27]

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[27] Defendants also argue that their recordings could not have violated the EA because the EA did not prohibit audio and video recording, it only prohibited photography. Oppo. Br. at 19-20; EA at ¶ 13. Disputes over whether a ban on "photography" would prohibit video and audio recording aside, the CAs clearly prohibited all forms of recording and are enforceable against defendants, even for the 2015 meeting as discussed above. In a footnote, defendants assert that the CAs should be read as limiting the prohibition on recording to only formal sessions at the Meetings and not informal discussions. Oppo. Br. at 20, fn. 8. That argument is not supported. There is nothing in the text of the CA that indicates that "discussions" is limited to formal panel or workshop presentations and does not encompass information that is conveyed outside of those "formal" events.

3. Scope and Reasonableness of the EA

Defendants argue that the EA is unenforceable because it is overbroad, imprecise, and unreasonable. Specifically, they rely on NAF's characterization of the EA (and presumably the CA as well) as "broad" and encompassing all NAF communications and things learned at the NAF Meetings to argue that the EA's breadth is problematic.

That a confidentiality provision is broad does not mean it is unenforceable. The cases cited by defendants on this point are not to the contrary.[28] For example, in *Wildmon v. Berwick Universal Pictures*, 803 F. Supp. 1167, 1178 (N.D. Miss.) *aff'd*, 979 F.2d 209 (5th Cir. 1992), after applying Mississippi's contract interpretation doctrine and determining that the contract language was ambiguous, the Court concluded that "an ambiguous contract should be read in a way that allows viewership and encourages debate." The problem in *Wildmon* was not breadth, but ambiguity.

In *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127 (N.D. Cal. 2002), a securities class action, the state of Connecticut moved the court to limit the scope of a confidentiality agreement the employer imposed on its employees so that the employees could respond to a state investigation. The court concluded,

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[28] *Cf. Coast Plaza Doctors Hosp. v. Blue Cross of California*, 83 Cal. App. 4th 677, 684 (2000), *as modified* (Sept. 7, 2000) (giving full effect to "contractual language [that] is both clear and plain. It is also very broad. In interpreting an unambiguous contractual provision we are bound to give effect to the plain and ordinary meaning of the language used by the parties.").

to "the extent that those agreements preclude former employees from assisting in investigations of wrongdoing that have nothing to do with trade secrets or other confidential business information, they conflict with the public policy in favor of allowing even current employees to assist in securities fraud investigations." *Id*. at 1137. The considerations the court addressed in *In re JDS Uniphase Corp. Sec. Litig* that led it to limit the scope of the employee confidentiality agreement may have some persuasive value with respect to the interests of the Attorney General *amici* discussed below, but do not weigh against enforcement of NAF's confidentiality agreements against defendants generally. This is especially true considering that there are significant, countervailing public policy arguments weighing in favor of enforcing NAF's confidentiality agreements. *See, e.g*., Cal. Govt. Code § 6215(a) (recognizing that persons working in the reproductive health care field, specifically the provision of terminating a pregnancy, are often subject to harassment, threats, and acts of violence by persons or groups).

The final case relied on by defendants in support of their argument that the EA should be interpreted narrowly, consistent with the public's interest in hearing speech on matters of public concern, did not address a confidentiality agreement at all. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 145 (1967). The *Curtis* case found that absent clear and compelling circumstances, the Court would not find that a defendant had waived a First Amendment defense to libel (where that specific defense had not been

established by the Supreme Court at the time of defendants' libel trial).

Defendants also rely on established case law directing courts to interpret ambiguous contracts in a manner that is reasonable and does not lead to absurd results. Oppo. Br. at 22-23. Defendants argue that the broad coverage NAF contends the EA imposes on defendants is unreasonable and absurd because NAF's interpretation of the broad scope of the EA would cover all information discussed at NAF's Meetings, even publicly known information. Oppo. at 22-23. Defendants' argument might have some merit if it was made concerning a challenge to the application of the EAs' confidentiality provisions with respect to specific pieces or types of information that are otherwise publicly known or intended by NAF to be shared with individuals not covered by the EA. Defendants do not make that type of "as applied," narrow argument. Instead, they argue that the whole EA is unenforceable. There is no legal support for that result or for defendants' speculation that the EA might be enforced in an unreasonable manner against other NAF attendees.[29]

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[29] I agree with defendants that NAF's intent with respect to the EA and CA is irrelevant for purposes of this motion. Under California contract law, intent comes into play only when contract language is ambiguous. There is no ambiguity concerning meaning of the EA or CA with respect to defendants' conduct here and, therefore, no need to construe otherwise ambiguous terms against the drafter. *But see Rebolledo v. Tilly's, Inc.*, 228 Cal. App. 4th 900, 913 (2014) ("ambiguities in standard form contracts are to be construed against the drafter.").

4. What Information is Covered by EA

Defendants argue that even if enforceable, the EA should be read to create confidentiality only for the information *provided* by NAF in formal sessions and should not be construed to cover information provided by conference attendees in informal conversations. Oppo. Br. at 26-27. Defendants rely on the two portions of paragraph 17 of EA for their restrictive interpretation of its coverage; they argue that paragraph 17 only restricts disclosure of information "NAF may furnish" and "written information provided by NAF." Those provisions, defendants say, should be read to modify "any information which is disclosed orally or visually." Taken together, defendants argue, this language "connotes formality" and therefore should cover only oral and visual information provided in formal sessions at the Meetings. Oppo. Br. at 26.

As an initial matter, defendants wholly ignore the provision in the EAs that signatories agree – on behalf of entities and their employees and agents – to "hold in trust and confidence any confidential information received in the course of exhibiting at the NAF Annual Meeting and agree not to reproduce or disclose confidential information without express permission from NAF." Pl. Exs. 3,4. The only reason defendants gained access to the NAF Annual Meetings was under their guise as exhibitors and all information they received was in the course of that role, even if gathered in places other than the exhibition hall. Moreover, defendants' constrained reading of paragraph 17 is illogical. The text of paragraph 17, when read as a whole, covers all written, oral, and visual information,

and the "formality" of the language does not restrict its requirements to only the "formal" workshops and presentations as argued by defendants.[30]

In sum, on the record before me, NAF has demonstrated a strong likelihood of success on its breach of contract claims both with respect to the EAs that were signed by all CMP operatives in 2014 and 2015, and with respect to the CAs that were signed by Daleiden and his associates in 2014 and signed by Lopez in 2015.

B. California Penal Code section 632

NAF also contends that it has demonstrated a likelihood of success on its claim that defendants violated California Penal Code section 632. That provision makes it a crime to, "without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device." Cal. Penal Code § 632(a). "The term 'confidential communication' includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication . . . in any other circumstance in which the parties to the communication may reasonably expect that the

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[30] The same is true of defendants "implications of formality" argument made with respect to the CAs in a footnote. *See* Oppo. Br. at 27, n.12.

communication may be overheard or recorded." *Id.* § 632(c). And "[e]xcept as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding." *Id.* § 632(d).

Defendants argue that because section 632 does not prohibit publication of recordings made in violation of the statute, NAF cannot justify an injunction against defendants based upon an alleged violation of that statute. Indeed, California courts have held that "Penal Code section 632 does not prohibit the disclosure of information gathered in violation of its terms." *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 167 (2003); *cf. Kight v. CashCall, Inc.*, 200 Cal. App. 4th 1377, 1393 (2011) ("Although a recording preserves the conversation and thus could cause greater damage to an individual's privacy in the future, these losses are not protected by section 632.").

In reply, NAF argues that its section 632 claim is not being asserted as a basis for enjoining release of the recordings already made, but in support of its request that defendants be enjoined from "attempting to gain access to any future NAF meetings in order to tape its members, a form of relief specifically provided under § 637.2(b) ("Any person may . . . bring an action to enjoin and restrain any violation of this chapter, and may in the same action seek damages as provided by subdivision (a).").

Penal Code section 632, therefore, is not relevant to NAF's chances of success on the merits, but only with respect to the appropriate scope of injunctive relief, discussed below.[31]

C. The First Amendment and Public Policy Implications of the Requested Injunction

Defendants argue that, assuming NAF demonstrates a likelihood of success on the breach of contract claim, the EAs and CAs should not be enforced through an injunction prohibiting defendants from publishing the recordings because that is an unjustified prior restraint and against public policy. NAF counters that even if First Amendment issues are raised by the injunction it seeks, any right to speech implicated by publishing the NAF recordings has been waived by defendants knowing agreement to the EAs and CAs.

NAF relies primarily on a line of cases holding that where parties to a contract agree to restrictions on speech, those restrictions are generally upheld. For example, in *Leonard v. Clark*, the Ninth Circuit addressed a union and union members' challenge to a Collective Bargaining Agreement that arguably restricted their First Amendment rights to petition the

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[31] Both sides spend much time arguing whether section 632 prohibits recording panel presentations as opposed to conversations between individuals, because section 632's protections only extend to information as to which the speaker has a "reasonable expectation" of privacy. I need not reach these arguments as NAF no longer asserts section 632 as a ground for its likelihood of success on this motion.

government. 12 F.3d 885, 886 (9th Cir. 1993), *as amended* (Mar. 8, 1994). The court, following Supreme Court precedent, recognized that "First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent," and concluded that in negotiating the CBA the union knowingly waived any First Amendment rights that may have been implicated. *Id*. at 890.

Other cases have likewise found that speech rights can be knowingly waived. *ITT Telecom Prod. Corp. v. Dooley*, 214 Cal. App. 3d 307, 317, 319 (1989) (recognizing, in a case determining the scope of California's litigation privilege, that "it is possible to waive even First Amendment free speech rights by contract."); *Perricone v. Perricone*, 292 Conn. 187, 202 (2009) (Supreme Court of Connecticut enforced non-disclosure agreement as knowing and voluntary waiver of First Amendment rights and enjoined ex-wife from "appearing on radio or television" for purposes of discussing her former marriage or spouse); *Brooks v. Vallejo City Unified Sch. Dist*., No. 2:09-CV-1815 MCE JFM, 2009 WL 10441783, at *5 (E.D. Cal. Oct. 30, 2009) (recognizing, in denying a third-party's attempt to secure a copy of a public entities' settlement agreement with two individual plaintiffs, that individuals "were entitled to bargain away their free speech rights by agreeing to confidentiality provisions or other contractual provisions that restrict free speech").

Defendants respond that NAF has not shown that Daleiden knowingly and intelligently waived his First Amendment rights by signing the NAF confidentiality

agreements, resting their argument on Daleiden's position that he believed the agreements were unenforceable and void. Daleiden PI Decl. ¶ 12 ("I understood that no nondisclosure agreement is valid in the face of criminal activity. In the course of my investigative journalism work, I have seen other confidentiality agreements, all of which were far more specific and detailed in terms of what the protected information was. I believed the working of the nondisclosure portions of the Exhibit Agreement was too broad, vague, and contradictory to be enforced."). However, even if Daleiden honestly believed he had *defenses* to the enforcement of the confidentiality agreements, there is no argument – and no case law cited – that his signature on them and his agreement to them was not "knowing and voluntary." Daleiden and his associates *chose* to attend the NAF Annual Meetings and voluntarily and knowingly signed the EAs and CAs.

Daleiden's argument would vitiate the enforceability of confidentiality agreements based on an individual's correct *or mistaken* belief as to the enforceability of those agreements. It is contrary to well-established law. *See, e.g., Leonard v. Clark*, 12 F.3d at 890 ("The fact that the Union informed the City of its view that Article V was 'unconstitutional, illegal, and unenforceable' does not make the Union's execution of the agreement any less voluntary."); *see also Griffin v. Payne*, 133 Cal. App. 363, 373 (Cal. Ct. App. 1933) ("A secret intent to violate the law, concealed in the mind of one party to an otherwise legal contract, cannot enable such party to avoid the contract and escape his liability under its terms.").

Defendants contend that the public policy at issue – allowing free speech on issues of significant public importance – weighs against finding a waiver and/or enforcing the confidentiality agreements. The Ninth Circuit has recognized that courts should balance the competing public interests in determining whether to enforce confidentiality agreements that restrict First Amendment rights. *Leonard*, 12 F.3d at 890 ("even if a party is found to have validly waived a constitutional right, we will not enforce the waiver 'if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.'") (quoting *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir.1991)); *see also Perricone v. Perricone*, 292 Conn. 187, 221-22 (in weighing the public interests as to whether to enforce the agreement, the court observed: "The agreement does not prohibit the disclosure of information concerning the enforcement of laws protecting important rights, criminal behavior, the public health and safety or matters of great public importance, and the plaintiff is not a public official.").

On the record before me, balancing the significant interests as stake on both sides supports enforcement of the confidentiality agreements at this juncture. As the Supreme Court recognized in *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991), "the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law." *Id.* at 672. "'[T]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of

others.'" *Id*. at 7670 (quoting *Associated Press v. NLRB*, 301 U.S. 103 (1937)); *see also Dietemann v. Time, Inc*., 449 F.2d 245, 249 (9th Cir. 1971) ("The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime."). That defendants intended to infiltrate the NAF Annual Meetings in order to uncover evidence of alleged criminal wrongdoing that would "trigger criminal prosecution and civil litigation against Planned Parenthood and to precipitate pro-life political and cultural ramifications when the revelations become public," does not give defendants an automatic license to disregard the confidentiality provisions. Pl. Ex. 26.

Defendants passionately contend that public policy is on their side (and the side of public disclosure) because the recordings show criminal wrongdoing by abortion providers – a matter that is indisputably of significant public interest. *Cf. Bernardo v. Planned Parenthood Fed'n of Am*., 115 Cal. App. 4th 322, 358 (2004) (approving judicial notice "of the fact that abortion is one of the most controversial political issues in our nation.").[32] I have reviewed the recordings relied

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[32] Defendants ask for leave to supplement the record to include the January 20, 2016 Order in the *StemExpress LLC, Inc. v. Center for Medical Progress* case pending in Los Angeles Superior Court. Dkt. No. 352. Defendants ask me to take notice that the Superior Court found defendants' Project video regarding StemExpress was "constitutionally protected activity in connection with a matter of public interest" under California's anti-SLAPP statute. That motion is GRANTED.

on by defendants and find no evidence of criminal wrongdoing. At the very most, some of the individuals expressed an interest in exploring a relationship with defendants' fake company in response to defendants entreaties of how "profitable" it can be and how tissue donation can assist in furthering research. There are no express agreements to profit from the sale of fetal tissue or to change the timing of abortions to allow for tissue procurement.[33]

I also find it significant that while defendants' repeatedly assert that their primary interest in infiltrating NAF was to uncover evidence of criminal wrongdoing, and that the NAF recordings show such wrongdoing, defendants *did not* provide any of the NAF recordings to law enforcement following the 2014 Annual Meeting. Nor did defendants provide any of the NAF recordings to law enforcement immediately following the 2015 Annual Meetings. Instead, defendants decided it was more important to "curate"

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[33] The first piece of evidence that defendants repeatedly point to show "illegality" is an advertisement by StemExpress that was in both of the NAF 2014 and 2015 Meeting brochures. That ad states that clinics can "advance biomedical research," that partnering with StemExpress can be "Financially Profitable*Easy to Implement Plug-In Solution*Safeguards You and Your Donors" and that the "partner program" "fiscally rewards clinics." *See* Dkt. No. 270-1 at p. 3 of 10. However, the ad explains that StemExpress is a company that provides human tissue products "ranging from fetal to adult tissues and healthy to diseased samples" to many of the leading research institutions in the world. *Id*. The ad, therefore, is a general one and not one aimed solely at providers of fetal tissue. The ad does not demonstrate that StemExpress was engaged in illegal conduct of paying clinics at a profit for fetal tissue.

and release the Project videos starting in July 2015. Sworn testimony from Daleiden establishes that the only disclosure of NAF materials he made to law enforcement officers was: (i) providing a StemExpress advertisement from the NAF 2014 Annual Meeting program to law enforcement in El Dorado County, California in May 2015; and, providing (ii) "short clips" of video to law enforcement in Texas in June or July 2015. Daleiden PI Decl. ¶ 24. If the NAF recordings truly demonstrated criminal conduct – the alleged goal of the undercover operation – then CMP would have immediately turned them over to law enforcement. They did not.

Perhaps realizing that the recordings do not show criminal wrongdoing, defendants shift and assert that there is a public interest in the recordings showing "a remarkable de-sensitization in the attitudes of industry participants." Oppo. Br. at 14. As part of that shift, defendants' opposition brief highlights portions of the recordings where abortion providers comment candidly about how emotionally and professionally difficult their work can be. Oppo. Br. at 14-15. I have reviewed defendants' transcripts of these portions of the recordings. Some comments can be characterized as callous and some may show a "de-sensitization," as defendants describe it. They can also be described as frank and uttered in the context of providers mutually recognizing the difficulties they face in performing their work. However they are characterized, there issome public interest in these comments. But unlike defendants' purported uncovering of criminal activity, this sort of information is already fully part of the public debate over abortion. Oppo. Br. at 49-50 (citing

Gonzales v. Carhart, 550 U.S. 124, 158 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 962 (2000)); *see also* VALUE OF HUMAN LIFE, 162 Cong Rec S 162, 163 (January 21, 2016); PROVIDING FOR CONSIDERATION OF H.R. 1947, FEDERAL AGRICULTURE REFORM AND RISK MANAGEMENT ACT OF 2013, 159 Cong Rec H 3708, 3709 (June 8, 2013 testimony on the PAIN-CAPABLE UNBORN CHILD PROTECTION ACT). The public interest in additional information on this issue cannot, standing alone, outweigh the competing interests of NAF and its members' expectations of privacy, their ability to perform their professions, and their personal security.

It is also this very information that could – if released and taken out of the context that it was shared in by NAF members – result in the sort of disparagement, intimidation, and harassment of which NAF members who were recorded during the Annual Meetings are afraid. Dunn Decl. ¶ 10; Reeves Decl. ¶ 17. In sum, the public interest in these comments is certainly relevant, but does not weigh heavily against the enforcement of the NAF confidentiality agreements.

On the other side, public policy also supports NAF's position. NAF has submitted extensive evidence that in order to fulfill its mission and allow candid discussions of the challenges its members face – both professional and personal – confidentiality agreements for NAF Meeting attendees are absolutely necessary. Dunn Decl. ¶¶ 5-6; Reeves Decl. ¶ 7; Saporta Decl. ¶¶ 11, 13-16; Mellor Decl. ¶¶ 7, 10-14. Release of the recordings procured by fraud and taken in violation of NAF's

stringent confidentiality agreements, which disclose the identities of NAF members and compromise steps NAF members take to protect their privacy and professional interests, is also contrary to California's recognition of the dangers faced by providers of abortion, as well as California's efforts to keep information regarding the same shielded from public disclosure and protect them from threats and harassment. *See* Cal. Govt. Code § 6215(a) ("(a) Persons working in the reproductive health care field, specifically the provision of terminating a pregnancy, are often subject to harassment, threats, and acts of violence by persons or groups."); Cal. Civ. Code § 3427 *et seq*. (creating cause of action to deter interference with access to clinics and health care); Cal. Govt. Code § 6218 ("Prohibition on soliciting, selling, trading, or posting on Internet private information of those involved with reproductive health services"); Cal. Govt. Code § 6254.28; Cal. Penal Code § 423 ("California Freedom of Access to Clinic and Church Entrances Act."). As noted above, since defendants' release of the Project videos (as well as the leak of a portion of the NAF recordings), harassment, threats, and violent acts taken against NAF members and facilities have increased dramatically. It is not speculative to expect that harassment, threats, and violent acts will continue to rise if defendants were to release NAF materials in a similar way. Weighing the public policy interests on the record before me, enforcement of the confidentiality agreements against defendants is not contrary to public policy.

That said, public policy may well support the release of a small subset of records – those that

defendants believe show criminal wrongdoing – to law enforcement agencies.[34] Defendants rely on a line of cases where courts have refused to enforce, or excused compliance with, otherwise applicable confidentiality agreements for the limited purpose of allowing cooperation with a specified law enforcement investigation. *See, e.g., Alderson v. United States*, 718 F. Supp. 2d 1186, 1200 (C.D. Cal. 2010); *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127 (N.D. Cal. 2002); *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 854 (10th Cir. 1972); *see also United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 965 (9th Cir. 1995) (refusing to enforce a prefiling release of a False Claims Act claim); *Siebert v. Gene Sec. Network, Inc*, No. 11-CV-01987-JST, 2013 WL 5645309, at *8 (N.D. Cal. Oct. 16, 2013) (declining to enforce a nondisclosure agreement with respect to documents relevant to a FCA claim because application of the NDA to those documents would "would frustrate Congress' purpose in enacting the False Claims Act—namely, the public policy in favor of providing incentives for whistleblowers to come forward, file FCA suits, and aid the government in its investigation efforts."); *but see Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1062 n.15 (9th Cir. 2011) (upholding breach of confidentiality claim, despite plaintiff's attempt to "excuse her conduct on the grounds that she was in contact with, and providing information to, government investigators," in part

[34] As I have said, my review of the recordings relied on by defendants does not show criminal conduct, but I recognize that law enforcement agencies may want to review the information at issue themselves in order to make their own assessment.

because that justification "neither explains nor excuses the overbreadth of her seizure of documents.").[35]

I do not disagree with the analysis and results in those cases, but note that the posture of this case is different. Defendants' purported desire to disclose the NAF recordings to law enforcement does not obviate the confidentiality agreements *for all purposes*. At most, defendants might have a defense to a breach of contract claim based on production of NAF materials to law enforcement. However, the question of whether defendants should be excused from complying with NAF's confidentiality agreements in order to provide NAF materials to law enforcement has not been placed directly at issue. In this case, Attorney General *amici* have appeared (with leave of court) to present their arguments on the scope of the TRO and the requested preliminary injunction.[36] They have not directly sought relief from the confidentiality agreements, the TRO, or the requested preliminary injunction by intervening and moving for declaratory relief in this Court or by seeking enforcement of their subpoenas in the courts of

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[35] Defendants also rely on a related line of cases holding that contracts which expressly prohibit a signatory from reporting criminal behavior to law enforcement agencies are void as against public policy. *See, e.g.,* Oppo. Br. at 52-55 (citing *Fomby-Denson v. Dep't of the Army*, 247 F.3d 1366, 1376 (Fed. Cir. 2001); *Bowyer v. Burgess*, 54 Cal. 2d 97, 98 (1960)). Those cases are inapposite.

[36] I have granted the Attorneys General of the states of Alabama, Arizona, Arkansas, Michigan, Montana, Nebraska, and Oklahoma leave to participate as *amici curiae* in this matter. Dkt. Nos. 99, 100, 285. As represented by the office of the Attorney General of Arizona, the *amici* filed a brief and argued in court during the hearing on the Motion for a Preliminary Injunction.

their own states. And contrary to their assertion, the TRO in place and the Preliminary Injunction requested do not prevent law enforcement officials from investigating defendants' claims of criminal wrongdoing. For example, law enforcement agencies from the states of Arizona and Louisiana have instituted formal efforts to secure the NAF recordings. Under procedures outlined in the Protective Order in this case, NAF and defendants have been and continue to meet and confer with those state authorities about the scope of the subpoenas and defendants' responses.[37]

The record before me demonstrates that defendants infiltrated the NAF meetings with the intent to disregard the confidentiality provisions and secretly record participants and presentations at those meetings. Defendants also admit that only a small subset of the total material gathered implicate any potential criminal wrongdoing. Oppo. Br. at 10-14. I have reviewed those transcripts and recordings and find no evidence of actual criminal wrongdoing. That defendants did not promptly turn over those recordings to law enforcement likewise belies their claim that they uncovered criminal wrongdoing, and instead supports NAF's contention that defendants' goal instead is to

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[37] There have only been three subpoenas served on CMP for NAF materials; the Congressional subpoena that has been complied with, as well as subpoenas from Louisiana and Arizona. Negotiations between NAF, CMP, and the states of Louisiana and Arizona are ongoing. While NAF and the defendants have repeatedly stipulated to extend the timeframe for NAF to file a challenge to the state subpoenas in state court (*see* Dkt. Nos. 246, 300), those were decisions reached by the parties and not imposed by the Court.

falsely portray the operations of NAF's members through continued release of its "curated" videos as part of its strategy to alter the political landscape with respect to abortion and the public perception of NAF's members.[38] I conclude that NAF has shown a strong likelihood of success on its breach of contract claims against CMP and Daleiden. Enforcement of NAF's confidentiality provisions for purposes of continuing the injunction prohibiting defendants from releasing the NAF materials is not against public policy.

D. Claims Against Newman

Defendant Newman argues that NAF has failed to show a likelihood of success against him because there is no evidence of his role in the NAF infiltration and no argument that Newman breached any of NAF's agreements. Newman's argument would be more relevant if this were a motion for summary judgment. However, it is not. The only question is whether NAF has made a strong showing of the likelihood of success on its contract claim against CMP and Daleiden, which it has. NAF submitted evidence of Newman's own admissions that he advised Daleiden on how to infiltrate the NAF meetings as part of the Project, which is relevant to the appropriate scope of an injunction. Pl. Ex. 14 (at NAF0004475-76); Pl. Ex. 16

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[38] In opposing NAF's request that the Court order Daleiden to turn over the NAF materials to his outside counsel, Daleiden's counsel explained that Daleiden needed access to the NAF materials because "Mr. Daleiden continues to work on the Human Capital Project, including the work of curating available raw investigative materials for disclosure to law enforcement and for release of videos to the public." Dkt. No. 195.

(at NAF0004493-94). That evidence makes clear that Newman should remain covered by the Preliminary Injunction, even if he is no longer serving as a board member of CMP. Dkt. No. 344.

II. IRREPARABLE INJURY

To sustain the request for a preliminary injunction, NAF must demonstrate that "irreparable injury is likely in the absence of" the requested injunction" and establish a "sufficient causal connection" between the irreparable harm NAF seeks to avoid and defendants' intended conduct – release of the NAF materials. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 982 (9th Cir. 2011).

Defendants argue that NAF has not shown that it will suffer irreparable injury to justify a preliminary injunction. However, as detailed above, the release of videos as part of defendants' Human Capital Project has directly led to a significant increase in harassment, threats, and violence directed not only at the "targets" of CMP's videos but also at NAF and its members more generally. This significant increase in harassment and violent acts – including the most recent attack in Colorado Springs at the clinic where "target" Dr. Ginde is the medical director – has been adequately linked to the timing of the release of the Project videos by CMP. Saporta Decl. ¶ 19; Saporta Depo. 42:1-10; Pl. Exs. 92, 93, 96-99.[39] If the NAF materials were publicly

[39] Defendants object to Exhibits 98 and 99 as inadmissible hearsay, for lack of personal knowledge, lack of authentication, and as irrelevant. Those objections are overruled.

released, it is likely that the NAF attendees shown in those recordings would not only face an increase in harassment, threats, or incidents of violence, but also would have to expend more effort and money to implement additional security measures. *See, e.g,.* Dunn Decl. ¶ 10; Reeves Decl. ¶ 19.[40] The same is true for NAF itself, which provides security assessments and assistance for its members. Mellor Decl., ¶ 15; Saporta Decl. ¶ 10.

Defendants contend that they cannot be held responsible for the threats, harassment, and violence caused by "third-parties" in response to the release of the Project videos, and that defendants' ability to publish the NAF materials cannot be prevented when defendants have not themselves been linked to the threats, harassment, and violence. Oppo. Br. at 43-44. But they fail to contradict NAF's evidentiary showing that a significant increase in these acts followed CMP's release of its Project videos. Moreover, a report submitted by NAF of an analysis of many of the "highlight" and "full" videos released by CMP concluded that the "curated" or highlight Project videos were "misleading" and suggests that the "full" videos defendants released along with their "highlights" were also edited. Pl. Ex. 77. Defendants do not counter this evidence, other than pointing to Daleiden's assertion that the highlight videos were accompanied by the release of the "full" recordings. Given the evidence of defendants' past practices, allowing defendants to use

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[40] Defendants object to paragraph 19 of Dr. Reeves' declaration as speculative, improper expert testimony, and for lack of foundation. Those objections are OVERRULED.

the NAF materials in future Project videos would likely lead to the same result – release of misleading "highlight" videos disclosing the identity and comments of NAF members and meeting attendees, resulting in further harassment and incidents of violence against the individuals shown in those recordings. The NAF members and attendees in the recordings have a justifiable expectation that release of the materials – in direct contravention of the NAF confidentiality agreements – will result not only in harassment and violence but reputational harms as well. *See, e.g.*, Dunn Decl. ¶¶ 9-10;[41] Reeves Decl. ¶ 17.

Defendants miss the point in their attempt to shift the responsibility to overly zealous third-parties for the actual and likely injury to NAF and its members that would stem from disclosure of the NAF materials. If defendants are allowed to release the NAF materials, NAF and its members would suffer immediate harms, including the need to take additional security measures. The "causal connection" between NAF's and its members' irreparable injury and the conduct enjoined (release of NAF materials) has been shown on this record.[42]

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[41] Defendants object to paragraph 9 of the Dunn Declaration as lacking in personal knowledge, improper expert testimony, inadmissible hearsay, improper opinion testimony, and under the best evidence rule. Those objections are overruled.

[42] The sum of defendants' argument and evidence on this point is that they cannot be blamed for the "hyperbolic comments of anonymous Internet commenters" and that "hyperbolic 'death threats' on the Internet and through social media has become an ubiquitous feature of online discourse." Oppo. Br. at 44-45. But the

On the other side of the equation is defendants' claim of irreparable injury. They focus on their First Amendment right to disseminate the information fraudulently obtained at the NAF Meetings, and the injury to the public of being deprived of the NAF recordings. But freedom of speech is not absolute, especially where there has been a voluntary agreement to keep information confidential. While the disclosure of evidence of criminal activity or evidence of imminent harm to public health and safety could outweigh enforcement of NAF's confidentiality agreements (as discussed above), there is no such evidence in defendants' recordings. Viewed in a light most favorable to defendants, what does appear is information that is already in the public domain that defendants characterize as showing a "de-sensitization" as to the work performed by abortion providers. The balance of NAF's strong showing of irreparable injury to its members' freedom of association (to gather at NAF meetings and share their confidences), to its and its members' security, and to its members' ability to perform their chosen professions against preventing (through trial) defendants from disclosing information that is of public interest but which is neither new or unique, tilts strongly in favor of NAF.

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misleading nature of the Project videos that they have produced – reflective of the misleading nature of defendants' repeated assertions that the recordings at issue show significant evidence of criminal wrongdoing – have had tragic consequences, including the attack in Colorado where the gunman was apparently motivated by the CMP's characterization of the sale of "baby parts."

III. BALANCE OF EQUITIES

Similar to the discussion of competing claims of irreparable injury, the balance of equities favors NAF. Defendants will suffer the hardship of being restricted in what evidence they can release to the public in support of their ongoing Human Capital Project, at least through a final determination at trial. However, the hardships suffered by NAF and its members are far more immediate, significant, and irreparable.

IV. PUBLIC INTEREST

I fully recognize that there is strong public interest on the issue of abortion on both sides of that debate, and that members of the public therefore have an interest in accessing the NAF materials. I also recognize that this case impinges on defendants' rights to speech and the public's equally important interest in hearing that speech. But this is not a typical freedom of speech case.[43] Nor is this a typical "newsgathering"

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[43] None of the "prior restraint" cases defendants rely on address the types of exceptional facts established here: (i) enforceable confidentiality agreements, knowingly and voluntarily entered into, in which defendants agreed to the remedy of injunctive relief in the event of a breach; (ii) extensive and repeated fraudulent conduct; (iii) misleading characterizations about the information procured by misrepresentation; and (iv) a strong showing of irreparable harm if the confidentiality agreements are not enforced pending trial. *See* Oppo. Br. at 32-35. Several of defendants' prior restraint cases expressly left open the possibility of limits on speech where "private wrongs" and "clear evidence of criminal activity" occurred. *See, e.g., Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971) (overturned broad injunction prohibiting "peaceful" pamphleteering across a city where injunction was not necessary to redress a "private wrong"); *CBS, Inc. v. Davis*, 510

case where courts refuse to impose prior restraints on speech, leaving the remedies for any defamatory publication or breach of contract to resolution post-publication. *See, e.g.*, *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994); *see also Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

Instead, this is an exceptional case where the extraordinary circumstances and evidence to date shows that the public interest weighs in favor of granting the preliminary injunction. Weighing against the public's general interest in disclosure of the recordings showing the "de-sensitization" of abortion providers, is the fact that there is a constitutional right to abortions and that NAF members also have the right to associate in privacy and safety to discuss their profession at the NAF Meetings, and need that privacy and safety in order to safely practice their profession. On the record before me, NAF has demonstrated the release of the NAF materials will irreparably impinge on those rights.

The context of how defendants came into possession of the NAF materials cannot be ignored and directly

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U.S. 1315, 1318 (1994) (emergency stay overturning prior restraint where damage to meat packing company was readily remedied by post-publication damages action and "the record as developed thus far contains no clear evidence of criminal activity on the part of CBS, and the court below found none."); *see also Bartnicki v. Vopper*, 532 U.S. 514, 529-30 (2001) (striking down wiretap statutes to extent they penalized the publishing of secretly recorded phone conversations by reporters who played no role in the illegal interception; rejecting proposition that "speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.").

supports preliminarily preventing the disclosure of these materials. Defendants engaged in repeated instances of fraud, including the manufacture of fake documents, the creation and registration with the state of California of a fake company, and repeated false statements to a numerous NAF representatives and NAF members in order to infiltrate NAF and implement their Human Capital Project. The products of that Project – achieved in large part from the infiltration – thus far have not been pieces of journalistic integrity, but misleadingly edited videos and unfounded assertions (at least with respect to the NAF materials) of criminal misconduct. Defendants did not – as Daleiden repeatedly asserts – use widely accepted investigatory journalism techniques. Defendants provide no evidence to support that assertion and no cases on point.[44]

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[44] Defendants rely on cases where reporters misrepresented themselves in the course of undercover investigations, but those cases do not show the level of fraud and misrepresentation defendants engaged in here. For example, in *Med. Lab. Mgmt. Consultants v. A*BC, 306 F.3d 806, 812 (9th Cir. 2002), reporters posed as employees of fictitious labs, in order to investigate whether an existing lab was violating federal regulations and misreading pap smear tests. There is no evidence that the reporters in the *Med. Lab.* case did anything other than verbally misrepresent themselves to the lab owner; the reporters did not create fictitious documents, register a fictitious company, or intentionally agree to confidentiality agreements before making their undercover recordings. *Id.* at 814 n.4 (noting the plaintiffs failed to obtain confidentiality agreements from defendants). It is also important to note that while the Ninth Circuit affirmed the district court's order granting summary judgment to defendants on plaintiffs' intrusion on seclusion, trespass, and tortious interference claims under Arizona law, the district court denied in

V. SCOPE OF INJUNCTION

A. Coverage of Third Party Law Enforcement Entities and Governmental Officials

Defendants and the Attorney Generals of the states of Alabama, Arizona, Arkansas, Michigan, Montana, Nebraska, and Oklahoma (AG *Amici*) argue that any continuing injunction on the release of the NAF

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part defendants' motion as to plaintiffs' fraud claim. *Id*. at 812. In *J.H. Desnick v. Am. Broad. Cos*., 44 F.3d 1345, 1348 (7th Cir. 1995), the reporters posed as patients of an eye center and secretly recorded their eye exams. The misrepresentations in that case simply do not rise to the level of the misrepresentations here or the fraudulent lengths defendants went through to secure their recordings. Also, in that case, the Court of Appeals remanded the defamation claim for further proceedings, and affirmed the dismissal of the trespass, privacy, wiretapping, and fraud claims based on an analysis of the facts under the state and federal laws at issue. The district court did not dismiss the breach of contract claim. *Id*. at 1354. Finally, defendants' citation to *Animal Legal Def. Fund v. Otter*, No. 1:14-CV-00104-BLW, 2015 WL 4623943 (D. Idaho Aug. 3, 2015), for the proposition that using deceptive tactics to conduct an undercover investigation "is not 'fraud' and is fully protected by the First Amendment," is not supported. In that case, the district court struck down a state law that criminalized the use of "misrepresentation" to gain access to and record operations in an agricultural facility. In striking down the law as a content-based regulation of protected speech which failed strict scrutiny, the court noted that the law did not "limit its misrepresentation prohibition to false speech amounting to actionable fraud," and any harm from the speech at issue would not be compensable as "harm for fraud or defamation" because the harm did not stem from the misrepresentation made to access the facility. *Id*. at * 5-6. That case *did not* hold that undercover operations could not result in actionable fraud, breach of contract, or libel.

materials should not run to third-party law enforcement entities or government officials because NAF has not shown that disclosure of the NAF materials to law enforcement entities or government officials will result in irreparable harm and the public interest strongly favors governments being free to exercise their investigatory powers. *See* AG *Amici* Brief (Dkt. No. 285).

The Protective Order and the injunction in this case do not hinder the ability of states or other governmental entities from conducting investigations. Nor do they bar defendants from disclosing materials in response to subpoenas from law enforcement or other government entities. Instead, those orders simply impose a notice requirement on defendants; requiring them to notify NAF prior to defendants' production of the NAF materials so that NAF may (if necessary) challenge the subpoenas in the state court at issue. Contrary to the AG *Amici* position, these limited procedures do not purport to bind the states or prevent them from conducting investigations or seeking relief in their own courts. The Protective Order and injunction simply create an orderly procedure to allow production of relevant information to state law enforcement or other governmental entities. As far as I am aware, that procedure has worked well and negotiations are ongoing between NAF, defendants, and the two states that have issued subpoenas to CMP, Arizona and Louisiana.[45]

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[45] Similarly defendants appropriately notified the Court that CMP was subpoenaed to testify in front of a grand jury, and explained that if Daleiden was called upon to disclose information he learned

B. Expansion of Injunctive Relief

NAF also seeks to expand the injunctive relief to prevent defendants and those acting in concert with them from publishing or disclosing "any video, audio, photographic, or other recordings taken of members or attendees Defendants first made contact with at NAF meetings" and "enjoin the defendants from attempting to gain access to any future NAF meetings." Motion at i, 2.

On this record, NAF has not demonstrated that an expansion of the injunction is warranted. NAF does not identify (under seal or otherwise) the NAF members or attendees whom it believes have been recorded and whom defendants "first made contact with" at a NAF Annual Meeting. A request for injunctive relief must be specific and reasonably detailed, but NAF's request would import ambiguity into the scope of the injunction. Absent a more specific showing supported by evidence, I will not expand the preliminary injunction to ban CMP from releasing unspecified recordings of unspecified NAF members or attendees defendants "first made contact with" at the NAF Meetings.

Similarly, NAF has not shown that an "open-ended" expansion of the injunction to prohibit the "defendants from attempting to gain access to any future NAF meetings," is necessary. Defendants and their agents

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at the NAF Annual Meetings in responding to the grand jury's questions, Daleiden intended to do so absent further order from this Court. Dkt. No. 323-5. This Court did nothing to prevent Daleiden from testifying fully in front of that grand jury.

are now well known to NAF and its members and absent evidence that defendants intend to continue to attempt to infiltrate NAF meetings, there is no need to extend the preliminary injunction at this juncture.

CONCLUSION

Considering the evidence before me, and finding that NAF has made a strong showing on all relevant points, I GRANT the motion for a preliminary injunction. Pending a final judgment, defendants and those individuals who gained access to NAF's 2014 and 2015 Annual Meetings using aliases and acting with defendant CMP (including but not limited to the following individuals/aliases: Susan Tennenbaum, Brianna Allen, Rebecca Wagner, Adrian Lopez, and Philip Cronin) are restrained and enjoined from:

(1) publishing or otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or any confidential information learned, at any NAF annual meetings;

(2) publishing or otherwise disclosing to any third party the dates or locations of any future NAF meetings; and

(3) publishing or otherwise disclosing to any third party the names or addresses of any NAF members learned at any NAF annual meetings.

IT IS SO ORDERED.

Dated: February 5, 2016

/s/ William H. Orrick
WILLIAM H. ORRICK
United States District Judge

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 16-15360

D.C. No. 3:15-cv-03522-WHO

[Filed March 29, 2017]

NATIONAL ABORTION FEDERATION, NAF,	)
Plaintiff-Appellee,	)
v.	)
CENTER FOR MEDICAL PROGRESS; BIOMAX PROCUREMENT SERVICES, LLC; DAVID DALEIDEN, AKA Robert Daoud Sarkis; TROY NEWMAN,	)
Defendants-Appellants.	)

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick III, District Judge, Presiding

Argued and Submitted October 18, 2016
San Francisco, California

Before: CALLAHAN and HURWITZ, Circuit Judges, and MOLLOY,[**] District Judge.

1. Plaintiff-Appellee the National Abortion Federation ("NAF") is a non-profit professional association of abortion providers whose mission is "ensur[ing] safe, legal, and accessible abortion care." NAF conducts annual meetings of its members and invited guests which are not open to the public. All meeting attendees must sign confidentiality agreements before obtaining meeting materials and access to the meeting areas.

2. The individual Defendants-Appellants are anti-abortion activists. Defendant-Appellant David Daleiden founded the Center for Medical Progress ("CMP") and later created the "Human Capital Project" to "investigate, document, and report on the procurement, transfer, and sale of fetal tissue."

3. In order to obtain an invitation to attend NAF's 2014 and 2015 annual meetings, the individual defendants misrepresented themselves as representatives of a company, BioMax Procurement Services LLC ("BioMax"), purportedly engaging in fetal

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[**] The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

tissue research. Daleiden—purporting to be a BioMax representative and using an alias—signed "Exhibit Agreements" for both annual meetings in which he acknowledged, among other things, that all written, oral, or visual information disclosed at the meetings "is confidential and should not be disclosed to any other individual or third parties" absent written permission from NAF.[1]

4. The individual defendants and several investigators they hired to pose as BioMax representatives also signed "Confidentiality Agreements" that prohibited: (1) "video, audio, photographic, or other recordings of the meetings or discussions at this conference;" (2) use of any "information distributed or otherwise made available at this conference by NAF or any conference participants . . . in any manner inconsistent with" the purpose of enhancing "the quality and safety of services provided by" meeting participants; and (3) disclosure of any such information "to third parties without first obtaining NAF's express written consent."

5. Notwithstanding these contracts, the defendants secretly recorded several hundred hours of the annual conferences, including informal conversations with other attendees. The defendants attempted in those conversations to solicit statements from conference

[1] In signing the agreement, Daleiden also falsely affirmed that all information contained in BioMax's application and other correspondence with NAF was "truthful, accurate, complete, and not misleading."

attendees that they were willing to violate federal laws regarding abortion practices and the sale of fetal tissue.

6. The defendants then made some of the recordings public. After the release of the recordings, incidents of harassment and violence against abortion providers increased, including an armed attack at the clinic of one of the video subjects that resulted in three deaths.

7. The district court issued a preliminary injunction enjoining the defendants from, in contravention of their agreements with NAF, "publishing or otherwise disclosing to any third party": (1) any "recordings taken, or any confidential information learned, at any NAF annual meetings;" (2) "the dates or locations of any future NAF meetings;" and (3) "the names or addresses of any NAF members learned at any NAF annual meetings."

8. We have jurisdiction over the defendants' appeal of that preliminary injunction under 28 U.S.C. § 1292(a)(1). We review for abuse of discretion, *Garcia v. Google, Inc.*, 786 F.3d 733, 739 (9th Cir. 2015) (en banc), and affirm. The district court carefully identified the correct legal standard and its factual determinations were supported by the evidence. *Id.*; *see also Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (asking whether the "district court's application of the correct legal standards was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record").

9. We add only a few thoughts to the district court's careful discussion. First, the defendants do not contest that they engaged in misrepresentation and breached

their contracts. But, they claim that because the information they obtained is of public interest, the preliminary injunction is an unconstitutional prior restraint. Even assuming arguendo that the matters recorded are of public interest, however, the district court did not clearly err in finding that the defendants waived any First Amendment rights to disclose that information publicly by knowingly signing the agreements with NAF. *See Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1994). Nor did the district court abuse its discretion in concluding that a balancing of the competing public interests favored preliminary enforcement of the confidentiality agreements, because one may not obtain information through fraud, promise to keep that information confidential, and then breach that promise in the name of the public interest. *See Dietemann v. Times, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) ("The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. . . . simply because the person subjected to the intrusion is reasonably suspected of committing a crime.").

10. The defendants claim that they were released from their contractual obligations because they obtained evidence of criminal wrongdoing. But the district court, having reviewed the recordings, concluded as a matter of fact that they had not. That determination is amply supported by the record. *See Pimentel*, 670 F.3d at 1105.

11. Our dissenting colleague believes that the district court erred in enjoining the defendants from voluntarily providing the purloined information to law

enforcement. But even assuming the dubious proposition that the defendants were entitled to root out what they considered to be illegal activities through fraud and breach of contract, the district court's finding that they uncovered no violations of the law is a sufficient answer to any right claimed by the defendants.[2]

12. The preliminary injunction places no direct restriction on law enforcement authorities. Rather, it enjoins the *defendants* from disclosing information to anyone except in response to a subpoena. If law enforcement officials obtain a subpoena, the defendants have agreed in a stipulated Protective Order to notify NAF so that it can decide whether to oppose the subpoena. The preliminary injunction and protective order explicitly provide that NAF may not "disobey a lawful . . . subpoena." The preliminary injunction therefore in no way prevents law enforcement from conducting lawful investigations.

13. The dissent, citing *S.E.C. v. O'Brien*, 467 U.S. 735, 750 (1984), argues that notifying the target of a third-party subpoena might allow that target to thwart an investigation by intimidating the third party and destroying documents. But *O'Brien* involves investigations in which a target is unaware of an ongoing investigation and still possesses materials that

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[2] The dissent cites no authority for the proposition that "our system of law and order depends on citizens being allowed to bring whatever information they have, however acquired, to the attention of law enforcement." Dissent at 3. Even if true, however, the proposition would confer no right on citizens to obtain that information through fraud or breach of contract.

would be the subject of a subpoena or potential investigation. *Id*. Here, by contrast, NAF already knows that some law enforcement authorities seek this information, the defendants—not NAF—possess the recordings, and the defendants, who are eager to comply with any subpoena for their own purposes, are hardly likely to destroy the subpoenaed recordings. Moreover, the district court has preserved the recordings.

14. Given the district court's finding, which is supported by substantial evidence, that the tapes contain no evidence of criminal activity, and its recognition of several states' ongoing "formal efforts to secure the NAF recordings," the preliminary injunction carefully balances the interests of NAF and law enforcement. We therefore decline the request by the amici Attorneys General to modify the injunction.

AFFIRMED.

CALLAHAN, Circuit Judge, concurring in part and dissenting in part:

Constrained as I am by the applicable strict standards of review, *see Garcia v. Google, Inc.*, 786 F.3d 733, 739 (9th Cir. 2015) (en banc), and *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012), I accept that Defendants have generally failed to carry their burden of showing that the District Court's grant of a preliminary injunction is an abuse of discretion.

I strongly disagree with my colleagues on the application of the preliminary injunction to law enforcement agencies. The injunction against Defendants sharing information with law enforcement

agencies should be vacated because the public policy in favor of allowing citizens to report matters to law enforcement agencies outweighs NAF's rights to enforce a contract. This was recognized by the Supreme Court over thirty years ago in *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984) ("It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities.").[1] Accordingly, I find no justification for not allowing Defendants to share the tapes with any law enforcement agency that is interested.

Moreover, the District Court's determination that the tapes contain no evidence of crimes, even if true, is of little moment as the duties of Attorneys General and other officers to protect the interests of the general public extend well beyond actual evidence of a crime. In *United States v. Morton Salt Co.*, 338 U.S. 632, 643 (1950), the Supreme Court recognized that "[w]hen investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law." *See also Wilson Corp. v. State ex rel. Udall*, 916 P.2d 1344, 1348 (N.M. Ct. App. 1996) (noting that New Mexico's civil investigative demands "enable the Attorney General to obtain information without first accusing anyone of violating the Antitrust

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[1] *See also In re U.S. for Historical Cell Site Data*, 724 F.3d 600, 610 (5th Cir. 2013); *Blinder, Robinson & Co., Inc. v. U.S. S.E.C.*, 748 F.2d 1415, 1419 (10th Cir. 1984).

Act."); *CUNA Mut. Ins. Soc. v. Attorney General*, 404 N.E.2d 1219, 1222 (Mass. 1980) (noting that use of civil investigative demands is not limited only to person being investigated, but extends to seeking information from the insurer concerning possible violations of that statute by others); Ariz. Rev. Stat. § 44-1524(A) (allowing the Attorney General in investigating a violation to "[e]xamine any merchandise or sample thereof, or any record book, document, account or paper as he may deem necessary.").

Furthermore, disclosure to a law enforcement agency is not a disclosure to the public. As the Attorneys General amici note: "[l]aw enforcement regularly handles highly sensitive materials, such as the identity of informants, information regarding gangs and organized crime, and the location of domestic violence victims. If law enforcement cannot be trusted to handle information with the potential to risk bodily harm or even death if it falls into the wrong hands, then it simply cannot do its job." Accordingly, our system of law and order depends on citizens being allowed to bring whatever information they have, however acquired, to the attention of law enforcement. This case is no exception and the district court erred in preventing Defendants from showing the tapes to law enforcement agencies.

Similarly, the injunction violates this strong public policy by requiring that if a law enforcement agency contacts Defendants and seeks materials covered by the injunction, Defendants must notify NAF of the request and allow NAF time to respond. These conditions inherently interfere with legitimate

investigations. *See Jerry T. O'Brien. Inc.*, 467 U.S. at 750. Moreover, the notice requirement does not purport to protect NAF from subsequent disclosures by a law enforcement agency after it had received the materials.

Whatever the balance between NAF's contractual rights and the Defendants' First Amendment rights, law enforcement is entitled to receive information from citizens regardless of how the citizens procure that information. Accordingly, I would vacate the preliminary injunction insofar as it purports to limit Defendants from disclosing the materials to law enforcement agencies and requires that Defendants notify NAF of any request they receive for the materials from law enforcement agencies.

APPENDIX G

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. 15-cv-03522-WHO

[Filed November 7, 2018]

NATIONAL ABORTION FEDERATION,

Plaintiff,

v.

CENTER FOR MEDICAL PROGRESS, et al.,

Defendants.

ORDER ON PENDING MOTIONS

Re: Dkt. Nos. 544, 545, 546, 547, 548

This case stems from defendants' alleged use of false identification and a "phony" corporation to gain access to conferences and meetings held by the National Abortion Federation (NAF). Once there, defendants surreptitiously recorded NAF's staff as well as speakers and participants in alleged contravention of agreements they signed to gain access.

There have been many orders issued in this case to date, including a preliminary injunction, an order of contempt, and orders on various privilege issues. Now that the Ninth Circuit has affirmed the Order Granting the Preliminary Injunction (Dkt. No. 354) (the "Preliminary Injunction Order"), *Natl. Abortion Fedn., NAF v. Ctr. for Med. Progress*, 685 Fed. Appx. 623 (9th Cir. 2017)(unpublished),[1] defendants move to dismiss the operative complaint, challenge the state law claims under California's anti-SLAPP statute (Cal. Code of Civ. Proc. § 425.16), and move to dissolve, modify, or clarify the injunction.

On their motions to dismiss, defendants seek to reargue issues decided against them in the Preliminary Injunction Order without pointing to any new case law in support, except for one that does not alter my prior analysis. Defendants also make a range of "evidentiary-based" arguments that cannot be resolved on a 12(b)(6) motion. On the special motion to strike, defendants introduce no new, material evidence that would undermine plaintiff's likelihood of success on the merits as found in the Preliminary Injunction Order based on the evidentiary record at that juncture.

Finally, I will not dissolve, modify, or clarify the Preliminary Injunction. I have explained, repeatedly, that nothing in the Preliminary Injunction prevents the Hon. Christopher Hite, who is supervising the state court criminal proceedings, from making orders about

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[1] Cert. denied sub nom. *Daleiden v. Natl. Abortion Fedn.*, 138 S. Ct. 1438 (2018), and cert. denied sub nom. *Newman v. Natl. Abortion Fedn.*, 138 S. Ct. 1439 (2018).

how materials covered by the injunction can be used in those proceedings. There is simply no merit to defendants' arguments that the injunction infringes on Daleiden's constitutional rights to present his defense to the state criminal charges. I recognize that, depending upon how Judge Hite rules on whether and how defendants will be able to use materials covered by the injunction in connection with the state court proceedings, revisiting the scope of the injunction may be appropriate. When that need arises (and it has not yet), defendants may seek relief on an expedited basis to modify or clarify the existing injunction.

BACKGROUND

The background to this case has been extensively discussed in my prior orders, including the the Preliminary Injunction Order. The evidentiary record relied upon in the Preliminary Injunction 2016 Order is relevant to the special motion to strike. For purposes of determining defendants' motions to dismiss, I am limited to reviewing only the allegations in the first amended complaint (FAC), as well as matters that are appropriate for judicial notice.

Significant to arguments made in the motion to dismiss and special motion to strike are the contents of the contracts to which defendants agreed in order to gain access to the 2014 and 2015 NAF Annual Meetings. The 2014 and 2015 NAF "Exhibit Agreements" attached to the FAC were required for exhibitors at NAF's 2014 and 2015 Annual Meetings, and were signed by specified defendants.

Both the 2014 and 2015 Exhibit Agreements contain confidentiality clauses:

> In connection with NAF's Annual Meeting, Exhibitor understands that any information NAF may furnish is confidential and not available to the public. Exhibitor agrees that all written information provided by NAF, or any information which is disclosed orally or visually to Exhibitor, or any other exhibitor or attendee, will be used solely in conjunction with Exhibitor's business and will be made available only to Exhibitor's officers, employees, and agents. Unless authorized in writing by NAF, all information is confidential and should not be disclosed to any other individual or third parties.

See Dkt. Nos. 131-1 & 131-5 at ¶ 17. Above the signature line, the Exhibit Agreements provide: "*I also agree to hold in trust and confidence any confidential information received in the course of exhibiting at the NAF Annual Meeting and agree not to reproduce or disclose confidential information without express permission from NAF*." Dkt. Nos. 131-1, 131-5 (emphasis in originals).

The Exhibit Agreements required Exhibitor representatives to "be registered" for the NAF Annual Meeting and to wear badges in order to gain entry into exhibit halls and meeting rooms. *Id*. ¶ 8. They also provide that "[p]hotography of exhibits by anyone other than NAF or the assigned Exhibitor of the space being photographed is strictly prohibited." *Id*. ¶ 13. They required an affirmation: "[b]y signing this Agreement, the Exhibitor affirms that all information contained

herein, contained in any past and future correspondence with either NAF and/or in any publication, advertisements, and/or exhibits displayed at, or in connection with, NAF's Annual Meeting, is truthful, accurate, complete, and not misleading." *Id.* ¶ 19. Finally, the Exhibit Agreements provide that a breach can be enforced by "specific performance and injunctive relief" in addition to all other remedies available at law or equity. *Id.* ¶ 18.

In order to gain access to the NAF Annual Meetings, Exhibitor representatives also had to show identification and sign a "Confidentiality Agreement." Dkt. Nos. 131-2, 131-3, 131-4. The Confidentiality Agreements provide:

> It is NAF policy that all people attending its conferences (Attendees) sign this confidentiality agreement. The terms of attendance are as follows:
>
> 1. **Videotaping or Other Recording Prohibited**: Attendees are prohibited from making video, audio, photographic, or other recordings of the meetings or discussions at this conference.
> 2. **Use of NAF Conference Information**: NAF Conference Information includes all information distributed or otherwise made available at this conference by NAF or any conference participants through all written materials, discussions, workshops, or other means. . . .
> 3. **Disclosure of NAF Materials to Third Parties**: Attendees may not disclose any

> NAF Conference Information to third parties without first obtaining NAF's express written consent . . . .

Dkt. Nos. 131-2, 131-3, 131-4.

In entering the Preliminary Injunction, I found that the evidence of record demonstrated that defendants secured false identification and set up a phony corporation to make surreptitious recordings in violation of agreements they had signed. Preliminary Injunction Order at 3-9. I also concluded that plaintiffs made a significant showing of potential and actual harm resulting from the breach and that additional harms would likely occur if defendants were not enjoined from further breaches by releasing additional recordings. *Id*. at 36-38.

In July 2018, NAF voluntarily dismissed some of its claims. Dkt. No. 542.[2] The only claims remaining in the operative First Amended Complaint (FAC) are the: (i) Third Cause of Action for Civil Conspiracy; (ii) Fourth Cause of Action for Promissory Fraud; (iii) Fifth Cause of Action for Fraudulent Misrepresentation; and (iv) Sixth Cause of Action for Breach of Contact(s). Dkt. No. 131 (FAC).

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[2] The claims voluntarily dismissed were: (i) First Cause of Action – Violation of 18 U.S.C. §§ 1962(a) and 1962(d); (ii) Second Cause of Action – Violation of 18 U.S.C. § 2511; (iii) Seventh Cause of Action – Tortious Interference with Contracts; (iv) Eighth Cause of Action – Trespass; (v) Ninth Cause of Action – Violations of Cal. Bus. & Prof. Code § 17200; (vi) Tenth Cause of Action – Violation of Cal. Penal Code § 632; and (vii) Eleventh Cause of Action – Violation of Maryland Ann. Code § 10-402. Dkt. No. 542.

Defendants CMP, BioMax, Daleiden, and separately Newman, move to dismiss those remaining claims. CMP, BioMax, and Daleiden separately move to strike those claims under California's anti-SLAPP statute, and also separately move to dissolve, modify, or clarify the injunction. Dkt. Nos. 544-547.

LEGAL STANDARD

I. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss if a claim fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the claimant must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads facts that "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). There must be "more than a sheer possibility that a defendant has acted unlawfully." *Id*. While courts do not require "heightened fact pleading of specifics," a claim must be supported by facts sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 570.

Under Federal Rule of Civil Procedure 9(b), a party must "state with particularity the circumstances constituting fraud or mistake," including "the who, what, when, where, and how of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097,

1106 (9th Cir. 2003) (internal quotation marks omitted). However, "Rule 9(b) requires only that the circumstances of fraud be stated with particularity; other facts may be pleaded generally, or in accordance with Rule 8." *United States ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 992 (9th Cir. 2011). In deciding a motion to dismiss for failure to state a claim, the court accepts all of the factual allegations as true and draws all reasonable inferences in favor of the plaintiff. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). But the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

II. SPECIAL MOTION TO STRIKE

California Code of Civil Procedure section 425.16 is California's response to "strategic lawsuits against public participation," or SLAPP lawsuits. It was enacted "to provide a procedure for expeditiously resolving nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue." *Hansen v. California Dep't of Corr. & Rehab.*, 171 Cal. App. 4th 1537, 1542-43 (2008). It provides that a cause of action against a person "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff

will prevail on the claim." Cal. Code Civ. Proc. § 425.16(b)(1). An "act in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue" includes:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law,
>
> (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law,
>
> (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or
>
> (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Cal. Code Civ. Proc. § 425.16(e).

"When served with a SLAPP suit, the defendant may immediately move to strike the complaint under Section 425.16." *Id.* at 1543. That motion is known as an anti-SLAPP motion. To determine whether an anti-SLAPP motion should be granted, the trial court must engage in a two-step process. "First, the defendant

must make a prima facie showing that the plaintiff's suit arises from an act in furtherance of the defendant's rights of petition or free speech." *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 595 (9th Cir. 2010) (citation and internal quotation marks omitted). "Second, once the defendant has made a prima facie showing, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the challenged claims." *Id*.

"At [the] second step of the anti-SLAPP inquiry, the required probability that [a party] will prevail need not be high." *Hilton v. Hallmark Cards*, 599 F.3d 894, 908 (9th Cir. 2009). A plaintiff must show "only a 'minimum level of legal sufficiency and triability.'" *Mindys*, 611 F.3d at 598 (quoting *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 438 n.5 (2000)). The plaintiff need only "state and substantiate a legally sufficient claim." *Id*. at 598-99 (citation and internal quotation marks omitted). In conducting its analysis, the "court 'does not weigh the credibility or comparative probative strength of competing evidence,' but 'should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.'" *Id*. at 599 (quoting *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 821 (2002). At this stage, the court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." *Id*. at 598 (quoting Cal. Code Civ. Proc. § 425.16(b)(2)).

DISCUSSION

I. CMP, BIOMAX, AND DALEIDEN'S MOTION TO DISMISS

A. Jurisdiction

Defendants[3] argue, first, that since NAF dismissed its two federal claims, I lack subject-matter jurisdiction over the remaining state law claims. They contend that NAF cannot establish diversity jurisdiction because there is no diversity amongst NAF's members and the defendants, which defendants contend is required because NAF is suing to enforce the rights of its members and to prevent further harm to its members. *See* FAC ¶ 50 (alleging harm to "NAF members and other abortion provides" from disclosure of "selectively edited, misleading videos"); *see also id.* ¶ 171 ("defrauding NAF and its constituent members in order to unlawfully obtain access to NAF's annual meetings"), ¶¶ 184 & 191 ("harm to the safety, security, and privacy of Plaintiff and its members, harm to the reputation of Plaintiff and its members"), ¶ 196 ("the purpose of these agreements was to protect NAF and NAF Confidential Information, and to protect NAF's staff, its members, and the attendees at NAF's annual meetings"), ¶ 200 ("Plaintiff and the intended third-party beneficiaries described above have suffered and/or will suffer economic harm and other irreparable harm caused by Defendants' breaches, including harm to the safety, security, and privacy of Plaintiff and its

[3] I refer to "defendants" in this section of the Order, recognizing the defendant Newman has moved to dismiss separately, and cite to their motion as "CMP Mot." and their reply as "CMP Reply."

members, harm to the reputation of Plaintiff and its members").[4] NAF simply pleads that there is diversity between NAF and each of the defendants.

Defendants rely on a line of cases analyzing the citizenship of trade associations for diversity jurisdiction purposes. Those cases hold that association members are the "real parties in interest" when it is the members' claims for damage or potential damage at stake and the members' business dealings that have been impacted. In those circumstances, courts have concluded that it is the members' citizenship that counts for the diversity analysis.

Those cases are significantly different from this one. NAF is alleging that defendants broke contracts that they had with NAF, not with NAF's members. In that event, as the Seventh Circuit recognized, "the wrong would be to the association even though the loss resulting from it would be borne ultimately by the" corporation's members. *Natl. Ass'n of Realtors v. Natl. Real Est. Ass'n, Inc.*, 894 F.2d 937, 939 (7th Cir. 1990); *see also CCC Info. Services, Inc. v. Am. Salvage Pool Ass'n*, 230 F.3d 342, 347 (7th Cir. 2000) ("In a suit where the members sought to enforce their rights as third party beneficiaries, the members' citizenship

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[4] NAF alleges it is incorporated in Missouri and headquartered in Washington, D.C. FAC ¶ 10. NAF alleges that CMP is charitable trust based in Irvine, California, *id.* ¶ 12; BioMax Procurement Services, LLC is a California limited liability company headquartered in Norwalk, California, *id.* ¶ 18; Daleiden is an individual who, on information and belief, resides in Yolo County, California, *id.* ¶ 19; and Newman is an individual who, on information and belief, resides in Wichita, Kansas. *Id.* ¶ 20.

would control. But where the members are incidentally benefitted by the association's enforcement of its own contract rights, the citizenship of the association is the only relevant factor in the diversity analysis."); *but see Zee Med. Distributor Ass'n, Inc. v. Zee Med., Inc.*, 23 F. Supp. 2d 1151, 1156 (N.D. Cal. 1998) ("by coming to federal court to obtain a declaratory judgment on the language of contracts entered into by its individual members, asserts no corporate interest of its own. ZMDA is not a party to any of these contracts, nor would the declaratory judgment affect its rights or privileges as a legal entity in any way.").[5]

Significantly, that *some* harm was allegedly suffered by NAF's members as the result of defendants' alleged conduct does not turn this case into one seeking vindication of unasserted legal rights by those members. It is NAF's contracts that were allegedly breached and it was the fraud perpetrated on NAF by defendants in order to gain access to NAF's meetings that resulted in the alleged harms. NAF, therefore, was "in the front line" of defendants' actions. *See Natl. Ass'n of Realtors*, 894 F.2d at 940 (members of non-profit corporation were "in the front line" of defendants allegedly fraudulent conduct). It is NAF's citizenship

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[5] In reply, defendants argue that courts in the Northern District do not follow the Seventh Circuit's "paramount" test but, instead, look to the diversity of both members and their representative when both have "rights" at stake. CMP Reply 1. However, the only decision defendants rely on for that argument, *Majestic Ins. Co. v. Allianz Intern. Ins. Co.*, 133 F. Supp. 2d 1218, 1221 (N.D. Cal. 2001), was addressing the admittedly unique nature and structure of the Lloyd's of London reinsurance market and is not useful here.

that must be compared to defendants and under that comparison diversity exists.

B. Damages

Defendants argue that because NAF has not asserted a defamation claim, its claims for "damages" stemming from all remaining causes of action are barred by the First Amendment. CMP Mot. 3-5. I addressed this exact argument in the related case, *Planned Parenthood v. CMP, et al.*, Case No. 16-236. In the Order Denying the Motions to Dismiss and Strike in that case (September 2016 Order), I explained that while "reputational" damages stemming solely from the publication of recordings may be barred by the First Amendment, other damages were not, including "increased security costs for the protection of their staff, their clinics, their conferences, and their websites and IT systems." September 2016 Order at 33-36, *aff'd* 890 F.3d 828 (9th Cir. 2018), *amended*, 897 F.3d 1224 (9th Cir. 2018). Here, NAF has alleged *non-reputational* damages, including increased security costs (for staff and at conferences and meetings). FAC ¶¶ 142-146. The line demarking permitted damages from purely reputational damages (that stem only from truthful, non-misleading publication of material), as I noted in the *Planned Parenthood* case, cannot be determined on a motion to dismiss.[6]

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[6] This is consistent with my more cursory analysis of this argument earlier in this case. In my August 2015 Order Denying Motion to Stay Discovery Pursuant to California Code of Civil Procedure Section 425.16(g), I explained that plaintiff's request for

Defendants mischaracterize the FAC as only seeking damages caused by the publication of the recordings and the resulting actions of third parties by pointing to the allegation in the FAC that prior to the publication of the recordings, "NAF and its members did not know, and could not have known, that Defendants had fraudulently obtained NAF Confidential Information and access to NAF's meetings, or that they had surreptitiously made recordings during those meetings." FAC ¶ 141; CMP Mot. 5 n.3; CMP Reply 3-4. That NAF only learned of the infiltration after publication began does not mean the damages are from the publication. At least some of the damages pleaded are the result of the infiltration and would have been incurred even if none of the recordings were published and NAF learned of the infiltration through some other means.

In reply, defendants rely on the Ninth Circuit's decision in *Animal Leg. Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) to argue that my prior analysis should change. In *Wasden*, the Ninth Circuit affirmed an injunction striking down two provisions of an "Ag-Gag" law, concluding that Idaho's criminalization of misrepresentations to enter a production facility and ban on audio and video recordings of a production facility's operations "cover protected speech under the First Amendment and cannot survive constitutional scrutiny." *Id*. at 1190. Two other provisions of the law withstood scrutiny, Idaho's "criminalization of

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damages could not be dismissed "as a matter of law." Dkt. No. 95 at 11. Defendants reply brief on this motion proves this point. *See* CMP Reply 7 ("But why did NAF incur 'out-of-pocket expenses?").

misrepresentations to obtain records and secure employment," because those provisions were not aimed at "protected speech under the First Amendment and do not violate the Equal Protection Clause." *Id*.

Wasden does not support defendants' argument because the laws being applied in this case are "generally" applicable laws, not laws criminalizing speech. *Cf. Wasden*, 878 F.3d at 1190 (the "First Amendment right to gather news within legal bounds does not exempt journalists from laws of general applicability."). Further, when striking down the provisions criminalizing misrepresentations made to enter a facility, the *Wasden* panel explained the statute was "staggeringly" overbroad, particularly because it applied to property that was "generally open to the public" and broadly criminalized "innocent behavior." *Id*. at 1195; *see also id*. at 1195-1198 (discussing overbreadth).[7] Finally, *Wasden* recognizes – consistent with my prior decisions in this and the related case – that allowing tangible damages stemming from misrepresentations but excluding "reputational and publication damages" is consistent with the

[7] *Wasden* also supports some of NAF's allegations in this case. As the Ninth Circuit noted, securing records by false misrepresentations may be penalized as it impairs the owner's ability to control the records and who gets to see the records and in addition may "infringe on other rights by, for example, exposing proprietary formulas, trade secrets, or other confidential business information to unwanted parties." *Id*. at 1199.

constitution even in the context of undercover journalism. *Id.*, 878 F.3d at 1202.[8]

NAF's damages claims will not be dismissed at this juncture. They may, of course, be narrowed as the case progresses to summary judgment and trial.

C. Civil Conspiracy

Defendants argue that the conspiracy claim fails because the FAC does not plausibly allege any underlying tort (an argument I reject, as explained below) and because NAF has not identified a conspiracy between more than one legally distinct person. NAF alleges that the individual defendants – Daleiden and Newman – were acting as "agents" of BioMax and CMP and that CMP and BioMax are one and the same. Defendants interpret these allegations to show that all defendants are one entity that cannot conspire with itself.

I disagree. The FAC explains the separate roles and actions Daleiden and Newman took as part of the conspiracy, as well as the roles of CMP and BioMax. That the individuals are also alleged to be alter egos of the corporate entities cannot be used to preclude the

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[8] *Wasden's* rejection of the ban on unconsented recording at agricultural facilities does not support defendants' other arguments. That decision turned on the content-based nature of the statute that could not survive strict scrutiny because it was both under-inclusive (as not prohibiting photographs and aimed at keeping "controversy and suspect practices out of the public eye") and over-inclusive (as it suppressed more speech than necessary to protect the privacy and property interests at stake). *Id.*, 878 F.3d at 1204-05.

conspiracy allegation at this juncture. *See* September 2016 Order at 19 in Case No. 16-236 (rejecting materially identical argument).

D. Promissory Fraud

Defendants argue that NAF cannot plead a claim for promissory fraud because NAF has not pleaded and cannot plead the elements required under California law. They contend that this claim must be dismissed because: (i) as NAF has not rescinded the contracts, the alleged misrepresentations could not have caused NAF harm; (ii) NAF has not adequately alleged the fraud with requisite particularity; and (iii) NAF's fraud claim is based on the same conduct as the breach claim which, as discussed below, defendants assert that NAF cannot plausibly plead.

That NAF has not moved to rescind the breached contracts does not preclude this claim from going forward. In California, it is "the well settled rule that one who is induced by fraud to enter into a contract is entitled both to 'affirm' the contract and to sue for damages in tort. . . . In other words, the victim of the fraud may elect to undo the transaction in its entirety, restoring both parties to the status quo ante. However, the victim cannot be required to adopt this course; he has the right to 'retain the benefits of the contract ..., and make up in damages the loss suffered by the fraud. Hence, he may affirm the contract, and simply sue for damages for the fraud.'" *Denevi v. LGCC, LLC*, 121 Cal. App. 4th 1211, 1220 (Cal. App. 6th Dist. 2004) (quoting

5 Witkin, Summary of Cal. Law (9th ed. 1990) Torts § 726).[9]

Defendants also argue that because they did not breach the underlying contracts, there could be no harm that proximately flows from NAF having allegedly been fraudulently induced into allowing defendants access to their meetings. As discussed below, even if an allegation of breach is required to support the promissory fraud claim, NAF has more than adequately alleged breach and proximate harm from that breach. Accordingly, this dependent argument on promissory fraud likewise fails.

Defendants further contend that under Rule 9(b) they are entitled to know every single instance that NAF believes shows how defendants violated the agreements. This argument is meritless. NAF has provided extensive details in the FAC, laying out in full its theory how defendants made false promises to induce NAF into entering the contracts that defendants subsequently breached.

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[9] The cases relied on by defendants are inapposite because they address situations where the party claiming fraudulent inducement is seeking, at the same time, to "escape from its obligations" under the agreement. *See Goldman v. Seawind Group Holdings Pty Ltd*, 13-CV-01759-SI, 2015 WL 433507, at *8 (N.D. Cal. Feb. 2, 2015) (relying on *Vill. Northridge Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 50 Cal.4th 913, 921, (2010)). NAF is not seeking to escape from its obligations under the contracts at issue.

E. Fraudulent Misrepresentation

Defendants' first contention concerning fraudulent misrepresentation, that NAF's claim fails because it has no legally cognizable damages flowing from defendants' alleged fraud, has been rejected above. Their assertion, that the FAC lacks sufficient particularly under Rule 9(b), fails because NAF has explained, in paragraphs 187-188 of the FAC, exactly what representations it contends were false and why. Defendants have no authority for requiring NAF to identify at this juncture *why* NAF believes BioMax was a phony company or why NAF believed defendants intended to make those misrepresentations. Discovery can be used to adduce these contentions, but they are not grounds to dismiss.

Defendants' final argument, that there is no plausible claim for relief based on *Wasden,* is without substance. The part of *Wasden* on which defendants rely does not preclude all fraud claims based on misrepresentations made to secure access to a facility; it instead found a criminal statute unconstitutionally overbroad because it could be applied to in "almost limitless times and settings." *Wasden*, 878 F.3d at 1194. Context matters. And the implications of the context here, and related disputed facts, cannot be resolved on a motion to dismiss.

F. Breach of Contract

At the heart of defendants' motion to dismiss is their second-run at arguments made and lost when first seeking a discovery stay under California's anti-SLAPP statute (Dkt. No. 95) and then again at the

preliminary injunction stage. Dkt. No. 354. Defendants claim that NAF has failed to allege facts showing that consideration exists for the separate Confidentiality Agreements (CAs) or facts plausibly supporting NAF's contentions that defendants breached the CAs or Exhibit Agreements (EAs).

1. Confidentiality Agreements and Consideration

Defendants contend that NAF extracted no specific, separate consideration for the CAs, which defendants assert (relying on facts outside of the FAC) that they did not expect or know would be presented prior to their being allowed to enter the meetings. This argument was expressly addressed and rejected in the Preliminary Injunction Order. Dkt. No. 354 at 21-22. There is no reason raised to revisit that conclusion on the more circumscribed record for a motion to dismiss.

2. Manner of Use of Information

Defendants next argue that they cannot be held liable for breach of either set of agreements because NAF has not plausibly alleged that defendants used the information they secured in a way inconsistent with the purpose of the meetings (to "enhance the quality and safety of abortion services") and even if NAF could so allege, that purpose it too open-ended to be enforceable under California law. CMP Mot. 11-12. To the first point, NAF alleges in detail how defendants used the information they secured in a manner inconsistent with the purpose of the meetings. FAC ¶ 196, 197, 215. Defendants dispute those facts. That debate demonstrates why this argument is too fact-

dependent to be resolved on a motion to dismiss. To the second point, the argument that the "misuse" provision is too vague and indefinite to be enforceable under California law delves into intent and the reasonable expectations under the contract as well as potential narrowing constructions that are more appropriately addressed on a motion for summary judgment on a full evidentiary record.

3. Violation of Agreements by Recording

Defendants contend that the language of CAs is "most naturally" read as prohibiting only recording of the formal panels and presentations at the meetings, and the prohibition does not extend to "informal" discussions and discussions with participants. That argument was rejected in the Preliminary Injunction Order. Dkt. No. 354 at 25-26 & fn.30. There is no reason to revisit that determination now.[10]

4. Breach

Separately, defendants argue that there are no plausible or particular allegations that they breached the EAs. The basis for this argument is defendants' contention that NAF has not adequately identified *its own* beliefs about BioMax and what BioMax allegedly represented to it that was false. But the FAC provides

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[10] Nor does defendants' argument that NAF has failed to specify which portions of the meetings defendants improperly recorded help them. CMP Mot. 13-14. Defendants are not entitled, in a complaint, to a list of all the portions of the meetings recorded by them. That information is readily within their own possession.

more than sufficient and plausible details to support NAF's allegations that BioMax and the other defendants misrepresented themselves and violated the EAs. *See, e.g.*, FAC ¶¶ 84, 88-90. Additional contentions can be uncovered during discovery.

5. Damage from Breach

Defendants, making another fact-based argument, contend that the breach of contract claims fail because of a lack of proximate cause between their alleged actions and NAF's damages. This is simply a repeat of the argument made above, that the damages NAF seeks here are barred by the First Amendment and that all of the damages to NAF flow from the breach of the non-disclosure agreement and not from the alleged fraud committed by BioMax to secure entry to the meetings. Again, that NAF learned of defendants' breaches when defendants published their recordings does not mean that NAF's damages flowed from the recordings (implicating the First Amendment). The publication was simply the mechanism by which NAF found out about the infiltration. NAF has plausibly alleged that at least some of its damages would have been incurred no matter how the infiltration came to light and are separate from damages stemming from publication.

6. Violation of Agreements

Defendants make several arguments that the EAs and CAs are not enforceable against them and were not violated by them. I address each in turn.

a. Enforceability

Defendants argue that the EAs and Cas' restriction of any participant from disclosing any information learned at the meetings – at least without the consent of NAF – is an illegal restraint of trade with respect to abortion providers because the agreements prevent and unlawfully control the flow of information about abortion providers and their businesses. Defendants also claim that the EAs and CAs are overbroad because the agreements on their faces prohibit participants from disclosing any information, even non-confidential information.

Regarding their novel antitrust argument, defendants' briefs acknowledge that the evaluation of the anti-competitive effect of an agreement is a "practical, fact-specific inquiry." CMP Mot. 19. As such, despite the "admission" by NAF that its "members collectively care for half the women who choose abortions in the United States and Canada each year," FAC ¶ 10, whether the EAs and CAs constitute an impermissible restraint on trade is not appropriately resolved on a motion to dismiss. That analysis will necessarily turn on what powers NAF has over its members and perhaps other non-member providers. It will also turn on whether "membership" of over half of the providers in the United States, connotes the sort of powers – given NAF's purpose and influence in the market – that create the type anti-competitive impact the antitrust laws seek to prevent.[11] Even if the concept

[11] Given the context of this case, the "restraint of trade" cases addressing confidentiality agreements imposed in the employer-

is apposite, this analysis cannot be conducted on a motion to dismiss.

Defendants' overbreadth argument was addressed in depth and rejected in the Preliminary Injunction Order at 23-25. There is no reason to revisit it here.

b. Information Provided by NAF in Formal Session is Only Information Protected

Raising more arguments expressly rejected in the Preliminary Injunction Order, defendants argue that the EAs only prohibit disclosure of information provided by NAF in the context of formal proceedings and the CAs only prohibit disclosure of information provided in formal sessions. *Id.* at 23 & n.27, 25-26 & n.30. Similarly, defendants' argument regarding the "absurd" overbreadth of the agreements (arguing that on their face they would prevent disclosure of readily known or otherwise non-confidential information and should be limited to NAF's proprietary information) has already been rejected. *Id.* at 24.[12]

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employee context and covenants not to compete are inapposite, as are cases under California Bus. & Prof. Code § 16600. CMP Mot. 18-19.

[12] "Defendants' argument might have some merit if it was made concerning a challenge to the application of the EAs' confidentiality provisions with respect to specific pieces or types of information that are otherwise publicly known or intended by NAF to be shared with individuals not covered by the EA. Defendants do not make that type of 'as applied,' narrow argument. Instead, they argue that the whole EA is unenforceable. There is no legal support for that result or for defendants' speculation that the EA

There is no reason to revisit those arguments or my conclusions.

c. No Allegations Defendants Intend to Disclose Information Covered by the Agreements

Finally, building on their prior arguments that the EAs and CAs should be interpreted to cover only information disclosed by NAF in formal conference proceedings, defendants argue that the FAC fails to allege facts that defendants violated those narrowed provisions by disclosing or threatening to disclose in the future any information furnished by NAF in formal conference proceedings. Again, those arguments are not well taken at this juncture and are rejected.

CMP, BioMax, and Daleiden's motion to dismiss is DENIED.[13]

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might be enforced in an unreasonable manner against other NAF attendees." *Id*. at 25.

[13] In support of their motion to dismiss, defendants ask me to take judicial notice of: (i) two Congressional reports regarding human fetal tissue research (Reports); and (ii) the final judgment in the California Superior Court case imposing a penalty on a company who admitted to unlawfully selling fetal tissue, as well as the press release issued by the Orange County District Attorney about the same. RJN, Dkt. No. 545-1. Defendants do not simply ask me to take judicial notice of the fact of the Congressional investigations and Reports or the prosecution and judgment, but want me to take judicial notice of the disputed facts within these documents. Because the purpose of the judicial notice as requested is improper, the request is DENIED, I will take judicial notice of the existence of the Congressional Reports as well as judicial notice of the existence of the Orange County action and the judgment entered.

G. NAF's request for sanctions

NAF argues that sanctions against CMP, BioMax, and Daleiden are warranted under my inherent power and 28 U.S.C. § 1927 for defendants' reckless, bad faith, and vexatious conduct. It contends that defendants raise no legitimate arguments in their motion to dismiss (given my findings and the affirmance of the Preliminary Injunction Order) and that the motion was brought only to further delay this case. NAF Opposition to CMP Mot. 19 (Dkt. No. 558). NAF requests that I issue an Order to Show Cause why defendants should not be forced to pay NAF's fees in responding to this motion. *Id*. 19-20.

The request for an OSC re sanctions is DENIED. While I have rejected the breach of contract arguments consistent with conclusions I made in the affirmed Preliminary Injunction Order, I recognize that these defendants had not yet had the opportunity to challenge jurisdiction and the fraud-based claims. Sanctions are not warranted.

II. CMP, BIOMAX, AND DALEIDEN'S SPECIAL MOTION TO STRIKE

As in the related *Planned Parenthood* case, these three defendants filed a special motion to strike under California's anti-SLAPP statute in conjunction with and essentially duplicative of their motion to dismiss. For the reasons discussed below, this motion is DENIED.

A. Prong One – Acts in Furtherance

Defendants argue that they easily satisfy their burden to make a prima facie case that NAF's remaining causes of action arise out of defendants' investigatory actions, which were undertaken in support of their intent (and eventual conduct) in publishing the information gained. As in *Planned Parenthood,* for purposes of determining this motion I will assume that defendants have met their initial burden and made a prima facie showing that NAF's suit arises from an act in furtherance of the defendants' rights of petition or free speech.

B. Prong Two – Probability of Prevailing

1. Legal Sufficiency

Defendants make two arguments under the second prong of the anti-SLAPP statute. The first, is that to the extent their anti-SLAPP motion is based on a Rule 12(b)(6) failure to state a claim standard, their motion should be successful to the same extent it was above. As recently explained by the Ninth Circuit in the *Planned Parenthood* case, "when an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated." *Planned Parenthood Fedn. of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018), *amended*, 897 F.3d 1224 (9th Cir. 2018). Having rejected the motion to dismiss, I DENY the anti-SLAPP motion on the same grounds.

2. Factual Sufficiency

Defendants, however, are not simply resting on a 12(b)(6) challenge in their anti-SLAPP motion. They are also making a "nonsuit" type of challenge only to the breach of contract claim, which in their view then requires NAF to come forward with evidence regarding the legal sufficiency (and probability of success) on its breach of contract claims. Motion to Strike 8-10. Defendants' specific challenges are to evidence that: (i) defendants breached the contracts; (ii) damages that were proximately caused by those breaches; (iii) that the confidentiality agreements were supported by consideration; and (iv) defendants used information from the meetings inconsistent with the purposes of the confidently agreements. *Id*. 13. They expressly disclaim any intent to make a summary judgment-style challenge. *Id*. 15.

Defendants have not submitted any evidence on any of these points.[14] They argue that they can simply assert "nonsuit" and then they do not need to do anything other than identify the parts of the breach of contract claim they believe NAF does not have a likelihood of success on and force NAF to present its affirmative evidence in opposition.

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[14] As on the motion to strike in the related *Planned Parenthood* case, the only evidence defendants provide in support of their motion to strike is a declaration from defendant Daleiden that is relevant only to the first prong of the anti-SLAPP statute to support the argument that defendants' actions were in furtherance of defendants' rights to free speech. *See* Dkt. No. 546-1.

Even if there is support for this nonsuit type of anti-SLAPP challenge under California law, its applicability is at best questionable under federal law in the Ninth Circuit. As the Ninth Circuit most recently explained in *Planned Parenthood*, 890 F.3d at 834, there are two standards under which an anti-SLAPP motion is assessed in federal court. First, defendants can challenge the legal sufficiency under the Rule 12(b)(6) standard. Second, defendants may challenge the factual sufficiency under the Rule 56 standard. However, when a factual sufficiency challenge is made, "discovery must be allowed, with opportunities to supplement evidence based on the factual challenges, before any decision is made by the court." *Id*. 890 F.3d at 834.

Defendants argue that there is no need for further discovery before an analysis of the merits of the breach of contract claim can go forward because NAF has admitted in its most recent Case Management Conference statement that it does not need additional discovery on its contract claim. Dkt. No. 538 at 8. However, in their anti-SLAPP motion, defendants explicitly disclaim bringing a summary judgment type of challenge because "they have not had the opportunity to engage in enough of their own discovery." Motion to Strike 15. Defendants cannot have it both ways.

Further, defendants' position – that they can bring a factual sufficiency claim in federal court without having to first present any evidence themselves – flies in the face of the Ninth Circuit's rejection of defendants' position in *Planned Parenthood* and

recognition that evidence must be submitted *by defendant* in bringing a factual sufficiency claim. *See id.* at 834 ("In defending against an anti-SLAPP motion, if the defendants have urged only insufficiency of pleadings, then the plaintiff can properly respond merely by showing sufficiency of pleadings, and there's no requirement for a plaintiff to submit evidence *to oppose contrary evidence that was never presented by defendants*.") (emphasis added).

That said, in *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590 (9th Cir. 2010), when the panel was discussing the operation of anti-SLAPP motions to strike *under California law*, the panel indicated that the moving defendant did not need to present evidence and the standard for evaluating factual sufficiency was akin to nonsuit or directed verdict. *Id.* at 599. Given this arguably contradictory language, I address below the motion on the merits, considering the evidence presented by the parties on the preliminary injunction motion.

3. Merits

In the Preliminary Injunction Order, I considered sufficient evidence regarding NAF's breach of contract claim and found that NAF had demonstrated a strong likelihood of success on that claim, sufficient to support the injunction. That conclusion was affirmed by the Ninth Circuit on appeal.

Defendants attempt to avoid that conclusion by arguing – in their reply – that "practically all" of the evidence considered at the preliminary injunction stage was deficient for purposes of this motion. They reason

that at the prior stage, evidence was considered under a lower admissibility standard but is inadmissible hearsay or otherwise objectionable for lack of personal knowledge for purpose of a non-suit motion. Reply 8-9. But defendants do not object specifically to any evidence and do not address the evidence I relied on in my Preliminary Injunction Order except to "incorporate" their prior wholesale objections to NAF's preliminary injunction evidence. *Id*. 9.

Defendants criticize NAF for its failure to re-present the evidence that would support its breach claim in NAF's opposition to this motion, arguing that NAF is attempting to force the court to do its own work. That criticism, however, is more aptly lodged against defendants rather than NAF.[15] Absent specific evidentiary objections from defendants raised in their Reply, and considering the record that was before me at the preliminary injunction stage and the analysis laid out in the Preliminary Injunction Order, I conclude that NAF has submitted sufficient evidence to support its breach claim and to defeat defendants' nonsuit anti-SLAPP motion.

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[15] Defendants also mischaracterize the record. A close reading of the Preliminary Injunction Order shows that the majority of the evidentiary objections asserted by defendants based on hearsay and lack of personal knowledge and overruled by me in that Order involved NAF's evidence of threats and harassment following the release of CMP's videos. That evidence was not relevant to success on the merits of the breach of contract claim, but relevant to whether the injunction should otherwise issue. That evidence is irrelevant to defendants' nonsuit anti-SLAPP motion.

Assuming defendants can move for nonsuit on the breach of contract claim as opposed to summary judgment under Rule 56, and may do so in absence of presenting any evidence regarding that claim themselves or having fully completed discovery, I DENY the motion on its merits. Defendants point to no *new* evidence or material changes of law to cause me to revisit any of the findings in the Preliminary Injunction Order.

C. Whether this motion is frivolous or intended only for delay

NAF argues that considering my Preliminary Injunction Order and its affirmance by the Ninth Circuit, as well as the affirmance by the Ninth Circuit of my denial of the anti-SLAPP motion in the related *Planned Parenthood* case, the inescapable conclusion is that defendants' special motion to strike is frivolous and brought solely to delay this case. It asks me to impose sanctions under the anti-SLAPP statute (Cal. Code Civ. Proc. § 426.15(c)(1)), under 28 U.S.C. § 1927, or under my inherent authority. Defendants oppose, arguing that this was their first opportunity to challenge the pleading and evidentiary sufficiency of NAF's remaining causes of action. They also contend that sanctions are not available under the anti-SLAPP statute because the request for sanctions was not brought in a separate motion on 21 days' notice. *See* Cal. Code Civ. Proc. §§ 128.5(f)(1)(A), 128.5(f)(1)(B) (safe harbor provision).

As with the motion to dismiss, I DENY the request for sanctions related to the anti-SLAPP special motion to strike. While the special motion to strike was

unsuccessful and may well have been brought to delay the case, given that the Preliminary Injunction Order was based (for likelihood of success) on only the breach of contract claim, this was the first time defendants could effectively challenge the other remaining fraud-based claims. They were not successful, but sanctions are not warranted.

III. NEWMAN'S MOTION TO DISMISS

Defendant Newman separately moves to dismiss, arguing that the FAC contains few and insufficient allegations against him and that this Court lacks personal jurisdiction over him. His motion lacks merit.

A. Facts Regarding Newman

The FAC contains the following allegations regarding Newman, which are sufficient to establish specific jurisdiction. CMP, Daleiden, Newman and individuals acting in concert with them, conspired to defraud and did defraud NAF by setting up a fake company, defendant BioMax, which held itself out as a legitimate fetal tissue procurement organization. Newman and others "acting at Newman's behest" pretended to be officers and employees of their fake company in order to secure access to NAF's meetings. FAC ¶¶ 1-2, 82-84; *see also* ¶ 85 (asserting that Daleiden and Newman "registered Biomax as a limited liability company, and filed Articles of Organization with the California Secretary of State on October 11, 2013.").

Newman "publicly admitted in interviews with Fox News and other news outlets that Biomax was a bogus company that misrepresented its identity and purpose

in order to obtain NAF's confidential information, and to gain access to abortion providers and their facilities, including NAF's confidential annual meetings" and he "publicly boasted about the size and scope of the conspiracy" admitting that he and Daleiden used fake "actors" to infiltrate providers of abortion care. *Id*. ¶¶ 3, 18, 80, 81-84, 139. Newman also publicly boasted that the "genesis" of the "conspiracy began in his office in Wichita" and that he remains in control of the release of CMP's illegally obtained recordings. *Id*. ¶¶ 14, 80. He has claimed that he has provided "material support" for the activities complained of in this case. *Id*. ¶ 20.

NAF alleges, in support of its alter ego allegations, that there is a "unity of interest and ownership between Defendants CMP, Biomax, David Daleiden, Troy Newman and unnamed co-conspirators, . . . such that any individuality and separateness between these Defendants has ceased. CMP, Daleiden, Newman and unnamed co-conspirators among other actions, established Biomax as a fake company for the purpose of perpetrating a fraud on NAF, Planned Parenthood, and providers of abortion care." *Id*. ¶ 23.

Newman is listed as the Secretary of CMP in filings with the California Secretary of State (Daleiden is listed as the CEO). *Id*. ¶ 13. NAF asserts jurisdiction exists over Newman because he is an officer for CMP (a company incorporated in the state of California) and because he and the other defendants "have directed, participated in and provided material support for a scheme to deceive Plaintiff and its members within California." *Id*. ¶ 25.

B. Personal Jurisdiction

Newman argues that there is no jurisdiction – specific or general – over him. I disagree. Specific jurisdiction is satisfied given Newman's admissions regarding his role in the alleged conspiracy and his provision of material support for it. Newman's statements demonstrate that he purposefully directed the defendants' actions, including actions directed towards California, and his conduct gives rise in significant part to the claims.[16] NAF has adequately alleged that Newman purposefully directed his activities at California and its resulting claims against Newman arise out of those activities.

Significantly, the purposeful direction is not based on Newman's mere status as a director of CMP. This case is not about typical corporate activities, and the line of cases relied on by Newman regarding when a corporate officer can be personally liable for actions taken by a corporation is inapposite. Newman Mot. 5-6. Here, the allegations are that Newman set up CMP (in part) and BioMax (exclusively) to conduct the

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[16] The Ninth Circuit has articulated a three-prong test to determine whether a party has sufficient minimum contacts to be subject to specific personal jurisdiction: (i) the non-resident defendant must purposefully direct his activities or consummate some transaction in the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (ii) the claim must be one which arises out of or relates to the defendant's forum related activities; and (iii) the exercise of jurisdiction must comport with fair play and substantial justice, *i.e.*, it must be reasonable. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800-01 (9th Cir. 2004).

conspiracy and infiltrate of NAF's meetings. The allegations suffice to plausibly show how Newman's purposeful actions towards California gave rise to the causes of action NAF brings. Finally, given the nature of the contacts alleged, exercising jurisdiction over Newman in California fully comports with notions of fair play and substantial justice.[17] NAF is entitled to pursue its claims against Newman here in California.[18]

C. Direct Liability

Newman argues that there are no allegations that he has direct liability for the breach of contract, promissory fraud, or fraudulent misrepresentation causes of action. NAF essentially agrees by arguing that its alter ego or agency allegations are sufficient to hold Newman liable for each of these causes of action.

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[17] On the third prong of the specific jurisdiction test, to determine whether the assertion of personal jurisdiction comports with "fair play and substantial justice" courts evaluate the burden on the defendant in appearing in the forum, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985).

[18] I, therefore, do not need to address NAF's arguments that Newman waived his jurisdictional challenge because he opposed the motion for preliminary injunction, made 62 separate filings in this case, and had his attorneys appear at nine separate hearings.

D. Agency, Alter Ego, or Conspiracy Liability

1. Breach of Contract

a. Alter Ego & Agency

NAF argues that Newman can be held responsible for the breach of contract claim as the "alter ego" of CMP. Its theory is that because CMP is the alter ego of BioMax, and Newman is the alter ego of CMP, Newman can be held responsible for the breach of contracts by BioMax and the other individual defendants.

NAF relies on a well-established line of cases that when a corporation is used to "evade the law" the fiction of corporate separateness can be pierced to hold the individual liable. *See, e.g., Say & Say, Inc. v. Ebershoff*, 20 Cal. App. 4th 1759, 1768 (Cal. App. 2d Dist. 1993) (recognizing under California law two general requirements necessary to pierce the corporate veil: (1) there is unity of interest and ownership such that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow).[19] The complexity here,

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[19] On "unity of interest," courts consider whether there is evidence of commingling of funds or other assets, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership of the entities, use of the same offices and employees, use of one as a mere shell or conduit for the affairs of the other, inadequate capitalization, disregard of corporate formalities, and identical directors and officers. *See Stewart v. Screen Gems-EMI Music, Inc.*, 81 F. Supp. 3d 938, 954 (N.D. Cal. 2015) (internal

however, is that neither Newman nor CMP signed any of the contracts at issue – BioMax and Daleiden and the other co-conspirators, using pseudonyms, did. There are no allegations that Newman was an officer of BioMax (the entity that did enter into the contracts) although there are allegations that Newman was responsible with Daleiden for creating, setting up, and directing the activities of BioMax.

NAF argues that Newman is liable for CMP and the other individual defendants' breaches of contract because Newman allegedly lied when setting up CMP – where Newman is a corporate officer – with the State of California. But any lies he made to the California Secretary of State's office or the IRS are not at issue in the breach claim.[20] At most, the breach allegations flow from the role of CMP and Newman in setting up and directing the activities of BioMax.

NAF contends that because both CMP and BioMax were created by Newman and Daleiden as sham companies intentionally set up to engage in tortious

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quotation omitted). As to "inequity," courts look to whether defendant's use of the corporate form would be inequitable, fraudulent, unjust or otherwise used in bad faith. *Id.* at 956.

[20] NAF alleges that in setting up CMP and registering it with the State of California as a not-for-profit corporation, Newman and Daleiden "falsely averred that CMP was a 'nonprofit' and 'nonpartisan' organization, and that no substantial part of its activities would consist of 'carrying on propaganda, or otherwise attempting to influence legislation.' Newman and Daleiden also used CMP's false status as a 'nonprofit' and 'nonpartisan' organization to apply for tax-exempt status, which the IRS granted in December 2013." FAC ¶ 84.

behavior, the wrongs of BioMax (and the individual conspirators) can flow up through CMP to Newman. However, while the very detailed allegations regarding Newman's role are sufficient to establish for pleading purposes Newman's plausible liability for conspiracy (addressed below), they do not appear to fit the concept of alter ego liability, absent some on-point California authority, given that Newman is not a corporate director of BioMax even though he allegedly directed its creation and activities.

That said, the result is different under the theory of agency. NAF points out that a "contract made in the name of an agent may be enforced against an undisclosed principal, and extrinsic evidence is admissible to identify the principal." *Sterling v. Taylor*, 40 Cal. 4th 757, 773 (2007). It makes extensive and detailed allegations that Newman directed and supported Daleiden and the individual conspirators who signed the contracts and pretended to be officers and employees of BioMax, to support its allegation that BioMax and the individuals were the agents of Newman. FAC ¶¶ 2, 104 ("Daleiden, "Tennenbaum" and "Allen" signed these agreements while acting as agents not only for Biomax, but also as agents for CMP, Newman and Daleiden"), ¶ 128 (same), ¶ 199 (same).[21]

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[21] The particular allegations about Newman's role in creating and directing the conspiracy, through setting up BioMax and advising and directing the activities of the participants, distinguish this case from *whiteCryption Corp. v. Arxan Techs., Inc.*, No. 15-cv-00754-WHO, 2016 U.S. Dist. LEXIS 78106 (N.D. Cal. June 15, 2016) and similar cases where parent corporations are not found liable under an agency theory for their subsidiary's conduct where

These allegations, combined with Newman's alleged comments about the scope of his involvement, suffice to adequately plead agency for breach of contract.

2. Fraud Claims

NAF relies on the general line of cases under California law recognizing that corporate directors are, despite the corporate form, personally liable for any tortious conduct they directed the corporation to commit. *PMC, Inc. v. Kadisha*, 78 Cal. App. 4th 1368, 1379 (Cal. App. 2d Dist. 2000), *as modified on denial of reh'g* (Apr. 7, 2000) (recognizing that personal liability of a corporate action "if any, stems from their own tortious conduct, not from their status as directors or officers of the enterprise").

Newman contends that even if NAF has adequately alleged his personal participation in the fraud – and I find that NAF has – NAF's claim still fails because it does not "allege and prove that an ordinarily prudent person, knowing what the director knew at that time, would not have acted similarly under the circumstances." *Frances T. v. Village Green Owners Assn.*, 42 Cal. 3d 490, 509 (1986); Newman Reply 5. That concept applies only where a director knows of a condition hazardous to third parties or that the corporate conduct will likely cause harm and then knowingly fails to act. *See, e.g., id.* at 510-511 (discussing failure to act cases); *see also Cody F. v. Falletti*, 92 Cal. App. 4th 1232, 1246 (2001) (same); *PMC, Inc.*, 78 Cal. App. 4th at 1380 (same). That type

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the parent corporation simply establishes the "general policy and direction" for the subsidiary. *Id.* at *31-34.

of allegation is not required where the individual defendant is alleged to having knowingly directed or otherwise affirmatively help cause the tortious conduct, as in this case.

In sum, even though the line of corporate liability cases seems inapposite to the facts alleged here because Newman is not the corporate director of BioMax, the allegations that BioMax and the individual conspirators committed the alleged torts as agents of and at the direction of Newman suffices at this juncture to keep Newman as a defendant for the fraud-based claims.

3. Conspiracy

Finally, Newman argues that NAF failed to plausibly show that there was a collective plan among the conspirators to engage in conduct with an unlawful purpose and that Newman knew of and concurred with the unlawful purpose. His motion to dismiss this claim hinges, first, on supposed admissions by NAF that Newman and the other conspirators had a lawful purpose (conducting investigative journalism). But that is not the unlawful purpose alleged in the FAC. Instead, the unlawful purpose alleged is the intent to illegally infiltrate the NAF meetings through false promises and broken contracts.

Newman's argument hinges, second, on whether NAF was required to allege that CMP was formed solely for that unlawful purpose, since CMP might also be engaged in or have been engaged in lawful activities that would undermine the conspiracy claim. Whether CMP may have had a legitimate goal (to uncover

illegality by abortion providers and other entities) would not undermine NAF's allegations that Newman and CMP specifically agreed to the conspiracy's unlawful purpose, enacted through the "sham" corporation BioMax and the co-conspirators' use of pseudonyms to illegally infiltrate NAF's meetings.[22]

At this juncture, NAF adequately pleads all of the elements of conspiracy as to Newman and the co-conspirators. Newman's motion to dismiss is DENIED.

IV. CMP, BIOMAX, AND DALEIDEN'S MOTION TO DISSOLVE, MODIFY, OR CLARIFY PRELIMINARY INJUNCTION

A. Standard

"A party seeking modification or dissolution of an injunction bears the burden of establishing that a significant change in facts or law warrants revision or dissolution of the injunction." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). A "district court has inherent authority to modify a preliminary injunction

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[22] The repeated and (on this record) plausible allegations that the co-conspirators had an unlawful purpose in enacting the conspiracy to infiltrate NAF's meetings distinguishes this case from those where a tort or other violation of the law was simply committed during undercover newsgathering investigations. *See, e.g., Dowd v. Calabrese*, 589 F. Supp. 1206, 1209 (D.D.C. 1984) (dismissing conspiracy claim on summary judgment where "proof of cooperation between two individuals who had a common purpose to produce a news story was not a sufficient basis for an actionable conspiracy when there was no evidence of a joint purpose to defame.").

in consideration of new facts." *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098 (9th Cir. 2002).

B. Undermined Legal Reasoning and Factual Conclusions

Defendants argue that the following legal reasons regarding NAF's likelihood of success in the Preliminary Injunction Order have since been undermined: (i) defendants waived any First Amendment rights they had by agreeing to the agreements; (ii) NAF suffered harm following the disclosures; and (iii) liability for NAF harms can be imputed to defendants' conduct. They also assert that two factual findings underlying the Preliminary Injunction Order have likewise been undermined: (i) the recordings showed no evidence of criminal wrongdoing and (ii) defendants' disclosures led to harassment, threats and violent acts against NAF and its members. Mot. to Dissolve 4-5. They contend that at least two Congressional reports, of which they seek judicial notice, "repudiated" my conclusions that defendants' investigation lacked legitimacy and point specifically to my characterization of the videos they edited and released as "not pieces of journalistic integrity, but misleadingly edited videos and unfounded assertions." Dkt. No. 354 at 38-39.

As a general matter, I will not reconsider arguments that were made or could have been made at the preliminary injunction stage. Defendants are not entitled to an endless number of opportunities to make their arguments. They will have another opportunity to make their arguments based on a full evidentiary record at summary judgment. For purposes of ruling on

this motion, I will only consider new evidence and intervening case law.

Congressional Reports and Illegality. To start, it bears emphasizing that I have never broadly discussed the legitimacy or illegitimacy of defendants' investigation into the sale of human fetal tissue. The "integrity" comment defendants focus on was based on my finding that defendants' Human Capital Project videos were misleadingly edited. The "unfounded assertions" were not about whether some individuals or entities were illegally selling fetal tissue for profit, but only that defendants' repeated assertion that their recordings (those covered by the Preliminary Injunction Order) showed illegal conduct were unfounded. My findings were narrow and specific, and they have not been shown to be false by anything defendants point to, then or now.

The Congressional reports found evidence of "possible" violations of law and referred some portions of evidence gathered by the Committees to prosecutors.[23] Those comments and referrals do not identify the specific information on which they are

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[23] The two Reports are: Majority Staff Report of the U.S. Senate Judiciary Committee titled "Human Fetal Tissue Research: Context and Controversy," and dated December 2016; and the Final Report of the Select Investigative Panel of the U.S. House of Representatives Energy & Commerce Committee, dated December 30, 2016. I have taken judicial notice of these Reports, upon defendants' request, for purposes of recognizing the scope of the Congressional investigation and the findings of the Committees, but not for the determination of any disputed adjudicative facts. *See* Daleiden Decl. (Dkt. No. 547-1) ¶¶ 14-15.

based, let alone any of the materials reviewed by me prior to issuing the Preliminary Injunction Order. [24] The characterization in the Congressional Reports of "possible" illegality in unidentified information in no way undermines my finding that there was no evidence of illegality in the enjoined materials.[25]

Harms. As to the harms justifying the injunction, defendants argue at this juncture that I should look beyond hearsay evidence. If defendants want me to look beyond hearsay (mere months after the injunction was affirmed on appeal and the petition for a *writ of certiorari* denied), I would be happy to do so on a motion for summary judgment, which defendants have

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[24] In the Executive Summary of the Report from the Senate Judicial Committee, the Report expressly disclaims any reliance on the CMP videos and noted that it reviewed over 20,000 documents from numerous sources. Senate Report at 1.

[25] I recognize that the Executive Summaries from the House Report characterize some of the CMP videos as showing "abortion providers and executives admitting that their fetal tissue procurement agreements are profitable for clinics and help keep their bottom line healthy. Multiple clips also show them admitting that they sometimes changed the abortion procedure in order to obtain a more intact specimen, and some use the illegal partial birth abortion procedure." House Report at xviii. The House Report does not identify the particular video segments it relies on to support those summaries, but having reviewed all of the video segments defendants relied on in opposition to the motion for a preliminary injunction, I disagree with the House Report's characterization. It is also significant, for purposes of defendants' motion here, that the House Report later noted, that "The Panel did not design its investigation to prove or disprove the credibility of tapes released by the Center for Medical Progress (CMP)." *Id*. at xix.

yet to bring. Defendants also assert that the harms that I found occurred after the release of the recordings have been "proven false" because NAF's report on violence and disruption (Daleiden Decl., Ex. 11) shows no increase in actual threats of harm. They exclude instances of threats and harassment that they believe should not have been counted (for example, incidents of constitutionally protected-picketing activity or "accidental" trespassing). NAF disputes defendants' attempt to downplay what it characterized as a significant increase in threats and harassment.

Much of this argument is simply a repeat of that made in opposition to NAF's motion for a preliminary injunction. The small amount of "new" evidence (mostly from discovery in the related *Planned Parenthood* case) is not as clear cut or significant as defendants contend.

Jurisdiction. Defendants raise, as a ground to dissolve or modify the injunction, their "lack of diversity jurisdiction" argument rejected above. There is no further need to discuss it.

New Law. Defendants place heavy weight on the *Wasden* decision, also discussed above. For the reasons given, suffice it to say that the *Wasden* decision – issued four months *before* the Ninth Circuit affirmed the injunction in this case – does not undermine any of the legal or factual findings supporting the Preliminary Injunction Order.

Daleiden's Criminal Prosecution. Defendants argue that the criminal prosecution of Daleiden requires a reassessment of the balancing of the public interest, which I found favored issuing the injunction. In

particular, defendants argue that Daleiden has a constitutional, Sixth Amendment right to counter negative publicity by releasing to "the court of public opinion" the materials I enjoined in the Preliminary Injunction Order ("the Preliminary Injunction materials") so that the defendant may counter public perceptions, including those of potential jurors, that Daleiden's investigation was illegitimate.

Defendants may hold as many press conferences as they care too (unless restricted by Judge Hite). *But see Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (recognizing importance of public awareness and criticism of government prosecutions, but allowing curtailment of extrajudicial statements by counsel where there is a "substantial likelihood of material prejudice" to the fairness of a judicial proceeding). But they have no constitutional right to further disobey the Preliminary Injunction Order.

Defendants also argue the "anti-injunction act" prevents the Preliminary Injunction from interfering with the state court criminal proceedings. But nothing in the Preliminary Injunction interferes with those proceedings. If Daleiden believes he needs to use Preliminary Injunction materials to support his defense, he can notify Judge Hite in advance of the specific portions of the materials he wants to use and seek leave from Judge Hite to file those materials under seal or in the public record or show those materials in open or closed court. If Judge Hite orders that some of the Preliminary Injunction materials may be released in some public manner to allow Daleiden to fully contest the criminal charges, Judge Hite may do

so without my interference. That determination rests with Judge Hite, not with defendants.[26]

There is, finally, no merit to defendants' argument that Judge Hite's recent protective order, requiring the use of Doe monikers and allowing the individuals who were allegedly illegally recorded by defendants to remain anonymous at least up to the preliminary hearing, supersedes the Preliminary Injunction Order. There is nothing in the protective order that discussed or otherwise allows defendants to use in open court (or unsealed filings) any of the Preliminary Injunction materials.

To be crystal clear, defendants' motion to dissolve or modify the Preliminary Injunction is DENIED. The Preliminary Injunction Order remains in full effect.

C. Clarification

I have repeatedly admonished defendants to seek clarification from me on what they can do with the Preliminary Injunction materials in advance of taking any action. Accordingly, defendants seek clarification on the following point: if a video enters the public domain through the criminal proceedings, may defendants' or their counsel comment on it, share it, or

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[26] As Judge Hite is presiding over the criminal proceedings, he will have a better sense of what portion of the Preliminary Injunction materials Daleiden legitimately needs to use for his defense, whether any of those materials should be publicly disclosed in open court or unsealed filings, and if disclosed whether any further restrictions should be placed on the materials' use or dissemination.

otherwise use it without violating the Preliminary Injunction? Mot. to Dissolve 24.

If Judge Hite rules that specific portions of the Preliminary Injunction materials may be used in open court or in unsealed pleadings, then defendants may come to me on an expedited basis under Civil Local Rule 7-11 (governing motions for administrative relief) for a modification or clarification of the Preliminary Injunction Order with respect to the collateral use they would like to make of the materials. Any such modification or clarification is premature at this juncture because Judge Hite has not (as far as I am aware) made any such rulings and because Judge Hite may himself restrict the scope of Daleiden's use of the Preliminary Injunction materials (for example, materials may be shown in open court to the judge or jury, but not be further disseminated).

CONCLUSION

For the foregoing reasons, defendants' motions to dismiss and the special motion to strike are DENIED. Defendants' motion to dissolve, modify, or clarify the Preliminary Injunction is DENIED, without prejudice to defendants seeking expedited relief under Civil Local Rule 7-11 based upon rulings of Judge Hite with respect to use of the Preliminary Injunction materials in the state court proceedings.

IT IS SO ORDERED.

Dated: November 7, 2018

/s/ William H. Orrick
William H. Orrick
United States District Judge